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*Summary records  
of the meetings  
of the forty-sixth session  
2 May-22 July 1994*

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## NOTE

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Volume I: summary records of the meetings of the session;

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Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the forty-fourth session of the Commission (A/CN.4/SR.2328-A/CN.4/SR.2377), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law ( <i>concluded</i> )	
2. Texts of draft articles 1, 2, subparagraphs (a), (b) and (c), 11 to 14 <i>bis</i> [20 <i>bis</i> ], 15 to 16 <i>bis</i> and 17 to 20 with commentaries thereto, provisionally adopted by the Commission at its forty-sixth session ( <i>concluded</i> )	
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## MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Husain AL-BAHARNA	Bahrain	Mr. Mochtar KUSUMA-ATMADJA	Indonesia
Mr. Awn AL-KHASAWNEH	Jordan	Mr. Ahmed MAHIOU	Algeria
Mr. Gaetano ARANGIO-RUIZ	Italy	Mr. Vaclav MIKULKA	Czech Republic
Mr. Julio BARBOZA	Argentina	Mr. Guillaume PAMBOU-TCHIVOUNDA	Gabon
Mr. Mohamed BENNOUNA	Morocco	Mr. Alain PELLET	France
Mr. Derek William BOWETT	United Kingdom of Great Britain and Northern Ireland	Mr. Pemmaraju Sreenivasa RAO	India
Mr. Carlos CALERO RODRIGUES	Brazil	Mr. Edilbert RAZAFINDRALAMBO	Madagascar
Mr. James CRAWFORD	Australia	Mr. Patrick Lipton ROBINSON	Jamaica
Mr. John de SARAM	Sri Lanka	Mr. Robert ROSENSTOCK	United States of America
Mr. Gudmundur EIRIKSSON	Iceland	Mr. Alberto SZEKELY	Mexico
Mr. Nabil ELARABY	Egypt	Mr. Doudou THIAM	Senegal
Mr. Salifou FOMBA	Mali	Mr. Christian TOMUSCHAT	Germany
Mr. Mehmet GÜNEY	Turkey	Mr. Edmundo VARGAS CARREÑO	Chile
Mr. Qizhi HE	China	Mr. Vladlen VERESHCHETIN	Russian Federation
Mr. Kamil IDRIS	Sudan	Mr. Francisco VILLAGRÁN KRAMER	Guatemala
Mr. Andreas J. JACOVIDES	Cyprus	Mr. Chusei YAMADA	Japan
Mr. Peter KABATSI	Uganda	Mr. Alexander YANKOV	Bulgaria

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## OFFICERS

*Chairman:* Mr. Vladlen VERESHCHETIN  
*First Vice-Chairman:* Mr. Chusei YAMADA  
*Second Vice-Chairman:* Mr. Francisco VILLAGRÁN KRAMER  
*Chairman of the Drafting Committee:* Mr. Derek William BOWETT  
*Rapporteur:* Mr. Peter KABATSI

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*Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General, and Mrs. Jacqueline Dauchy, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.*

## **AGENDA**

The Commission adopted the following agenda at its 2328th meeting, held on 2 May 1994:

1. Filling of casual vacancies (article 11 of the statute).
2. Organization of work of the session.
3. State responsibility.
4. Draft Code of Crimes against the Peace and Security of Mankind.
5. The law of the non-navigational uses of international watercourses.
6. International liability for injurious consequences arising out of acts not prohibited by international law.
7. Programme, procedures and working methods of the Commission, and its documentation.
8. Cooperation with other bodies.
9. Date and place of the forty-seventh session.
10. Other business.

## ABBREVIATIONS

ASEAN	Association of South-East Asian Nations
CSCE	Conference on Security and Cooperation in Europe
ECA	Economic Commission for Africa
ECE	Economic Commission for Europe
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ITU	International Telecommunication Union
OAS	Organization of American States
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
UNEP	United Nations Environment Programme
UNHCR	Office of the United Nations High Commissioner for Refugees

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<i>I.C.J. Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	<i>PCIJ, Collection of Judgments (Nos. 1-24: up to and including 1930)</i>
<i>P.C.I.J., Series A/B</i>	<i>PCIJ, Judgments, Orders and Advisory Opinions (Nos. 40-80: beginning in 1931)</i>

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## NOTE CONCERNING QUOTATIONS

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

**MULTILATERAL INSTRUMENTS  
cited in the present volume**

*Source*

**HUMAN RIGHTS**

- |  |  |
|--|--|
| Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)   | United Nations, <i>Treaty Series</i> , vol. 78, p. 277.  |
| Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)   | Ibid., vol. 213, p. 221.   |
| Convention on the reduction of cases of Multiple Nationality and on Military Obligations in cases of Multiple Nationality (Strasbourg, 6 May 1963) | Ibid., vol. 634, p. 221.   |
| International Covenant on Civil and Political Rights (New York, 16 December 1966)  | Ibid., vol. 999, p. 171.   |
| International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)  | Ibid., vol. 993, p. 3.   |
| Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968)                | Ibid., vol. 754, p. 73.  |
| International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)                                  | Ibid., vol. 1015, p. 243.  |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)                              | <i>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51, resolution 39/46, annex.</i> |

**PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS**

- |   |   |
|---|---|
| Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946)  | United Nations, <i>Treaty Series</i> , vol. 1, p. 15. |
| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)   | Ibid., vol. 500, p. 95.                               |
| Vienna Convention on Consular Relations (Vienna, 24 April 1963)   | Ibid., vol. 596, p. 261.                              |
| Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973) | Ibid., vol. 1035, p. 167.                             |

**ENVIRONMENT AND NATURAL RESOURCES**

- |   |                          |
|---|--------------------------|
| Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Washington, D.C., 12 October 1940) | Ibid., vol. 161, p. 193. |
|---|--------------------------|

- Convention and Statutes relating to the development of the Chad Basin (Fort Lamy, 22 May 1964) United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 8.
- African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968) United Nations, *Treaty Series*, vol. 1001, p. 3.
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989) UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, England, 1991), vol. 2, p. 449.
- Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991) Document E/ECE/1250, 1991.
- Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992) *International Legal Materials* (Washington, D.C.), vol. XXXI, No. 6 (November 1992), p. 1313.
- United Nations Framework Convention on Climate Change (New York, 9 May 1992) *Ibid.*, No. 4 (July 1992), p. 851.
- Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) *Ibid.*, p. 822.

## LAW OF THE SEA

- Convention on the Continental Shelf (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 499, p. 311.
- Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) *Ibid.*, vol. 516, p. 205.
- Convention on the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 450, p. 11.
- Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 559, p. 285.
- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

## LAW APPLICABLE IN ARMED CONFLICT

- Convention for the Pacific Settlement of International Disputes (The Hague, 29 July 1899 and 18 October 1907) J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition (New York, Oxford University Press, 1918), p. 41.

Source

- Inter-American Treaty for Reciprocal Assistance (Rio de Janeiro, 2 September 1947) United Nations, *Treaty Series*, vol. 21, p. 77.
- Geneva Conventions for the protection of war victims (Geneva, 12 August 1949) Ibid., vol. 75, pp. 31 *et seq.*
- Protocols additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of armed conflicts (Protocols I and II) (Geneva, 8 June 1977) Ibid., vol. 1125, pp. 3 *et seq.*
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989) *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49, resolution 44/34, annex.*

LAW OF TREATIES

- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) United Nations, *Treaty Series*, vol. 1155, p. 331.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) Document A/CONF.129/15.

NARCOTIC DRUGS

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988) Document E/CONF.82/15 and Corr.1 and 2.

CIVIL AVIATION

- Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970) United Nations, *Treaty Series*, vol. 860, p. 105.
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971) Ibid., vol. 974, p. 177.
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation *International Legal Materials*, vol. XXVII, No. 3 (1988), p. 627

LIABILITY

- Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) United Nations, *Treaty Series*, vol. 956, pp. 251 and 325.
- Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963) Ibid., vol. 1063, p. 265.

- Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, 29 March 1972) Ibid., vol. 961, p. 187.
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988) International Maritime Organization, convention No. 18. 1988.
- Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993) Council of Europe, *European Treaty Series*, No. 150.

GENERAL INTERNATIONAL LAW

- Convention on Private International Law (Havana, 20 February 1928) League of Nations, *Treaty Series*, vol. LXXXVI, p. 111.
- Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime Council of Europe, *European Treaty Series*, No. 141.

## CHECK-LIST OF DOCUMENTS OF THE FORTY-SIXTH SESSION

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/455	Provisional agenda	Mimeographed. For agenda as adopted, see p. ix above.
A/CN.4/456	Filling of casual vacancies: note by the secretariat	Reproduced in <i>Yearbook</i> . . . 1994, vol. II (Part One).
A/CN.4/456/Add.1-3	<i>Idem</i> : addenda to the note by the secretariat: list of candidates and curricula vitae	Mimeographed.
A/CN.4/457	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-eighth session of the General Assembly	<i>Idem</i> .
A/CN.4/458 and Add.1-8	Comments of Governments on the report of the Working Group on a draft statute for an international criminal court	Reproduced in <i>Yearbook</i> . . . 1994, vol. II (Part One).
A/CN.4/459	Tenth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem</i> .
A/CN.4/460 [and Corr.1]	Twelfth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Idem</i> .
A/CN.4/461 and Add.1, Add.2 [and Add.2/Corr.1] and Add.3	Sixth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem</i> .
A/CN.4/462	Second report on the law of the non-navigational uses of international watercourses, by Mr. Robert Rosenstock, Special Rapporteur	<i>Idem</i> .
A/CN.4/L.491 and Rev.1 and 2 [and Rev.2/Corr.1] and Rev.2/Add.1-3	Report of the Working Group on a draft statute for an international criminal court	Mimeographed.
A/CN.4/L.492 [and Corr.1 and 3*]	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts of articles adopted by the Drafting Committee on second reading: articles 1-33	See summary record of the 2353rd meeting (para. 46).
A/CN.4/L.492/Add.1	<i>Idem</i> : Draft resolution adopted by the Drafting Committee	See summary record of the 2356th meeting (para. 38).
A/CN.4/L.493 and Add.1 [and Add.1/Corr.1] and 2	The law of the non-navigational uses of international watercourses. Draft articles and commentaries thereto, adopted by the Commission on second reading: articles 1-33	Texts reproduced in <i>Yearbook</i> . . . 1994, vol. II (Part Two), para. 222.
A/CN.4/L.494 [and Corr.1]	Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. Titles and texts of articles adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission: articles 1, 2 (subparas. (a), (b) and (c)), 11-14 <i>bis</i> [20 <i>bis</i> ], 15-16 <i>bis</i> and 17-20	See summary records of the 2362nd to 2365th meetings.
A/CN.4/L.495 and Rev.1	Draft report of the International Law Commission on the work of its forty-sixth session: chapter I (Organization of the session)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10)</i> . The final text appears in <i>Yearbook</i> . . . 1994, vol. II (Part Two).
A/CN.4/L.496 and Add.1	<i>Idem</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem</i> .
A/CN.4/L.497 and Add.1	<i>Idem</i> : chapter IV (State responsibility)	<i>Idem</i> .

\* Corr. 2 applies only to French.

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.498 and Add.1 and 2	<i>Idem</i> : chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.499		[Symbol not used]
A/CN.4/L.500	<i>Idem</i> : chapter III (The law of the non-navigational uses of international watercourses)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10)</i> . The final text appears in <i>Yearbook ... 1994</i> , vol. II (Part Two).
A/CN.4/L.501	Draft articles on State responsibility. Titles and texts of articles adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission	See summary record of the 2366th meeting (para. 1).
A/CN.4/L.502	Report of the Planning Group: Programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.503 and Add.1 and 2	International liability for injurious consequences arising out of acts not prohibited by international law. Texts of draft articles with commentaries thereto, provisionally adopted by the Commission at its forty-sixth session: articles 1, 2 (subparas. (a), (b) and (c)), 11-14 <i>bis</i> [20 <i>bis</i> ], 15-16 <i>bis</i> and 17-20	Reproduced in <i>Yearbook ... 1994</i> , vol. II (Part Two).
A/CN.4/L.504	Draft report of the International Law Commission on the work of its forty-sixth session: chapter VI (Other decisions and recommendations of the Commission)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10)</i> . The final text appears in <i>Yearbook ... 1994</i> , vol. II (Part Two).
A/CN.4/SR.2328-A/CN.4/SR.2377	Provisional summary records of the 2328th to 2377th meetings	Mimeographed. The final text appears in the present volume.

# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FORTY-SIXTH SESSION

*Held at Geneva from 2 May to 22 July 1994*

### 2328th MEETING

*Monday, 2 May 1994, at 3.30 p.m.*

*Acting Chairman:* Mr. Gudmundur EIRIKSSON

*Chairman:* Mr. Vladlen VERESHCHETIN

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

#### Opening of the session

1. The ACTING CHAIRMAN declared open the forty-sixth session of the International Law Commission and extended a warm welcome to members.

#### Election of officers

*Mr. Vereshchetin was elected Chairman by acclamation.*

*Mr. Vereshchetin took the Chair.*

2. The CHAIRMAN expressed his thanks to members for the confidence they had placed in him and assured them that he would do his best to serve the Commission with dedication and to bring the work of the forty-sixth session to a successful conclusion.

3. He suggested that the meeting should be suspended in order to give members more time for consultations concerning the composition of the Bureau.

*The meeting was suspended at 3.40 p.m. and resumed at 4.35 p.m.*

*Mr. Yamada was elected First Vice-Chairman by acclamation.*

*Mr. Villagrán Kramer was elected Second Vice-Chairman by acclamation.*

*Mr. Bowett was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Kabatsi was elected Rapporteur by acclamation.*

#### Adoption of the agenda (A/CN.4/455)

4. The CHAIRMAN suggested that the provisional agenda (A/CN.4/455) should be adopted on the understanding that the order in which the various items were shown was without prejudice to the decisions the Commission would take on the organization of its work in the light of various factors, including, *inter alia*, the requests contained in General Assembly resolution 48/31, the availability of documentation, the plans of Special Rapporteurs, and so forth. In addition, the requests in paragraph 10 of that resolution should be considered under agenda item 7 (Programme, procedures and working methods of the Commission, and its documentation).

*It was so agreed.*

*The agenda (A/CN.4/455) was adopted.*

#### Organization of work of the session

[Agenda item 2]

5. The CHAIRMAN suggested that the Enlarged Bureau should meet immediately after the present meeting was adjourned. He invited the Chairman of the Drafting Committee to undertake the necessary consultations as soon as possible so that the Committee might begin its work without delay. The relevant guidelines were to be found in paragraph 371 of the Commission's report on the work of its forty-fourth session.<sup>1</sup> He said he would also be grateful if the First Vice-Chairman, in his capacity as Chairman of the Planning Group, engaged in consultations as soon as possible on the constitution of the Group.

*The meeting rose at 4.55 p.m.*

<sup>1</sup> *Yearbook* . . . 1992, vol. II (Part Two), p. 54.

**2329th MEETING***Tuesday, 3 May 1994, at 10.10 a.m.**Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**Statement by the Legal Counsel**

1. The CHAIRMAN welcomed Mr. Hans Corell, Under-Secretary-General and new Legal Counsel of the United Nations, and expressed to him, on behalf of all the members of the Commission, their sincere congratulations on his recent appointment. The members of the Commission who had taken part in meetings of the Sixth Committee of the General Assembly had already had occasion to appreciate his qualities as a jurist and his sense of leadership as Legal Adviser to the Ministry of Foreign Affairs of his country, Sweden.

2. Mr. CORELL (Under-Secretary-General, the Legal Counsel) thanked the Chairman for his words of welcome. For several years, he had been following the work of the Commission and would endeavour to pursue the fruitful collaboration established with the Commission by his predecessor, Mr. Fleischhauer. He would comment on the work of the Commission at a later meeting.

**Tribute to the memory of  
Mr. Eduardo Jiménez de Aréchaga**

3. The CHAIRMAN said that he had the sad duty to remind the members of the Commission that Mr. Jiménez de Aréchaga, former President of ICJ and former member and Chairman of the Commission, had passed away on 4 April 1994.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. Eduardo Jiménez de Aréchaga.*

4. Mr. VILLAGRÁN KRAMER said he was all the more deeply affected by the death of Mr. Jiménez de Aréchaga because the man had succeeded in crystallizing the legal thinking of the South American continent. He recalled the contribution made by that brilliant author and professor to the study of the international responsibility of States and his ability, as a member of arbitral bodies, to find pragmatic and equitable solutions to very complex problems.

5. Mr. BOWETT, referring to the exceptional qualities of concentration, insight into legal problems, courtesy and humility of Mr. Jiménez de Aréchaga, said that with his death, he had lost a personal friend.

6. Mr. THIAM expressed great sadness over the death of a man who had been the beacon and pride of the third world.

7. Mr. YANKOV referred to the integrity and dignity of the man and the erudition of the jurist who had made outstanding contributions in many fields of international law. Mr. Jiménez de Aréchaga's death meant the loss of a dear friend.

8. The CHAIRMAN said he would transmit the Commission's condolences to the family of Mr. Jiménez de Aréchaga.

**Organization of work of the session (continued)**

[Agenda item 2]

9. The CHAIRMAN informed the Commission of the recommendations made by the Enlarged Bureau. It was recommended that elections to fill casual vacancies should be held on Thursday, 5 May 1994, at 10 a.m.

*It was so agreed.*

10. The CHAIRMAN said the Enlarged Bureau further recommended that, in order to take advantage of the presence of the Legal Counsel in Geneva, a meeting of the Planning Group should be scheduled for Wednesday, 4 May 1994, at 3 p.m.

*It was so agreed.*

11. The CHAIRMAN, referring to the consideration of agenda items, said that, in the light of paragraph 6 of General Assembly resolution 48/31, which requested the Commission to continue its work as a matter of priority on the question of a draft statute for an international criminal court with a view to elaborating a draft statute, if possible at the current session, the Enlarged Bureau recommended that the first week of the session should be devoted to a discussion of that subject in plenary. The topic of the law of the non-navigational uses of international watercourses would, in accordance with the recommendations of the Enlarged Bureau, be considered in plenary during the second week of the session, bearing in mind paragraph 8 of Assembly resolution 48/31, in which the Assembly had welcomed the Commission's decision to endeavour to complete in 1994 the second reading of the draft articles on the law of the non-navigational uses of international watercourses. The Enlarged Bureau also drew the Commission's attention to the fact that, in paragraph 8 of Assembly resolution 48/31, the Assembly also requested the Commission to resume at its forty-sixth session the consideration of the draft Code of Crimes against the Peace and Security of Mankind, and that would have to be borne in mind for the organization of work in future.

12. According to the Enlarged Bureau's recommendations, the topic of State responsibility would be consid-

ered in plenary during the third week of the session on the basis of the sixth report of the Special Rapporteur (A/CN.4/461 and Add.1-3).<sup>1</sup>

13. The Enlarged Bureau would in the near future draw up a programme of work for the remainder of the session and submit the relevant recommendations to the Commission in plenary.

14. If he heard no objection, he would take it that the Commission endorsed the recommendations of the Enlarged Bureau for the first three weeks of the session.

*It was so agreed.*

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

[Agenda item 4]

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

15. The CHAIRMAN recalled that the report of the Working Group on a draft statute for an international criminal court was set out in the annex to the report of the Commission on the work of its forty-fifth session.<sup>4</sup> Paragraph 100 of the report of the Commission<sup>5</sup> indicated that the Commission would welcome comments by the General Assembly and by Governments on the specific questions referred to in the commentaries to the draft articles and on the draft articles as a whole. He drew attention to the topical summary of the relevant debate in the Sixth Committee (A/CN.4/457, section B) and to the written comments of Governments (A/CN.4/458 and Add.1 to 8), which were available in all working languages.

16. Mr. BOWETT said that the summary of the discussion in the Sixth Committee and the written comments of Governments showed that, notwithstanding certain criticisms, the Commission's work had been well received.

17. The main problems related to the question of the jurisdiction of the court. Article 22 (List of crimes defined by treaties) had met with little opposition; the concept of a court based on treaties of that type was widely accepted. The list was not exhaustive and could be shortened or added to. Some representatives in the Sixth Committee had proposed, for example, the addition of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, but the decision on that score would have to be taken at the diplomatic level.

18. Article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) had met with more criticism because of uncertainty and hesitation

about its paragraph 2 (a) dealing with crimes under customary international law. That paragraph had been criticized because it was vague and because it contravened the principle *nulla poena sine lege*. He was prepared to accept those criticisms in part, but only to the extent that they did not rule out the jurisdiction of the Court for crimes of aggression. It would be nonsensical to establish an international criminal court having no jurisdiction over the crime of aggression, which was the most serious of all international crimes and should form the very cornerstone of the jurisdiction of the new court.

19. However, he did not think that limiting paragraph 2 (a) to the crime of aggression would in itself remove the difficulties. First of all, it was not certain that there was a sufficiently precise definition of aggression. There was, of course, no treaty definition, but a number of instruments, the Charter of the United Nations foremost among them, did contain some relevant provisions. Thus, Article 2, paragraph 4, of the Charter placed a prohibition on the use of force which was of unquestionable relevance to the definition of aggression. In the past, a general prohibition of that type had been deemed sufficient by the Nürnberg Tribunal for the purpose of establishing its jurisdiction in respect of that crime. In fact, what article 6 (a) of the Charter of the Nürnberg Tribunal, annexed to the London Agreement<sup>6</sup> submitted to the jurisdiction of the Tribunal were crimes against peace, namely, the planning or waging of a war of aggression or a war in violation of international treaties, but it had gone no further in defining aggression. That had not stopped the Nürnberg Tribunal from affirming its jurisdiction in respect of the crime of aggression or the General Assembly in 1946 from enshrining the principles adopted by the Tribunal.<sup>7</sup> The main treaty underlying the London Agreement had, of course, been the 1928 Pact of Paris, known as the Briand-Kellogg Pact, which also contained no precise definition of aggression, but provided for an obligation to renounce war as an instrument of national policy. Furthermore, while the obligation imposed by the Pact applied only to the signatory States, the Nürnberg Tribunal had had no difficulty in extending the concept of State obligations to cover individual criminal responsibility by affirming that crimes against the law of nations were committed by men, not by abstract entities.

20. If the Nürnberg Tribunal had been able to deduce the principle of individual criminal responsibility from a very general treaty prohibition on war as an instrument of national policy, why should it not be possible to do the same within the framework of the Charter, whose provisions were at least as specific as those of the Pact? The substantial body of United Nations practice would, moreover, facilitate the task of the court, which, unlike the Nürnberg Tribunal, would also have at its disposal documents prepared by the General Assembly, such as

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Yearbook . . . 1993*, vol. II (Part Two), pp. 100 *et seq.*

<sup>5</sup> *Ibid.*, p. 20.

<sup>6</sup> London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 288).

<sup>7</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Hereinafter referred to as the "Nürnberg Principles") (*Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), para. 45).

the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations<sup>8</sup> and the Definition of Aggression.<sup>9</sup> Even if those documents were not treaty definitions of aggression, they would afford more guidance to the new court than had been available to the Nürnberg Tribunal.

21. A second stumbling block was that the lack of a definition of self-defence reinforced doubts arising out of the lack of a definition of aggression, since the two concepts were complementary.

22. Such excessive timidity was the essential problem the Commission had to overcome in drafting the statute of the new court. The task of the court would be not so much to decide whether a particular State had committed aggression as to determine whether individuals indicted had been sufficiently privy to the planning or waging of the war as to be guilty of the crime of aggression. That was primarily a problem of proof rather than one involving a legal definition of aggression.

23. He conceded, however, that a problem still existed even if article 26, paragraph 2 (a), was confined to the crime of aggression. Wild charges of aggression were often made against States and States would not want to expose their political leaders to a criminal indictment before the court without adequate safeguards. A scheme with the following elements might therefore be envisaged: an article 26, paragraph 2 (a), limited to the crime of aggression; making a finding of aggression by the Security Council a preliminary condition for any indictment; and a provision in relation to individuals indicted to the effect that, in addition to other defences available to them, they were entitled to prove that, notwithstanding the Security Council determination that the State whose policy they had directed had committed aggression, the actions which they had controlled or directed had in fact been legitimate self-defence. In other words, a finding of aggression by the Security Council, being essentially political in nature, should not preclude the accused individual from arguing self-defence.

24. A related problem was that of the role of the Security Council *vis-à-vis* the court. Article 25 (Cases referred to the Court by the Security Council) envisaged that the Security Council could refer cases to the court. But a reading of the written comments of Governments indicated some apprehension about the precise role of the Security Council. In his view, the Commission should accept that the Council's role would not be to refer specific complaints against specific, named individuals, but to bring to the attention of the court situations which warranted the opening of an investigation. The investigation would be conducted by the Procuracy, which would decide whether an indictment should be brought against a named individual. The Security Council was not empowered to conduct a criminal investigation and it would be for the Procuracy, in accordance with normal procedure, to identify individuals who should be charged with responsibility.

25. Mr. TOMUSCHAT said that he entirely agreed with Mr. Bowett on the need to retain article 26, paragraph 2 (a), which, to his mind, occupied much too modest a place in the draft statute. In any event, the Working Group on a draft statute for an international criminal court had very wisely refrained from including a list of well-defined crimes in paragraph 2 (a), which was a general and open clause that would be applicable whenever a crime under general international law occurred. It was really very closely linked to article 22, in the sense that its general wording allowed customary international law to move into the interstices corresponding to situations where international treaties could not be invoked for reasons of non-ratification. To replace the concept of a crime under international law by that of aggression would therefore be both to restrict the jurisdiction of the court and to expand it unduly: to restrict it because international crimes other than aggression would be excluded where international treaties could not be invoked—a situation that would be unacceptable, in particular, in the case of the crime of genocide—and to expand it because, in the present state of international law, at least since the jurisprudence of the Nürnberg Tribunal, individual criminal responsibility could arise from the planning or waging of a war of aggression, but not from the mere act of aggression. The Definition of Aggression<sup>10</sup> was, to be sure, reproduced in the draft Code of Crimes against the Peace and Security of Mankind,<sup>11</sup> but the Code was merely an instrument designed to become an international treaty and there were no grounds for regarding all its ingredients as part of customary international law.

26. Mr. ARANGIO-RUIZ said that the problem of crimes against humanity was a category that Mr. Bowett seemed to have excluded, although it had been envisaged in the London Agreement,<sup>12</sup> which had served as the basis for the Nürnberg Tribunal. Assuming that the court had jurisdiction for crimes of aggression, its jurisdiction would cover *ipso facto* the acts committed in the course of such aggression, but what happened when the Security Council did not establish that an act of aggression had taken place, when no State or entity was designated as the aggressor and when terrible crimes had been perpetrated none the less? There were also, of course, war crimes in the strict sense, for which there existed, in addition to general international law, a corpus of treaty law, but the main problem remained that of crimes against humanity.

27. Mr. YANKOV said that the traditional tendency to apply to domestic situations concepts elaborated in the framework of inter-State relations resulted in confusion between aggression and domestic conflict and in situations in which there was no agreement about the identity of the aggressor. The point in the current case was not to redefine the concept of aggression or to arrive at a precise definition of the concept of self-defence, but, as part of its consideration of the items of the draft Code of Crimes against the Peace and Security of Mankind and that of State responsibility, the Commission had to re-

<sup>10</sup> Ibid.

<sup>11</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

<sup>12</sup> See footnote 6 above.

<sup>8</sup> General Assembly resolution 2625 (XXV), annex.

<sup>9</sup> General Assembly resolution 3314 (XXIX), annex.

flect on the kind of crimes the new situations of genocide entailed and on whether there had to be mechanisms or rules to deal with the new type of situation, which in the medium term might well prove to be more dangerous than confrontations between States or alliances. For example, 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 (hereinafter referred to as the International Tribunal)<sup>13</sup> must not ultimately turn out to serve little purpose from the point of view of case-law because that would be a serious and lasting setback for everyone.

28. Mr. IDRIS said that it was particularly important to clarify the procedural and substantive differences between the Security Council's bringing a complaint before the court in the strict sense of the term and drawing the court's attention to a given situation. Would that involve a political statement by the Council or something else that might be interpreted as a complaint formulated by the Council and brought before the court?

29. Mr. THIAM questioned whether there was any difference between an act of aggression and a war of aggression.

30. Mr. TOMUSCHAT said that a war of aggression usually presupposed a planned action systematically carried out by troops acting in a coordinated manner, whereas the concept of aggression was much broader and could be applied to an isolated act which might not last more than one day. There was thus a far-reaching difference in nature stemming in both cases from the scale of the action. By making "wars of aggression" punishable, the Charter of the Nürnberg Tribunal had introduced an innovation into international law that had derogated from the fundamental principles *nullum crimen sine lege* and *nulla poena sine lege*. Article 15 of the International Covenant on Civil and Political Rights contained another derogation of the same kind. The Commission must prevent derogations from such a fundamental principle of criminal law from proliferating too easily.

31. Mr. CRAWFORD, referring to the question asked by Mr. Idris, said that, under article 25, the Security Council could, in fact, delegate jurisdiction to the court, inasmuch as a Security Council resolution could replace the consent of States set out in articles 23 and 26. The Prosecutor was, however, not bound to institute proceedings: the point of article 25 was to enable the Security Council to bring cases before the court instead of creating a large number of special courts.

32. Mr. YANKOV said that he understood the *de facto* differences between acts of aggression and wars of aggression, but the *de jure* differences were not clear. In his view, it would be more sensible to consider that acts and wars of aggression both constituted crimes under general international law.

33. Mr. ROSENSTOCK said that he agreed with Mr. Crawford's analysis of the effects of a decision by the Security Council to bring a case before the court,

whether it concerned aggression or, more generally, situations that were a threat to peace and security. Such a decision would have the same function as the acceptance by a State of the jurisdiction of the court under article 23 of the draft statute. However, if such acceptance was a precondition for the institution of proceedings by the Procuracy, it was not sufficient: a complaint still had to be filed. Yet it would be very difficult to get the Security Council to say that a person should be indicted by the court for genocide and, where the Council had instituted proceedings, it might be necessary to give the Procuracy more latitude than desired.

34. Accordingly, the Commission would have to agree that a decision by the Security Council entailed the application of article 23 of the draft statute, but that it was not the mechanism for instituting proceedings. The Commission therefore had to think about ways of solving the problem, but without giving the Procuracy such discretionary powers that it would deter States from becoming parties to the statute of the future international criminal court. The Working Group should explore that area more thoroughly.

35. Mr. MAHIU said that he basically agreed with the line of reasoning set out by Mr. Yankov concerning the difference between acts of aggression and wars of aggression. The problem raised by Mr. Tomuschat was, of course, real, but, at the current stage, he had some difficulty understanding how it would be possible to distinguish between the two situations: after all, a war of aggression was nothing more than a succession of acts of aggression over time. Was an act of aggression instantaneous and of short duration, whereas a war of aggression was planned, expected and continued for a certain period? He doubted that those details would have a legal impact, particularly as what counted were their consequences for individuals whose responsibility had been established and who must be prosecuted in accordance with the seriousness of the act committed. An act of aggression could have devastating effects and, conversely, a war of aggression, depending on the types of weapons used, the circumstances, and so forth, might ultimately have limited consequences from the point of view of damage caused and the individual responsibility of the guilty persons. Those were, however, all cases of aggression, even if the consequences and responsibility might be different.

36. Given the limited time available for the consideration of the Working Group's report, it would be preferable for the members of the Commission to focus on important questions that were essential to ensuring that work progressed.

37. Mr. ARANGIO-RUIZ said that the difference between aggression and wars of aggression was a matter of threshold. Clearly, aggression was the commission of an aggressive act. However, for example, the shooting down of a civilian or military aircraft might or might not constitute an act of aggression, depending on the circumstances surrounding that act, the intention behind it, and so forth. Beyond a certain threshold, it was an act of aggression, a crime of aggression that was more or less serious. It would be for the court and the Prosecutor to draw a distinction and to decide on the degree of crimi-

<sup>13</sup> See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

nal responsibility of each of the persons accused of the crime of aggression.

38. With regard to a comment by Mr. Rosenstock, he did not believe that it should be left to the Security Council to bring charges of genocide against individuals or groups or accuse them of committing that crime. That was the Prosecutor's task, whereas the Council had to concern itself with threats to the peace, breaches of the peace and acts of aggression in order to ensure the maintenance of international peace and security. Needless to say, a problem of genocide might arise in connection with an act or a series of acts characterized as aggression by the Council, but that was another matter.

39. Mr. TOMUSCHAT said he did not think that it was the task of the Commission to define crimes under international law; that would have to be done by the future court. The Commission should simply point the way, setting forth a general clause which referred to crimes under general international law; then, in each instance, the court would have to say whether an individual had committed a breach of a very important rule of international law and whether he had therefore committed a crime under international law. It would be advisable for the Commission to reflect on the effects of the clause contained in article 26, paragraph 2 (a), of the draft statute, which should be given a more prominent place in the draft.

40. The Commission was not drafting new rules: it had to do that within the framework of the draft Code of Crimes against Peace and Security of Mankind, in which it could include the crime of aggression or the crime of war of aggression.

41. It was not a question whether aggression was unlawful in relations between States—any act of aggression was unlawful under Article 2, paragraph 4, of the Charter of the United Nations and under general international law—but of the possible existence of a rule that established individual criminal responsibility.

42. The Commission might wish in that connection to reflect on the sources of general international law, to which reference was made in article 26, paragraph 2 (a), of the draft statute. General international law comprised rules of customary law, which in turn derived from practice and *opinio juris*. The only practice that established individual criminal responsibility was the practice of the Nürnberg Tribunal<sup>14</sup> and the Tokyo Tribunal<sup>15</sup> and it was not very solid because not one individual had been charged with aggression since then. It was based on the planning and waging of a war of aggression and the same principle was set forth in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.<sup>16</sup> An act of aggression and a war of aggression differed in size and magnitude, but also, significantly, in law. Half a century after the end of the Second World War, the international commu-

nity was not prepared to institute proceedings for an isolated act of aggression. General international law had a second source, the dictates of the conscience of mankind (the Martens clause), as underlined by ICJ in its judgment in the *Corfu Channel* case<sup>17</sup> and the advisory opinion it had delivered in connection with reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>18</sup> There, as well, there was no question of individual criminal responsibility.

43. There was a difference, which was more than factual, between a war of aggression, which shocked the conscience of mankind, and an isolated act of aggression, which was the outcome of a political miscalculation or the work of militant activists. It was therefore possible to invoke only two legal texts and the practice based on those texts; but the texts in question referred solely to wars of aggression, specifying that they were crimes under international law. There had thus far been no international instrument which stated that aggression as such, even an isolated act of aggression, was a crime under international law.

44. Mr. THIAM said that he had some misgivings about the distinction drawn by Mr. Tomuschat between aggression and a war of aggression, in other words, between an unprepared act and a planned act. Prior to the Second World War and at the time of the Nürnberg trial, the expression "war of aggression" had covered any war waged without a prior declaration, since, at the time, war had been regarded as a lawful act, whereas all wars were now unlawful. He therefore saw no difference between a war of aggression and aggression, since they had the same legal consequences. He would like further clarification on that point.

45. Mr. Sreenivasa RAO said he was gratified that the question under consideration had given rise to a very open dialogue and exchange of views among all members of the Commission in plenary. The Working Group was, of course, useful, but discussion in plenary could be very productive and he trusted that the practice would continue.

46. As to the distinction drawn between an act of aggression and a war of aggression, it had its use, no doubt, but he was not persuaded by Mr. Tomuschat's arguments. His own view was that such a distinction was not necessary to determine which were the crimes of aggression that could lead to prosecution before the court.

47. With regard to Mr. Bowett's point concerning the role of the Security Council in the event of a threat to peace and an act of aggression—a role which was well defined in Chapter VII of the Charter of the United Nations—it was clear that, when the Security Council determined the existence of a general situation of aggression, it could take a number of steps under its own powers, but it should not categorize a particular individual as an aggressor. It was for the Procuracy of the court to examine the complaints or allegations of aggression and to submit the evidence gathered to the court, which could then, without prejudice to the Council's initial decision, pronounce on the responsibility of an individual and de-

<sup>14</sup> See footnote 6 above.

<sup>15</sup> Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, Tokyo, 19 January 1946, *Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 *et seq.*

<sup>16</sup> See footnote 8 above.

<sup>17</sup> Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

<sup>18</sup> *I.C.J. Reports 1951*, p. 15.

clare whether or not he was guilty of a crime of aggression. Furthermore, as he had stated on other occasions, even if the Council had not determined the existence of an act of aggression in a particular case, but a claim in that connection had been referred to the Procuracy, it should be possible to request the Council to determine whether the act of aggression reported in the complaint had indeed been committed without reference to the complaint itself. Another problem could then arise if the Council was not willing to pronounce on the matter: what should the Procuracy do if evidence was available to it which, in its view, justified the adoption of certain measures? That was a delicate question to which there was no immediate answer, but which the Commission should nevertheless ponder.

48. As consideration of the draft statute proceeded, other problems of the same kind would arise. The Commission would have to pay the closest attention to them before it could in all honesty recommend the draft to the General Assembly for its decision as to the action to be taken on it. The time had come for the Commission to give serious consideration to all those issues in the context of a frank and open dialogue during which the problems could be pinpointed, if not solved. Lastly, without wishing to minimize the value of working groups, he would stress the importance of the work carried out in plenary.

49. Mr. ARANGIO-RUIZ, referring to the question of the distinction between an act of aggression and a war of aggression, said that it was ambiguous, to say the least, to speak of factual or legal differences. Obviously, a simple attack by a State or by a group of persons on another State was less serious, factually, than a war of aggression. The main question was whether there were differences between the two in law. That would depend on the degree of gravity of the act committed, which would be assessed by reference to a pre-established threshold beyond which the act in question would be treated as a crime. Once a crime of aggression had been determined, the legal consequences would be different according to whether it was a simple act of aggression or a war or a series of wars of aggression. The distinction between aggression and a war of aggression could therefore not be reduced to mere factual or legal differences, since, in the two cases, both factual and legal aspects would have to be taken into consideration.

*The meeting rose at 12.45 p.m.*

## 2330th MEETING

*Wednesday, 4 May 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Ma-

hiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 4]

#### DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT<sup>3</sup> (*continued*)

1. Mr. CRAWFORD said that the Commission's work in preparing the draft statute for an international criminal court had proceeded on the basis of six propositions. First, the court should be established by a statute in the form of a treaty agreed to by States parties. Secondly, at least in the initial phase of its operations, the court should exercise jurisdiction only over individuals, as distinct from States. There was no disagreement on those two propositions. Thirdly, the court's jurisdiction should relate to specified international treaties in force defining crimes of an international character: there was general agreement that it should not be limited to the Code of Crimes against the Peace and Security of Mankind. Fourthly, the court was seen as a facility for States parties and as supplementing existing criminal justice systems and existing procedures for international judicial cooperation. It should not have compulsory jurisdiction in the sense of a general jurisdiction that a State party was obliged to accept. That proposition, too, had gained broad acceptance among States, though with some differences of nuance. Fifthly, the court should not be a full-time body but an available legal mechanism ready to be called into operation when required. General, though not universal, agreement had been reached on that point. Sixthly, the statute must guarantee due process and the independence and impartiality of the court's procedures. There was no disagreement on that point. Those six principles could well be supplemented and modified, but they already provided criteria for assessing the draft articles.

2. The Commission was envisaging an entirely new system: there had never before been an international criminal court, and the process must be taken step by step. Law libraries throughout the world were full of schemes for an international criminal court, but none had proved acceptable, for reasons that hinged on the unwillingness of States to establish sweeping new procedures that might have unpredictable effects. The Commission was habitually a modest body, but it might have to be even more modest than usual in the present case.

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

3. The proposed court outlined in the draft might not be an ideal solution, but the important thing at present was to get agreement on a widely acceptable, flexible and effective body capable of trying the most serious international offences in accordance with well-defined standards of due process. If that meant that proposals had to be more limited in scope than the Commission might like, so be it. The call for caution had been sent out by a wide range of countries in the Sixth Committee's debates. Some countries, while supporting the basic approach adopted in the draft statute, wanted a more restricted list of offences to fall within the jurisdiction of the court. Many had expressed concern over the vagueness of the category of "crimes under general international law". States that would go considerably further than the scheme set out in the draft articles were definitely in the minority.

4. A primary issue of substance was that of the court's jurisdiction. There was a close link between articles 22 (List of crimes defined by treaties) and 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) and the principle of *nullum crimen sine lege* set out in article 41. For crimes defined by the treaties listed in article 22, there was no jurisdictional requirement that the State of which the accused was a national should be a party to the treaty. Once the requirements spelled out in article 24 (Jurisdiction of the Court in relation to article 22) for acceptance by States of jurisdiction were met, the court had jurisdiction over the crime in relation to the accused, and the only issue was whether the *nullum crimen sine lege* principle applied. But in accordance with article 15 of the International Covenant on Civil and Political Rights, that principle was not infringed when the act in question was a crime under general international law. In principle, general international law could be used in a supplementary way in relation to crimes under article 22. The combination of the jurisdictional provision and the *nullum crimen sine lege* principle could allow general international law to supplement the crimes defined under article 22 if they were crimes under general international law.

5. If one accepted the argument he had just outlined, then the controversial provision on crimes under general international law set out in article 26, paragraph 2 (a), could apply only to crimes not defined in article 22, in other words, to undefined international crimes. A widely held view was that there were only two such crimes: aggression and crimes against humanity. He would be most reluctant to leave out of the draft the category of crimes against humanity. Admittedly, most acts committed during international armed conflicts that could qualify as crimes against humanity were already covered by article 22. So were some, but not all, of those committed in internal armed conflict—acts amounting to genocide, for example. However, many of the worst crimes against humanity occurred in internal armed conflict or in internal civil strife. He could, on the other hand, understand the concern of some States about the licence the draft articles appeared to give the court to define new crimes under general international law. If the court did so, the *nullum crimen sine lege* guarantee would not prevent a conviction, since it, too, referred to crimes under general international law. So there was an area of uncertainty in that regard.

6. The situation now was different from that at the time of the Nürnberg Tribunal. In 1945, not even genocide had been defined as an international crime. Since then, enormous efforts had been made to delineate international crimes in treaties, whereas the customary law process had been largely bypassed. That created real difficulties of definition for the "additional" crimes under general international law. It was true that there were strict jurisdictional requirements for crimes under general international law in article 26, paragraph 3 (a), but those requirements were themselves likely to prevent the trial of persons for crimes against humanity committed in internal armed conflict or civil strife. Perhaps Mr. Bowett's suggestion (2329th meeting) of limiting the coverage of article 26, paragraph 2 (a), to acts of aggression was the only solution. The Commission should none the less consider ways in which, consistent with the structure of the draft, it could include the category of crimes against humanity committed in internal conflicts.

7. The Working Group on a draft statute for an international criminal court would also have to examine, *inter alia*, the list of treaties in article 22. The main, if not the only, addition to the list suggested in the Sixth Committee was the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In that connection, the Commission might wish to reconsider its earlier view that the Convention was in fact one aimed at the suppression of a particular crime. Some delegations had favoured reducing the list by leaving out, for example, the conventions dealing with terrorism, such as the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention). Personally, he would be opposed to such deletions. The court might well be the appropriate or even the only possible forum for the trial of State officials charged with aircraft hijacking or with the bombing or destruction of civil aircraft.

8. As to the need for a list of treaties in relation to article 26, paragraph 2 (b), failure to enumerate the major multilateral conventions aimed at the suppression of a particular crime to be covered by that article constituted a clear anomaly. A list could readily be drawn up and would be comparatively short. Obviously, it would include the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which in any event was the main reason for including that category of crimes in the statute. Clearly, the way should not be left open to include any convention concluded by more than a few States dealing with almost any topic, even on a regional basis and without any of the requirements of generality and general acceptance that ought to be found in the jurisdictional provisions of the statute. The list, like the one in article 22, should be confined to major multilateral conventions aimed at the suppression of crimes on which there was general consensus. With such a list it would be convenient to separate the two parts of article 26—crimes under general international law and crimes under conventions aimed at the suppression of a particular crime—for they had little in common with each other and required separate consideration.

9. The difficult task of establishing an international criminal jurisdiction for a range of offences involved no less than three problems: jurisdiction *ratione materiae* (which crimes?), jurisdiction *ratione personae* (which accused persons?) and the problem of choice of jurisdiction (an international criminal court or an available national court?). Each problem had to be dealt with adequately. That would inevitably lead to a rather complex scheme, but it should at least be clear. On the third issue, the choice of forum, the draft articles, at present, did not go far enough and did not give sufficient guidance. The Working Group ought to consider whether the international court should not have power to stay a prosecution on specified grounds, a power that existed in many national jurisdictions. The grounds might include, say, the existence of an adequate national tribunal with jurisdiction over the offence or the fact that the acts alleged were not of sufficient gravity to warrant trial at the international level. Failing such power, the court might be swamped by peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free. Some capacity to deal with problems of that kind had to be provided. It was not sufficient for such considerations to be taken into account by the prosecutor since this would raise problems of accountability. The international court was intended to supplement, rather than replace, existing national criminal jurisdictions, and a suitable provision would help to give effect to that principle.

10. On the question of the relationship between the court and the Security Council, he agreed that the Council should not act as a prosecutorial or fact-finding agency in relation to the function of referral bestowed upon it by article 25 (Cases referred to the Court by the Security Council). The precise relationship between a referral under that article and the role of the prosecutor needed to be spelt out. There was also a need to ensure a clear distinction between the roles of the Security Council in relation to matters of international peace and security and of the court in relation to crimes allegedly committed by accused persons.

11. Although many national jurisdictions, including his own, deprecated them, trials *in absentia* were undoubtedly permissible with appropriate safeguards under human rights law. On the other hand, the issue of whether trial *in absentia* should be allowed in an international court raised a serious question of policy that should be kept separate from the question of the rights of the accused. An international court whose main or sole task was the trial of accused persons in their absence would be transformed into a mechanism of denunciation and would be brought into disrepute if none of its sentences were ever executed. Appropriate ways had to be devised of preventing any system of trial *in absentia* from being abused. At the previous session, a provision that would have excluded trial *in absentia* except in very limited circumstances had been omitted from the draft by the Working Group without, however, anything being substituted for it.<sup>4</sup> As the European Court of Human Rights had repeatedly made clear, most recently in *Poitrinol*

v. *France*,<sup>5</sup> there was a need for a mechanism for regulating *in absentia* trials, providing for notification, and so forth. The draft, as it stood, addressed neither the issue of policy nor that of human rights, and the Working Group would have to grapple with that problem.

12. In the Sixth Committee it had been suggested by one delegation that the rules of procedure and proof should be set out in detail in the articles. On balance, he thought that was not desirable, not only because it would require a great deal of time and expertise but also because some flexibility should be provided in respect of many procedural rules. On the other hand, he agreed that the draft articles should spell out the main rules governing evidence and procedure on issues of principle, such as trial *in absentia* or the disclosure of prosecution evidence to the accused.

13. The Commission should try to complete the drafting of the statute at the present session but should on no account prejudice the quality of its work. If agreement could not be reached on all issues during the present session, the Commission would still have achieved remarkable progress over the past three years or so. Lastly, in view of the close connection between the various issues involved, the Working Group should not break up into subgroups as it had done in 1993. The Working Group, whose continuation he strongly supported, should work on the text as a whole and he would be happy to assist in that endeavour.

14. Mr. MIKULKA, referring to the court's jurisdiction *ratione materiae* said he fully agreed with Mr. Bowett's view (2329th meeting) that the list of treaties to be included in article 22 should be left to a decision of the future diplomatic conference, since the question of extending or restricting the list was basically one of political choice. On the other hand, the inclusion or omission of a provision such as the one contained in draft article 26, paragraph 2 (a), although it too might seem largely political at first glance, would have major repercussions on the court's operation and usefulness and it therefore deserved careful study by the Commission.

15. If the court was designed as a body operating exclusively on the principle of conferred jurisdiction whereby the initiation of proceedings was limited to States parties to the statute, jurisdiction *ratione materiae* could be confined to crimes by individuals as defined by international conventions and no major difficulties would be created. That, however, was not the case. A major exception to the principle of conferred jurisdiction lay in the Security Council's right to refer a case, or rather a situation, to the court. Nevertheless, while the Security Council's decision to make a referral could serve as a substitute for the consent of the State concerned in establishing the court's jurisdiction *ratione personae*, it could not serve as a substitute for the consent of that State to become party to one of the conventions listed in article 22. The fact that a State was not party to one of those conventions meant that acts by individuals under its jurisdiction could not be considered

<sup>4</sup> In this regard, see the commentary to article 44 (*Yearbook... 1993*, vol. II (Part Two), p. 120).

<sup>5</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 277, *Judgment of 23 November 1993* (Registry of the Court, Council of Europe, Strasbourg, 1994).

crimes by virtue of that treaty, even if in all other respects those acts fitted the treaty definition of an international crime. Accordingly, those acts would not fall among crimes within the court's jurisdiction *ratione materiae* and the Council would not be able to refer them to the court. The Council's decision might replace the consent of a State, but not a rule of (treaty) law which was necessary for an act to be qualified as an international crime. Otherwise, the *nullum crimen sine lege* principle would be seriously violated.

16. If the court's jurisdiction *ratione materiae* was limited to treaty-defined crimes, the Security Council might well find it was powerless to refer to the court horrifying situations or acts clearly constituting crimes under general international law simply because the State in question was not a party to the treaty which defined the crimes. That was why article 25 spoke of cases referred to the court by the Security Council under article 26, paragraph 2 (a), as well as under article 22. The provision in article 26, paragraph 2 (a), could bear some textual improvement and should, in his view, be placed in article 22 as paragraph 2, but the idea that crimes under general international law fell within the jurisdiction *ratione materiae* of the court should certainly be maintained.

17. Mr. VILLAGRÁN KRAMER said he agreed that it was not essential for the work on the statute to be completed in 1994: the main thing was to resolve the major problems connected with the statute. If that could be done at the present session, then the Commission should feel well satisfied, but it should not regard prompt submission of the draft as more important than quality.

18. A number of articles deserved special consideration in the light of comments made by Governments in the debates in the Sixth Committee, and those received from Governments (A/CN.4/458 and Add.1-8).

19. Article 2 (Relationship of the Tribunal to the United Nations) set out the possible relationship between the court and the United Nations. From the debate in the Sixth Committee, one could conclude, first, that Governments were concerned about that relationship and wanted the Commission to elucidate its nature, and secondly, that the options for such a relationship could not go beyond what was set out in articles 25 and 27 (Charges of aggression). Those articles envisaged interaction between the Security Council and the court, but perhaps States would welcome further clarification from the Commission.

20. Two proposals had been made in the Sixth Committee, one being that relations between the United Nations and the international criminal court could be structured in accordance with Article 57 of the Charter of the United Nations, along the lines of those of the Organization and the specialized agencies. That had only one drawback, namely, under Article 63, paragraph 1, of the Charter, the Economic and Social Council would be responsible for working out the terms for such a relationship, for subsequent approval by the General Assembly.

21. The second suggestion made in the Sixth Committee, and which was quite interesting, was that the international criminal court could be subsidiary to ICJ. If Article 92 of the Charter identified ICJ as the principal

judicial organ of the United Nations, that meant there was room for other, subsidiary legal bodies. The Working Group should, in his view explore the type of interrelations to be established between the court and the United Nations, for that would resolve a number of institutional questions.

22. As to article 7 (Election of judges), he agreed with some representatives in the Sixth Committee that the period of 12 years initially envisaged for the term of office of judges was too long. It would be more reasonable to provide for a term lasting seven or nine years. Again, the likelihood that an accused person might reject a given judge under article 11 (Disqualification of judges) and, by recurrent rejections, ultimately disqualify the entire court, must be obviated by setting a limit whereby an accused person could reject only two judges, for example.

23. The most important aspect of the matter of jurisdiction was the relationship between article 22 and article 26. The Commission had proposed a harmonious structure, and that harmony must be preserved. On the other hand, new factors that arose as work progressed could not be ignored. The first was the non-international conflicts that formed the subject-matter of the Protocol additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Most observers were deeply distressed by the dimensions taken on by internal conflicts, particularly in Africa and Central America. In the past 50 years, the world had seen many such conflicts, which had international implications, and the question was how to handle them within the evolving international legal system. His view was that article 26 of the draft could be interpreted as applying to internal conflicts. Some representatives in the Sixth Committee had suggested incorporating Protocol II in article 22 of the draft. He was not sure whether such a course was feasible, but it merited consideration.

24. The idea had also been advanced in the Sixth Committee that the list of treaties should be supplemented by the inclusion of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. He sympathized with the idea, but it would entail technical difficulties. Incorporation of those treaties in article 22 would mean that, if a country had ratified one of them, the court's jurisdiction would be extended. Among the alternatives proposed for article 23 (Acceptance by States of jurisdiction over crimes listed in article 22), the second was the most attractive because it linked ratification of treaties to the jurisdiction of the court, whereas the first alternative left the acceptance of jurisdiction up to the State.

25. Articles 22 and 26 contained a number of elements that were reminiscent of the Commission's work on article 19 of part one of the draft on State responsibility.<sup>6</sup> In that article, the Commission had established definitions

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

of international crimes, and those definitions should be kept in mind in the current drafting efforts. Article 19 characterized as an international crime a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; a serious breach of an international obligation of essential importance for safeguarding the right to self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; and a serious breach on a widespread scale of an international undertaking of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid.

26. Those notions had been further refined since 1979, but the initial objective had been to identify the most essential elements of an international crime. Whether or not that terminology was reproduced in the draft statute, the Working Group would do well to determine whether it should envisage only very serious breaches of obligations or a whole range of crimes. Article 26 of the statute in its present form would only allow for consideration of serious breaches under general international law. That seemed to be the trend in its work at the moment, but the Commission should be fully aware of that evolution and make sure that that was its intention.

27. On the role of the Security Council, Mr. Bowett's comments (2329th meeting) had brought a useful note of clarification. When the provisions of the Charter of the United Nations on the act of aggression had been studied in the past, it had usually been from a regional standpoint and the language of the Charter had proved to be lacking in clarity. The Security Council was empowered to determine only when an act of aggression had occurred, but there were many events leading up to the act of aggression, including the first use of force. For example, in 1969 Salvadoran nationals had been expelled en masse from Honduras and El Salvador had engaged in reprisals involving the use of force. OAS had responded by calling on the Government of El Salvador to withdraw its armed forces to its own side of the border. The incident showed that supranational bodies had the power to induce a State to put an end to its illegal acts so that it would not be deemed an aggressor; if it was so deemed, then sanctions provided under the Charter of the United Nations and in regional security mechanisms would be applied.

28. What course, therefore, should the Commission take? It could not restrict the Security Council's ability to characterize something as an act of aggression or to refer a case to the court if it saw fit. What the Commission could do, however, was to make sure that a situation that might be defined as aggression simply in order for the court to judge the guilty parties would not be brought before the court again and again. For example, in some countries in Africa, Asia and Latin America the leaders of small armed groups often considered themselves to be little Napoleons and frequently provoked border skirmishes. Incidents of that kind were so numerous that, if they were allowed onto the agenda of the future international criminal court, on the grounds that they qualified as the first use of force, the court's case-load would soon

become crushing. In reality, those were fairly superficial incidents that did not amount to acts of aggression.

29. He agreed with Mr. Crawford that the human rights treaties did not limit or prohibit trials *in absentia*. What they did do was establish conditions that must be fulfilled in order for such trials to be held. Such conditions included the accused person's being informed of the opening date for the trial and his or her right to appear at the trial at any time if he or she so desired. Eventually, all trials *in absentia* reached a stage when the principle of due process came into play. He favoured instructing the Working Group to find an acceptable formulation for preserving the concept of trial *in absentia*.

30. Mr. KABATSI said that the prospects for setting up the international criminal court had never been better. The establishment in 1993 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<sup>7</sup> was a highly favourable factor. The Commission's draft statute for an international criminal court had been well received by the General Assembly and the numerous replies by Governments also indicated broad acceptance. The present discussion showed that very few areas of controversy remained, and it was reasonable to hope that the Working Group would produce a final draft, preferably, although not necessarily, during the present session.

31. An international criminal court that was expected to deal decisively with offenders who threatened international peace and security as well as the conscience of mankind could not be limited exclusively to crimes defined as such by treaty provisions. Clearly, the crimes listed under article 22 did not cover all violators. In his view, it would therefore be a serious mistake to delete article 26, especially paragraph 2 (a). Aggression not only threatened a stable world order but also frequently entailed many other crimes, particularly crimes against humanity. The statute would be incomplete if the provision in article 26, paragraph 2 (a), was omitted.

32. The court should be empowered to try individuals accused of committing crimes against humanity in the course of internal conflicts. The difficulty of bringing the perpetrators to book so long as the Government responsible for the crimes remained in power should not be overrated. It was extremely important that the perpetrators should know that justice would catch up with them sooner or later. He accepted the view that it should be the role of the Security Council to identify a situation of aggression and to bring it before the court, all further action being left to the prosecutor and the court. He also agreed that accused persons should have the right to enter a plea of self-defence. Lastly, the Commission should not, in his view, recommend the holding of trials *in absentia*. Apart from its human rights implications, such a provision would cast doubt upon the court's status as a world body. Since the crimes dealt with by the court would not be subject to any statute of limitations, there would be no harm in deferring the trial until it could be

<sup>7</sup> See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

held with the accused in attendance, thus ensuring that full justice was done.

33. Mr. RAZAFINDRALAMBO said that he accepted the explanations provided in paragraphs (1) and (2) of the commentary to article 25<sup>8</sup> and was pleased to note the view of the Working Group expressed at the end of paragraph (2) of the commentary, namely, that the Security Council would not normally be expected to refer to the court a case in the sense of a complaint against named individuals suspected of crimes under articles 22 or 26 but would more usually refer a situation of aggression. In that connection, he also endorsed the provision contained in paragraph 4 of article 13 (Composition, functions and powers of the Procuracy). In order to avoid all ambiguity with regard to the role of the Council in relation to the court, he wondered whether article 25 of the draft ought not to specify that the jurisdiction of the court was not subject to acceptance by any State, since the terms of Article 24 of the Charter of the United Nations would apply to Council action. With regard to article 27, Mr. Bowett (2329th meeting) was right to say that determination by the Security Council of the existence of an act of aggression was a necessary formality.

34. As for the distinction drawn between an act of aggression and a war of aggression, he agreed with Mr. Thiam (*ibid.*) that the difference between the two was only slight. In that connection, he drew attention to the definition provided in article 24 of part one of the draft on State responsibility.<sup>9</sup> Lastly, he wondered whether the Working Group should not reconsider paragraph 2 of draft article 24, since acceptance of the jurisdiction of the court by a State when one of the State's leaders was accused of a serious crime was unlikely to be forthcoming. In such a case, the credibility of the court would be seriously undermined. He reserved the right to speak again on the subject of the statute at a later stage.

35. Mr. CALERO RODRIGUES noted that the debate had focused on part two of the draft statute of the Working Group (Jurisdiction and applicable law), which the Group itself had referred to as the central core of the statute.

36. Earlier in the meeting, the debate had been about a definition of jurisdiction *ratione materiae*. He hoped that the Commission would consider the question of the conditions for the actual establishment of jurisdiction and the role of States in that regard, a separate, important, matter that deserved thorough debate.

37. The basic approach adopted in part two was questionable. Actually, it had been rightly pointed out that the approach had been approved two years previously, yet approval had been arrived at hastily, without time to discuss the subject properly. Insufficient attention had been given to the relationship between the substantive law to be applied by the court and the procedural law represented by the statute. The Working Group had found it necessary to go into substantive law to decide which law the court should apply, but there was a vagueness about the rules of substantive law which the Work-

ing Group had sought to dispel. The problem was that substantive law should not be confused with the procedural law currently embodied in the statute.

38. The approach adopted was to refer to existing written law, such as treaties (art. 22) and general international law (art. 26). Existing treaties defined crimes that should fall within the jurisdiction of the court, but the definitions were often vague and it was difficult to decide which treaties should be included in the draft. As to crimes under general international law, it was doubtful whether customary law could provide a firm basis for a definition of crimes with the precision that was required in criminal law. An effort must be made to draw upon both sources—existing treaties and general international law—in order to draft adequate provisions that the court could apply. It was not possible for the Working Group to deal with that question thoroughly.

39. Such an effort was being made by the Commission in the draft Code of Crimes against the Peace and Security of Mankind. The draft Code would be a compilation, consolidation and codification of existing law, perhaps with some additions or progressive development. With the Code, there would no longer be a problem about which treaties to choose or the vagueness of customary law, and adequate provisions of substantive law would exist, enormously facilitating the work of the court. The Commission should continue that effort and bring the draft Code to a speedy conclusion. The draft adopted on first reading was only a rough one and could be improved, and it was to be hoped that the Special Rapporteur's twelfth report on the topic (A/CN.4/460) would help in that regard.

40. It was argued that the Code and the court should not be linked because the task was difficult and time-consuming and that it was necessary to put the court into operation as a matter of urgency. He disagreed. The court would not be effective without a proper definition of the law it was to apply. Such a definition did not exist, and the Code alone could provide it without too much delay.

41. It was unrealistic to assume that the court would be endorsed by States once the draft statute was sent to the General Assembly. In his view, the Commission should rise to the occasion and create a better, more useful and permanent instrument, even if it took longer to do so. The international community wanted a court with power to deal with all crimes committed around the world. That would not be possible if too many restrictions were placed on the court's jurisdiction. The prospects of a permanent court with an independent jurisdiction were remote, but it was better to work towards that goal than to propose an ineffective instrument. The Commission must meet its responsibility as the main codification body of the United Nations. An institution was needed to make sure that criminals who had not been tried by national courts did not enjoy impunity—an institution that could thus act as a genuine deterrent. States must not be able to interfere with the trial of their nationals.

42. He had little hope of changing the prevailing view in the Commission, but the report should indicate that there was a dissenting opinion. It might be decided to include in the draft a reference to the possibility of replac-

<sup>8</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 109.

<sup>9</sup> See footnote 6 above.

ing the current provisions of articles 22 and 26 by the provisions of the Code if such an instrument came into being, because the Code would cover crimes under existing instruments and also crimes under general international law. For example, article 22 of the draft statute listed a number of instruments. It spoke of the Geneva Conventions of 12 August 1949 for the protection of victims of war and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). Abuse of the symbol of the Red Cross was a grave breach of the Protocol. Surely, that should not come under the court's jurisdiction, which should cover only exceptionally serious violations of the Geneva Conventions and the Protocol. Again, article 22, paragraphs (c) to (h) concerned terrorism. In the draft Code, there would be a single provision on terrorism, in which that crime was defined. One possibility would be to prepare an alternative text on the basis of the Code.

43. Mr. PAMBOU-TCHIVOUNDA said he endorsed the method of an exchange of views that had taken place the previous day on the report of the Working Group on a draft statute for an international criminal court. Regrettably, more time could not be allotted to a discussion of the subject in plenary, but it was to be hoped that the Working Group would quickly re-examine the draft articles and that they could then be reviewed and improved upon in plenary. Such a review would be necessary because the plenary would have had the time to discuss the sixth report of the Special Rapporteur on State responsibility (A/CN.4/461 and Add.1-3)<sup>10</sup> and to debate the twelfth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind. Those two reports would have an impact on the Commission's perception of the shape of an international criminal court.

44. The drafting of the requisite instrument of the court must be placed in its initial context: the current concerns of humanity must be addressed. One difficulty, however, was to relate the present exercise to any of the questions included in the Commission's programme of work. Everyone was aware of the limits of the undertaking which the partisans of the creation of ad hoc courts by the Security Council would not fail to exploit. In some sense, the Commission was making itself the ally of the adversaries of the progressive development of the law.

45. It was disconcerting to find that, so far as the questions of jurisdiction and applicable law were concerned, the draft statute was a great mix as to both substance and form. That prompted certain questions. What benefit, for instance, would a State party to a treaty covered by article 22 derive from becoming a party to the statute of the court? Was it certain that such treaties would stipulate that their application would require recourse to some international machinery for prosecution? Moreover, the jurisdiction it was hoped to vest in the Security Council in such cases could be called into question at any time, since any State could all too easily invoke the authority of the Charter of the United Nations. The Council could not serve as a super-prosecuting authority, however, nor

as a mere officer of the court. All those questions merited reflection.

46. It was also essential to make just and proper use of the principle *nullum crimen sine lege*, which was more a norm of clarification than one of characterization. Article 26 did not seem to reflect the basic purpose of that principle. It was as though the article contemplated the case of an individual—a "Superman" perhaps—who waged war, on his own, against a State: that would be the sort of person who would then be regarded as the perpetrator of an act of aggression. He had some doubts on that score and wondered in particular whether the possibility that States could be brought to justice on the basis of such responsibility should be disregarded or, on the contrary, taken into account in the future work on the draft Code of Crimes against the Peace and Security of Mankind.

47. Mr. FOMBA said he wondered whether a list of crimes defined by treaties, as provided for in article 22, was the best solution. It would, of course, have the advantage of legal certainty and would be in keeping with the principle *nullum crimen sine lege*, but there was a risk that, as the universal legal conscience evolved, it could not readily be encapsulated in space and time. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, referred to in paragraph (4) of the commentary to article 22, provided an illustration of the limitations to such an approach. Also, the express reference to the treaty as the sole legal basis could not conceal the fact that there was no well-established hierarchy of norms in international law.

48. With regard to article 25, the Security Council should have the right to refer cases to the court, given the essential role it played in the regulation of international policy, but its task should be confined to the legal characterization of situations of aggression, as provided for under Article 39 of the Charter of the United Nations.

49. A related question was whether the right of referral should be extended to the General Assembly. In his view, the answer was in the affirmative. First, the Assembly, as a plenary organ, was the most representative body of the international community; secondly, despite some improvement in the present climate, the possibility of the Security Council's action being paralysed was no mere fiction; and thirdly, under Article 12, paragraph 1, of the Charter of the United Nations, the Assembly had a residual jurisdiction. The third reason merited particular consideration.

50. So far as article 27 of the draft statute was concerned, it was only logical that it should be for the Security Council, or where necessary the General Assembly, to take cognizance of the commission of an act of aggression before the machinery for determining individual criminal responsibility was set in motion.

51. In short, he generally endorsed the Working Group's line of argument. With regard to the distinction made between "war of aggression" and "act of aggression", he would draw attention to the Definition of Aggression,<sup>11</sup> in which the word "aggression" appeared

<sup>10</sup> See footnote 1 above.

<sup>11</sup> General Assembly resolution 3314 (XXIX), annex.

seven times and the expression "act of aggression" nine times, but the expression "war of aggression" figured just once, in article 5, paragraph 2. The wording of that provision, however, merely indicated into which legal category a war of aggression fell; it did not allow for any clear distinction between a war of aggression and an act of aggression from the standpoint of legal characterization *stricto sensu*. Any difference between the two was more a matter of degree than of law.

52. Mr. IDRIS, noting that there were two "hard-core" issues, said that the first related to article 22, which was intended to form the basis of the court's jurisdiction. The article did not provide an exhaustive list of crimes and was silent about the status of the legal instruments to be concluded in the future. While an exhaustive list was not desirable, it was equally inadvisable to leave the article open to extension, since that would create a considerable degree of legal uncertainty. Such questions as the meaning of a reference to future treaties to be included in the list were perfectly reasonable, however, and should be addressed by a small body of the Commission.

53. In the absence of a Code of Crimes, article 22 would remain highly controversial; unfortunately, the revision of the list of crimes, as provided for in article 21, would not provide a solution. In that connection, the distinction drawn by the Working Group between treaties that defined crimes as international crimes and treaties that simply provided for the suppression of undesirable conduct which constituted crimes under national law should receive further attention.

54. Another highly controversial issue was the relationship between the Security Council and the international criminal court. The Council's power of referral should, in his view, relate not to a case against named individuals but to a specific case of, for instance, aggression, while the court should be responsible for the criminal investigation and the indictment. That, however, was not immediately apparent from the terms of article 25. The impression given was that the Council would be vested with powers additional to those granted to it under the Charter of the United Nations. The main point, of course, was whether the General Assembly should also have a power of referral. At all events, it would be extremely undesirable from the standpoint of their prestige and integrity, if the Council and the Assembly were to be affected by criminal procedures that were placed outside their purview.

55. The category of crimes under general international law, as referred to in article 26, paragraph 2 (a), still lacked precision and, if approved, would require realistic consideration by the Working Group.

56. He would suggest that, to facilitate the task of the Commission, a list of "hard-core" controversial issues should be established on which the Working Group could start work. Only thereafter should it proceed to deal with matters that would not require substantive debate either in the Commission or in the General Assembly.

### Composition of the Planning Group

57. Mr. YAMADA (Chairman of the Planning Group) proposed, on the basis of consultations he had held, that the Planning Group should be composed of the following members: Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Jacovides, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Yankov and, as an ex-officio member, Mr. Pellet.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

### 2331st MEETING

*Thursday, 5 May 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

#### Filling of casual vacancies (article 11 of the statute) (A/CN.4/456 and Add.1-3,<sup>1</sup> ILC/(XLVI)/Misc.1 and Add.1)

[Agenda item 1]

1. The CHAIRMAN invited the Commission to hold a closed meeting in order to fill the casual vacancies created by the election of Mr. Koroma and Mr. Shi to ICJ.

*The meeting was suspended at 10.15 a.m. and resumed at 10.40 a.m.*

2. The CHAIRMAN announced that the Commission had elected Mr. Qizhi He and Mr. Nabil Elaraby to fill the casual vacancies created by the election of Mr. Shi and Mr. Koroma to ICJ at the forty-eighth session of the General Assembly. On behalf of the Commission, he would inform Mr. He and Mr. Elaraby of their election and congratulate them on it.

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

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

[Agenda item 4]

**DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT<sup>4</sup>**  
(continued)

3. Mr. PELLET said that he was not opposed to the idea of an international criminal court, and that he believed that the perpetrators of serious crimes which affected all of mankind should be punished on behalf of the international community and on the basis of international law. The problem was one of the utmost gravity and the Commission should avoid taking decisions that would merely soothe its conscience at little cost. That was what it would be doing by creating a top-heavy mechanism based on a treaty ratified only by "good States", which would be unlikely to have recourse to it, since they would have nothing to reproach themselves with, and it would be useless because it would never be called upon to try any criminal, but would have to stand by helplessly while massacres or wars of aggression were being perpetrated. Clearly, that was not the intention of the Working Group, whose draft had its merits and undoubtedly went in the right direction, in particular because it departed to some extent from the "model" of a permanent Nürberg Tribunal. The three main criticisms that could be addressed to the Working Group were, first, that the proposed draft statute was not sufficiently internationalist or, rather, not sufficiently universalist; secondly, that it gave too prominent a place to inter-Stateism in an area where individuals and the international community were, or should be, face to face; and, thirdly, that it was far too complex, especially with regard to the jurisdiction of the tribunal. Those three points were so closely linked that they could not be dealt with separately. He would therefore make a few comments on the issues of greatest concern to him, namely, the method of establishment of the tribunal and its relationship to the United Nations, the jurisdiction of the tribunal and, lastly, some aspects of its operation. First, however, he pointed out that, in French, it was the word *cour* that should be used to designate the proposed judicial system as a whole and the word *tribunal* that should be used to designate the judicial organ. The point was not without importance because, in French, a court (*cour*) was a higher organ than a tribunal.

4. With regard to the question of the establishment of the tribunal and its relationship to the United Nations, he found the draft somewhat inconsistent. The Working Group stressed the need for a link with the United Nations and proposed two alternatives to that effect in article 2 (Relationship of the Tribunal to the United Nations), only to dismiss the first one implicitly by going on to refer to the specific rights and obligations of

the "States parties to the Statute", which necessarily implied that the statute would be a treaty. Article 7 (Election of judges) and article 13 (Composition, functions and powers of the Procuracy), paragraph 2, for example, were totally incompatible with the establishment of a tribunal that would be a judicial organ of the United Nations. It would be quite unacceptable if only a few States had the right to elect the judges or the procurator of a subsidiary organ of the General Assembly or other organs of the United Nations. The first alternative was precisely the one he preferred because the point was to bring to justice the perpetrators of international crimes which threatened the international community as a whole and it would therefore not be right if a mere handful of States, however virtuous, were endowed—or endowed themselves—with jurisdiction of their own. The Working Group was aware of the problem, since, in articles 25 (Cases referred to the Court by the Security Council) and 29 (Complaint), it provided for the possibility that the Security Council could refer matters to the court and that possibility would even be open to States which were not parties to the statute if the rather obscure commentary to article 29<sup>5</sup> was to be believed. As a lawyer, he was somewhat perplexed, for, in his view, a treaty concluded between only a few States could not modify the powers of the Security Council under the Charter of the United Nations and he found it regrettable that only a few States should be called on to punish crimes of concern to mankind as a whole. Those problems could be solved by opting for the alternative which made the tribunal a subsidiary organ of the General Assembly or a joint subsidiary organ of the General Assembly and the Security Council. Contrary to what sometimes had been said, that would enable the tribunal to benefit from the moral authority of the United Nations and really to become the judicial organ of the international community as a whole, rather than of a small group of States. All States had a "direct interest", to use the wording of the commentary to article 38 (Disputes as to jurisdiction),<sup>6</sup> in having those responsible for a war of aggression, a genocide or a crime against humanity brought to justice. Moreover, the General Assembly was fully entitled to establish a judicial organ, as ICJ had affirmed in its advisory opinion of 13 July 1954<sup>7</sup> and as provided in Article 22 of the Charter of the United Nations. In so doing, it would be well within the limits of its mandate, since Articles 10 and 11 of the Charter gave it general competence in respect of all matters within the scope of the Charter and it was not irrelevant to recall in that connection that one of the purposes of the United Nations was to promote respect for human rights and fundamental freedoms. If it was considered that the tribunal should also be an instrument of the Security Council, it would have to be established by a joint resolution of the General Assembly and the Council. True, the General Assembly could not oblige the Member States of the United Nations and, *a fortiori*, States which were not members to refer matters to the court or to hand over criminals to the court, but it

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

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

<sup>5</sup> Ibid., p. 112.

<sup>6</sup> Ibid., pp. 117-118.

<sup>7</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 47.

certainly could establish a court that would be at the service of States.

5. Turning to the question of the court's jurisdiction and applicable law, he said that he was one of those who had no objection to the Security Council's playing a role in that area, provided that it was not just any role, and, on that point, he considered the draft statute to be at once too vague, too timid and too bold. Although he agreed that aggression must first be determined, pursuant to article 27 (Charges of aggression) he did not see on what basis the Security Council might submit to the court any of the crimes listed in article 22 (List of crimes defined by treaties) or article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22), paragraph 2 (a), as indicated in article 25, because, unlike the General Assembly, the Security Council did not have general jurisdiction and had decision-making power only by virtue of Article 25 and Chapter VII of the Charter of the United Nations. It could submit a case to the court only in the event of a threat to peace, a breach of the peace or an act of aggression. He therefore did not think it appropriate that the Council's possibilities of bringing cases before the court should be broadened in that way. However, nothing should prevent the Council—and from that point of view the draft statute was too restrictive—from referring a crime to the court by virtue of that decision-making power if the punishment of that crime was necessary for maintaining peace and even from asking the court to prosecute certain persons, whether named or not, for an international crime.

6. With regard to referral by States, he found that the system imagined by the Working Group and described in articles 22, 23 (Acceptance by States of jurisdiction over crimes listed in article 22), 24 (Jurisdiction of the Court in relation to article 22) and 26 was unnecessarily complicated. The distinction drawn between the crimes listed in article 22 and those referred to in article 26 was superfluous. On the other hand, any confusion between the jurisdiction of the court, applicable law and referrals to the court must be avoided if consistent results were to be achieved. First of all, it must be borne in mind that the objective of the exercise was to create an international criminal court empowered to try, on behalf of the international community, persons responsible for particularly heinous crimes against humanity. Moreover, but that was a different problem, the Tribunal could also judge certain persons responsible for crimes that States, for very understandable reasons of security and efficiency, could not or did not want to try themselves, such as drug traffickers or certain terrorists. In the first hypothesis, it would therefore be enough to list all the acts that the court would be required to try; that list would not, in fact, be very long: it essentially involved genocide, crimes against humanity and grave violations of the law of armed conflict, aggression and, probably, apartheid. Any State should be able to refer those cases to the court and there would then be a danger of excessive reserve rather than abuse, since States were usually reluctant to play the role of prosecutor. For that reason, it would even be good if the Prosecutor, having learned about a crime of that type, could submit it to himself. It could also be envisaged that States should be able to bring other crimes before the court that were not necessarily of concern to the entire international community, but only

to certain States that wanted to be able to have an international criminal justice department. The States concerned could recognize the court's jurisdiction in an international convention or in the framework of bilateral agreements or by virtue of additional protocols to the conventions listed in article 22.

7. As to applicable law, the Working Group recognized in article 26, paragraph 2 (a) that the court had jurisdiction in respect of international crimes that were crimes "under general international law". The reference to the conventions cited in article 22 was thus not only superfluous, but even constituted an unfortunate retreat compared to positive law. The Nürnberg Tribunal had tried criminals on the basis of the general principles of law "recognized by civilized nations", not on the basis of conventions. Since 1945, the law had been strengthened and custom had been added to the general principles of law. Security Council resolution 808 (1993) of 22 February 1993 creating 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<sup>8</sup> had also not based applicable law on existing conventions.<sup>9</sup> The emphasis on the treaty-based nature of the court's jurisdiction was thus a most regrettable step backwards. That might also mean that the person responsible for an act of genocide committed in a State that had not ratified the Convention on the Prevention and Punishment of the Crime of Genocide would not be punished. In his view, the concept of international legality on which the draft statute was founded and which derived from paragraph (4) of the commentary to article 33 (Notification of the indictment)<sup>10</sup> and from article 41 (Principle of legality (*nullum crimen sine lege*)), subparagraphs (a) and (c), was very narrow because international legality was not simply a sum of conventions; international custom and *jus cogens* in particular were its basic elements. Article 15 of the International Covenant on Civil and Political Rights provided a more internationalist and much less restrictive vision. Moreover, the list of conventions contained in the draft statute was very questionable. There was no reason to exclude, for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was referred to only in article 26.

8. He found that the reference to "national law" contained in article 28 (Applicable law) was not justified, except in respect of article 26, paragraph 2 (b), as indicated in the relevant commentary. In any case, if national law was to play a role, the exclusion of national judges from the Chambers of the court, as provided in article 37 (Establishment of Chambers), would be highly debatable. Lastly, the terms used in the draft statute must be as "international" as possible, that is to say, they must be applicable in all cases. Some of them were not: for example, the expression "enter a plea of guilty or not guilty" in article 39 (Duty of the Chamber), paragraph 3, and in article 49 (Hearings), paragraph 1, was totally

<sup>8</sup> Hereinafter referred to as the "International Tribunal".

<sup>9</sup> See also Security Council resolution 827 (1993) of 25 May 1993.

<sup>10</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 115.

incomprehensible for a Latin jurist or, at any rate, for a French one.

9. Recapitulating the points he considered to be most important, he said that, in his opinion, the court should be a subsidiary organ of the General Assembly or a joint subsidiary organ of the General Assembly and the Security Council. It should thus be created not by a treaty, but by a resolution; that resolution should confer general jurisdiction for the most serious crimes which were an affront to the conscience of the international community as a whole and which were defined by general international law; the court should also be largely open to States that wished to appeal to it for trying persons responsible for certain crimes, on the basis of a bilateral agreement between the States concerned or a multilateral convention; it should also be possible for the Security Council to refer cases to the court when it was acting within the framework of Chapter VII of the Charter of the United Nations and it considered that the punishment of certain crimes would be likely to contribute to the maintenance of international peace and security.

10. He had some comments to make on the operation of the tribunal. First of all, the balance struck between the permanent nature of the tribunal and the intermittent nature of its meetings was a good one, but he did not think an annual allowance had to be paid to the President if he did not exercise his functions on a full-time basis. Secondly, the organ in charge of prosecution should be a collegial, rather than an individual organ, that is to say, a procuracy as provided for in article 5 (Organs of the Tribunal), subparagraph (c), and not a prosecutor, as indicated in article 13. Thirdly, the title of article 34 (Designation of persons to assist in a prosecution) might well encourage the "infiltration" of certain States in the tribunal. The commentary on the article seemed to be more sensible in that regard than the article itself. Fourthly, like the majority of the members of the Working Group, he thought that dissident or individual opinions should be excluded; that was an important point in criminal matters. Fifthly, the provision of article 44 (Rights of the accused), paragraph 1 (h), was reasonable and much better balanced than the position set forth in paragraph (2) of the commentary to that provision.<sup>11</sup> Article 14 of the International Covenant on Civil and Political Rights did not at all exclude trial *in absentia* because, although an accused had the right to be present at his trial, he did not have the right to prevent the trial from taking place by deliberately not appearing.

11. In conclusion, he admitted that he had some reservations about an international criminal court because he feared that it would serve no purpose. However, he would take a more internationalist view of it than the Working Group, whose approach was much too inter-statist, especially with regard to heinous crimes against humanity. He also thought that the jurisdiction of the court was both too far-reaching and too restricted and, in any case, not adapted. Owing to those differences of opinion on basic points, he did not want to be a member of the Working Group at the present time. However, if the Working Group considered that a compromise was

possible on one question or another, he would make a point of participating in its work on an occasional basis.

12. Mr. ARANGIO-RUIZ said that, in his view, a court was an instrument of the law and of the law alone; it could therefore not be an instrument of the General Assembly, the Security Council or any other political body.

13. Mr. PELLET said that he regarded the distinction between law and politics as wholly academic: the law was an instrument of the international community and of States, and States were essentially political entities. There was no reason why they could not be provided with a legal instrument to enable them to find legal solutions to political problems both in the General Assembly and in the Security Council. After all, that was precisely what frequently happened when States brought a case before ICJ.

14. Mr. YANKOV said that he would confine his observations to the question of jurisdiction and applicable law and would start with some general remarks.

15. In the first place, he agreed with Mr. Pellet that the existing mechanisms for the settlement of disputes relating to peace and security, including the judicial institutions, were basically adapted to inter-State conflicts and based on the concepts of sovereign States and of inter-State relations, whereas, at the present time, and perhaps for some time to come, peace and stability were more threatened by internal disputes involving ethnic, political, religious and human rights issues than by the traditional issues of a *casus belli*. The Secretary-General of the United Nations himself had in fact recognized, in a lecture delivered at Laval University in Quebec, Canada, that the United Nations was faced every day with internal conflicts, civil wars, secessions, partitions, ethnic confrontations and tribal struggles which were a threat to international peace and imperilled the rights of individuals; and he had also said that it was up to the Organization to invent new responses and to find new solutions. On another occasion, in a report entitled "Agenda for Peace", the Secretary-General had recognized that

there is no adequate mechanism in the United Nations through which the Security Council, the General Assembly or the Secretary-General can mobilize the resources needed for such positive leverage and engage the collective efforts of the United Nations system for the peaceful resolution of a conflict.<sup>12</sup>

16. In his own view, it was necessary to take cognizance of the implications of such new situations for the settlement of disputes and the mechanisms used to protect international peace and the security of mankind. In the case of the future court, it would be necessary, in the context either of the consideration of the substantive provisions of the statute or of judicial or procedural law, to envisage such other dimensions—the "non-State" dimensions of those new phenomena.

17. In that connection, the example of the International Tribunal was of particular interest. The Commission should not fail to take account of the problems encountered by the International Tribunal when it came to

<sup>11</sup> *Ibid.*, p. 120.

<sup>12</sup> Document A/47/277-S/24111, para. 40.

examine not only the substantive law, as contemplated by the draft Code of Crimes against the Peace and Security of Mankind,<sup>13</sup> but also the judicial or procedural law, since, in many respects, that tribunal would set a precedent for the establishment of a permanent international criminal court. The success or failure of the International Tribunal could have a direct impact on the viability of the new court.

18. His second general comment concerned the fact that he could not agree that the statute of the court should be established by a resolution of the General Assembly or the Security Council. The creation of an international criminal court should be based on the most reliable legal foundations known, namely, an international treaty. Care should be taken not to agree, on grounds of expediency, that such a court should be set up as a subsidiary body or by resolution, the worst possibility being a resolution adopted by consensus which merely concealed differences of view. The statute should be carefully drafted and should provide a firm legal basis for the judgements delivered against the perpetrators of international crimes, and in all circumstances.

19. Thirdly, the draft Code and the draft statute should be based on the principles *nullum crimen sine lege* and *nulla poena sine lege*. That would first require well-elaborated substantive legal provisions which were recognized by the international community as a whole or at least by a significant majority of States.

20. In principle, according to the overwhelming jurisprudence of criminal law which he endorsed, substantive law had to precede judicial or procedural law. It was common knowledge, however, that views differed on that important issue and, in his opinion, the Commission should try to find a solution that would bring the viewpoints closer together. Such a solution might lie in accelerating the work on the draft Code of Crimes against the Peace and Security of Mankind with a view to introducing greater precision into the definition of crimes, at the same time as the consideration of jurisprudence and the applicable law. In the latter connection, draft article 22 was of particular interest, although most of the treaties it listed did not contain any precise definitions of crimes and did not expressly provide for any penalty or sanction against individuals. Furthermore, even the Code would be an imperfect instrument so far as the substantive law was concerned in that it could not define all the components of the crime or prescribe the penalties applicable, as was the case in internal criminal law. In that matter, the international criminal court should have a certain discretion, based on the relevant treaties to determine both the applicable law and the modalities of the judicial proceedings.

21. In his view, substantive law should, above all, not be confused with procedural law, even if the distinction could not be as clear-cut as in internal law owing to certain characteristics peculiar to the international legal order.

22. Turning to the articles set forth in part two (Jurisdiction and applicable law), he noted that the two main criteria on the basis of which the crimes covered by the treaties listed in article 22 were regarded as crimes under international law were, first, the fact that those crimes were themselves defined by the treaty in question in such a manner that an international criminal court could apply basic treaty law to the crime dealt with in the treaty and, secondly, the fact that the treaty created, with regard to the crime it defined, either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility that an international criminal court could try the crime, or both. He would again point out in that connection that he did not exclude a power of discretion for the court based more on the common law system than the civil law system. He trusted, however, that an effort would be made to draw up a list of crimes themselves.

23. So far as article 23 was concerned, he would prefer alternative A. Article 24, relating to the jurisdiction of the court in relation to article 22, was acceptable, subject, perhaps, to some drafting improvements which could be decided by the Working Group. With regard to article 25 and relations between the court and the Security Council, he was of the opinion that the provisions of the Charter of the United Nations with respect to the powers of the Security Council should be strictly observed. The Security Council could not act at one and the same time as judge and as the body that implemented its own decisions, as had sometimes occurred with unfair results, to say the least. In article 26, concerning jurisdiction *ratione materiae*, he would like the emphasis to be placed on conventional law, since it was inconceivable, at least for a lawyer trained in the civil law, that customary law could provide a reliable legal basis for judgements delivered in criminal cases. The jurisdiction of the court with respect to an act characterized as a crime under internal law could be exercised only under the conditions laid down in article 26, paragraph 2 (b), and in cases where the national law was in line with conventional law in the area concerned.

24. With regard to aggression, the Commission must go no further than what was provided in article 27, namely, that for international crimes and in conformity with Articles 24 and 39 of the Charter of the United Nations, the Security Council had no power other than that of first determining that the State concerned had committed the act of aggression which was the subject of the charge. That was the key to the relationship between the Security Council and the new court. As he had stated before, he could not agree to a court that would be merely some sort of subsidiary body of the General Assembly or the Security Council because he saw a need for the separation of powers and leeway for the court to exercise its judgement. With the exception of jurisdiction *ratione materiae*, he saw no difference between ICJ and the international criminal court from the standpoint of status and respect for the law. Yet ICJ had been established by the Charter of the United Nations and its Statute was an integral part of the Charter.

25. Lastly, he thought that the Code of Crimes against the Peace and Security of Mankind should be added to the list in article 28 because he could not imagine the establishment of an international criminal court without

<sup>13</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

the Code. Indeed, the idea of a court had been the result of the work on the draft Code.

26. Mr. BOWETT said he took a particular interest in two specific issues: the drafting of the tribunal's rules, which were the detailed rules governing the procedure to be followed and the rules of evidence to be applied in any trial, and the court's capacity to waive its jurisdiction in favour of a national court. On the first issue, article 19 of the draft statute (Rules of the Tribunal) stipulated that the court itself could draw up the tribunal's rules. A number of Governments considered, however, that they could not take a position on the statute before they knew the content of the rules and some had proposed that the Commission itself should draft them. In his opinion, that solution was hardly realistic, for the Commission was not equipped for such a task. Mr. Crawford (2330th meeting) had proposed that the statute should include a number of basic provisions that would subsequently be supplemented by more detailed rules, but that did not solve the problem of who would draft the supplementary rules. The General Assembly should be asked to choose between the solution proposed by the Commission, namely, the drafting of the tribunal's rules by the judges, and the appointment of a group of experts to be responsible for drafting the rules.

27. On the second issue, if it was agreed that the court could waive its own jurisdiction in a case in favour of a national court that would be ready and willing to rule on it, there would have to be a mechanism enabling the court to monitor the proceedings in the national court, either by having the right to appoint an observer to that court, or by requiring that it should report on the results of the trial. If those results were not satisfactory, the tribunal would so indicate to the General Assembly, assuming that it would be required to report annually to the Assembly on its activities. Clearly, the court must use sparingly the option of "ceding" jurisdiction to national courts, whose earlier results might not always have been satisfactory.

28. Mr. YANKOV said he agreed that pragmatic solutions must be sought, as long as they were in harmony with the principles of law. For several years, the Commission had been working on the draft Code of Crimes against the Peace and Security of Mankind and it had the resources required to draft the rules to be applied by the tribunal, including calling on experts to do so.

29. Mr. BOWETT explained that his comment had dealt only with the drafting of a detailed set of rules governing the procedure to be followed and the rules of evidence to be applied by the tribunal. The Commission was made up of international law experts who were not necessarily all experts in criminal procedure. In his view, it was necessary to avoid the error committed by the International Tribunal, which had drafted rules with which Governments seemed to be far from satisfied.

30. Mr. ROSENSTOCK said he was not sure that the appointment of a group of experts by the General Assembly would be the best solution. It might be appropriate to give judges on the court the responsibility for drafting the rules, on the understanding that they would be approved by a two-thirds majority of States parties, although States would not be able to amend the rules.

That would take account both of the wishes of Member States and of the fact that judges were in the best position to draft the tribunal's rules.

31. Mr. THIAM said that it was necessary to choose the lesser of two evils. Although the rules drafted for the International Tribunal appeared not to have been satisfactory to Governments, the court itself still had to work out its own procedures. Outside experts were not necessarily better qualified than judges to find a solution that would satisfy the majority of States.

32. Mr. YANKOV said that he had referred to substantive law and the Commission's competence in that area, and not to procedural law, an area in which he had no more expertise than anyone else. The proposal made by Mr. Rosenstock might make it possible to break the deadlock over the rules of procedure.

33. Mr. EIRIKSSON pointed out that the draft statute already contained a number of provisions, including those on the rights of the accused, which were similar to the rules of procedure now under discussion. It would be possible, as Mr. Crawford had suggested, to include a number of general rules in the draft statute that would serve as something like safeguard clauses. At all events, the Commission, at this stage, must avoid bringing up the relationship between the tribunal and States parties.

34. Mr. BENNOUNA said that the solution proposed by Mr. Rosenstock and Mr. Thiam would be a way of settling the dispute. However, another problem was even more important and that was the link established by the General Assembly between the court and the draft Code of Crimes against the Peace and Security of Mankind. The Commission could not draft the statute of a court that would make no reference whatsoever to the draft Code on which it had been working for many years and the Working Group had to give some thought to that problem.

35. Mr. Sreenivasa RAO pointed out that, if the rules of procedure were to be drafted by the court as soon as it was set up, the drafting would take place at a time when the number of States parties would be very small. It would be unfair if rules reflecting the positions of a minority of States were to be applied. Another possible solution would be to set up a working group responsible for proposing ideas and even drafting texts according to a timetable linked to the process of ratification. The judges would then have something to work on that was the outcome of broad consultations and the harmonization of various legal systems, a process which should be launched and completed without undue haste.

#### Organization of work of the session (*continued*)\*

[Agenda item 2]

36. The CHAIRMAN suggested that, in accordance with the recommendation made by the Enlarged Bureau, Mr. Crawford should be appointed Chairman of the Working Group on a draft statute for an international criminal court.

*It was so agreed.*

\* Resumed from the 2329th meeting.

37. Mr. BOWETT (Chairman of the Drafting Committee) announced that for the topics of "The law of the non-navigational uses of international watercourses" and "International liability for injurious consequences arising out of acts not prohibited by international law", the Drafting Group would consist of Mr. Al-Baharna, Mr. Calero Rodrigues, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Szekely, Mr. Villagrán Kramer, Mr. Yamada and Mr. Yankov. For the topic of "State responsibility", the Drafting Committee would be made up of Mr. Al-Khasawneh, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock and Mr. Tomuschat.

*The meeting rose at 1.05 p.m.*

## 2332nd MEETING

*Thursday, 5 May 1994, at 3.10 p.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 4]

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT<sup>3</sup>  
(continued)

1. Mr. TOMUSCHAT said he did not altogether agree that the six propositions mentioned by Mr. Crawford (2330th meeting) had not been seriously challenged. Admittedly, the draft submitted to the General Assembly reflected current legal thinking, according to which there could be no other basis for the statute than an interna-

tional treaty, but he wondered whether the Commission had not fallen into the trap of juridical orthodoxy. As an organ of the international community, the proposed tribunal, or court, would have power to impose sanctions for grave breaches of the basic tenets upheld by that community, and it would symbolize the discipline the international community would exercise when sovereign arbitrary acts were committed. Yet when it came to the establishment and jurisdiction of the tribunal, the Commission deferred to the traditional principle of State sovereignty, whereby States would be free to accept or reject the statute, and to submit or not to submit to the jurisdiction of the tribunal. The power granted to the Security Council under article 25 of the draft statute (Cases referred to the Court by the Security Council) departed somewhat from that general scheme, but an impartial reading showed that it would take effect only *vis-à-vis* such States as had accepted the statute.

2. It had been suggested that the whole undertaking should be viewed as a step-by-step process but he feared that prudence on the part of the Commission might lead the international community into an impasse. Was there really any incentive for States to ratify the statute and submit to the court's jurisdiction when that would inevitably mean putting on trial not only persons who came from States that were political foes but also accepting the same mechanism when it came to themselves? There would certainly be no rush of political outsiders to deposit instruments of ratification. It had taken 10 years for the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights to enter into force, and only two thirds of the nations of the world were now bound by them. Despite that undoubted success, it was a record that would be regarded as far from satisfactory in the case of criminal prosecutions. Events such as those now taking place in Rwanda called for a swifter response. One could hardly wait three decades for an international tribunal to become operative. In that connection, he read out an extract from a statement made by the representative of Venezuela on the occasion of the adoption of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991<sup>4</sup> a statement underlining the urgency of the need for a permanent tribunal.

3. It could, of course, be argued that, in any serious crisis, the Security Council would invoke its powers under Chapter VII of the Charter of the United Nations, as it had done in the case of the former Yugoslavia, but such an attitude would suggest that the Commission did not believe in its own endeavour and regarded it as more of an academic exercise for political ends. He realized that in adopting his position—one supported by Mr. Pellet (2331st meeting)—he was departing from the well-trodden path. There was every reason to do so, since the court would have the function of enforcing the basic values of the international community against individuals who, more often than not, were members of Gov-

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

<sup>4</sup> Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

ernment of States that had severed their ties with that community. The usual method of treaty-making was not suitable in the most serious cases when a trial of those responsible was essential in the interests of justice.

4. The Commission must offer the international community, and specifically the General Assembly, a model to show how the tribunal could be established without any State being able to prevent its becoming operative *vis-à-vis* its own nationals. Naturally, there were many ways in which an individual could be brought within the jurisdiction of the court, but the State of nationality continued to occupy an important place, in fact and in law.

5. Like Mr. Pellet, he wondered whether the General Assembly and the Security Council could not act jointly in creating the tribunal as a subsidiary organ. Although the General Assembly could not vest the tribunal with powers with respect to States and individuals, the Security Council could do so under Chapter VII of the Charter of the United Nations. Another, sounder, way of anchoring the tribunal in the Charter would be to amend the Charter; one article would suffice, and the statute of the court could then become an integral part of the Charter, like the Statute of ICJ. That method would have the advantage of producing a binding effect on all States Members of the United Nations as soon as two thirds had notified their agreement. Admittedly, the five major Powers would first have to give their agreement, but it was hard to conceive of an international court that did not command their support. He was not suggesting that his proposal should replace the 1993 draft statute<sup>5</sup> but rather that it should be put to the General Assembly as an alternative which reflected the community philosophy of which the tribunal was an offshoot.

6. Although the thinking behind articles 22 to 28 was correct, the drafting was too cumbersome and complex and should be reviewed. In particular, it should be imbued with the quality of intellectual accessibility. There was one major technical defect in the text: the court's jurisdiction *ratione materiae* should be clearly distinguished from the rules establishing the way in which jurisdiction could be conferred on the court. Article 22 (List of crimes defined by treaties) and article 26 (Special acceptance of jurisdiction by States in cases not covered by article 22), paragraph 2, formed one set of rules and should be brought together. On that point he agreed with Mr. Mikulka (2330th meeting) and Mr. Pellet.

7. There had been two different interpretations of article 22, one given by Mr. Crawford and one by Mr. Mikulka. According to Mr. Crawford (*ibid.*), treaty membership was irrelevant, the sole intention of article 22 being to provide that in trials of, for instance, cases of genocide, the relevant definition should be the conventional one. That interpretation, however, was not confirmed either by the wording of article 22 or by the commentary. He did not see how a State which was not a party to the Convention on the Prevention and Punishment of the Crime of Genocide could possibly refer to that Convention in its declaration under article 23 (Acceptance by States of jurisdiction over crimes listed in article 22). After all, the crimes defined in the various

conventions listed in article 22 were of an entirely different character. In some instances, such as genocide and war crimes, a customary rule ran parallel to the treaty rule, but in most instances that was not so. Also, Mr. Crawford's interpretation was not consistent with the principle *nullum crimen sine lege* as formulated in article 41, which made it abundantly clear that, in the case of article 22, it was the treaty rule that would constitute the basis for imposing punishment on the accused; were it otherwise, the expression "unless the treaty concerned was in force" in subparagraph (a) would make no sense.

8. Article 26, paragraph 2 (a), with its reference to general international law, was therefore necessary, though it could become a dangerous stumbling block. States might refrain from accepting the statute and from conferring jurisdiction on the court because of what was concealed behind the cloak of general international law. It would then fall to the court to determine which crimes existed under general international law. Governments might feel that judges had too much political discretion as a result. He for one would be happy with a court that had jurisdiction solely with regard to genocide, war crimes, crimes against humanity, and drug-related crimes. Aggression had virtually never been dealt with in a juridical forum. What point was there in attempting to do the impossible?

9. He was not totally convinced of the logic that distinguished between the two categories of treaties covered, respectively, by article 22 and by article 26, paragraph 2 (b), and would reserve judgement on that issue.

10. One unavoidable question was whether article 22 should be made open-ended by incorporating a reference to multilateral treaties on international crimes. Some quality control was needed, however, for not every treaty could come within the purview of the court's jurisdiction. There should be some core element in the statute which States would automatically accept when they ratified that instrument. He would suggest just one crime for the purpose: genocide. If States were not even prepared to allow the court to try cases of genocide, the whole undertaking might as well be scrapped. He would further suggest that there should be a separate article on genocide: to combine two crimes in one provision, as occurred in article 22, seemed almost offensive.

11. The order of the draft articles should be rearranged. Specifically, articles 22 to 28, which constituted the draft's centre of gravity, should follow immediately after article 5 (Organs of the Tribunal). Organizational matters could be dealt with thereafter. Of the two different models the Commission might wish to follow—ICJ and the International Tribunal—the latter clearly seemed preferable.

12. While he agreed that trials *in absentia* might be legally admissible, he nevertheless considered that, politically, they were extremely unsound, for the court would then degenerate into a paper institution processing one case after the other, to no practical effect.

13. Mr. BENNOUNA asked whether Mr. Tomuschat considered the Commission could make a proposal to the General Assembly that would be contrary to, or not in conformity with, the Charter of the United Nations, such

<sup>5</sup> See footnote 3 above.

as a proposal to provide for a new jurisdiction or to extend the jurisdiction of an organ of the United Nations. Also, did Mr. Tomuschat think that the Commission could propose to the General Assembly a revision of the Charter?

14. Mr. TOMUSCHAT said that, obviously, the Commission could not make proposals that were not in conformity with the Charter of the United Nations, but he did not think his own proposals were not in accord with the Charter. It was all a question of the interpretation of the powers of the General Assembly and the Security Council. Two years earlier no one would have dreamt that the Security Council could have jurisdiction to establish an international tribunal. None the less, despite some reservations all of the 15 States on the Council had approved the draft put forward by the Secretary-General and the feeling had been that it was fully in conformity with the Charter.

15. The Commission would not make an actual proposal to the General Assembly concerning an amendment to the Charter of the United Nations. It would merely point out that there were various ways of bringing a statute of the court into effect. The General Assembly could study the possibility of amending the Charter with a view to providing the court with a solid legal base, and that would have the advantage of making the court an organ of the United Nations. As already pointed out, the court could not be created by just a few States: it had to be an organ of the international community and it therefore had to have an organic link with the United Nations. All the legal possibilities should therefore be explored.

16. Mr. CRAWFORD said that, as far as the relationship between the court and the United Nations was concerned, there seemed to be a world of difference between the establishment of an international tribunal by the Security Council for a given situation under Chapter VII of the Charter of the United Nations and the establishment of an institution with general powers. As matters stood, the powers of the Security Council seemed to extend to the creation of ad hoc tribunals in situations where it deemed such a course necessary in order to maintain or restore international peace and security. Possibly the court should be created through some combination of Security Council and General Assembly resolutions and a treaty that would establish the future obligations of States. Resolutions in themselves would not be enough, however.

17. It was not so much the question of the relationship with the United Nations that should preoccupy the Commission as the issues so ably raised by Mr. Tomuschat. The main thing was to produce a defensible structure. If States did not accept that structure, then the issue of the relationship with the United Nations would not arise. If they did, then the issues could probably be resolved, as they had been in the case of the United Nations Convention on the Law of the Sea. There were various models of relationships with the United Nations and the categories were not closed.

18. Mr. Sreenivasa RAO said that the draft statute prepared by the Commission had captured most of the main elements involved, but some key provisions called for

close examination. The Commission, as an expert body, had a duty to the General Assembly and to the international community to give careful consideration to comments by Governments and not to be distracted by an artificial sense of urgency. The establishment of the International Tribunal meant that its experience, procedures and practices would provide the International Community with valuable pointers in achieving its own goals.

19. The first task was to prepare a statute for a permanent court to try individuals accused of committing crimes which, in the view of the international community: (a) posed a threat to international peace and security; (b) were contrary to good order and the well-being of the international community; and (c) shocked the judicial conscience of mankind. In its present form, the draft statute did not meet those tests for, under its terms, the court would not sit on a permanent basis, the judges being called upon to perform their tasks only as and when they were required to do so. In that sense, they were more in the nature of experts than judges. In his opinion, the matter required immediate rectification in the interests of the objectivity of the proposed tribunal.

20. While he was in favour of a list of crimes that would satisfy the *nullum crimen sine lege* principle and would form the basis of the court's jurisdiction, he considered that the list should include not only the crimes referred to in article 22 but also aggression, trafficking in narcotic drugs and genocide. In addition, it should be possible to amplify the list by means of international protocols, on the understanding that the statute would be agreed upon in the form of an international treaty. The relationship of the statute to the United Nations was a separate matter which required further reflection.

21. More important was the fact that the court's jurisdiction should be directly linked to the draft Code of Crimes against the Peace and Security of Mankind.<sup>6</sup> In that respect, he agreed that the court without the Code—and the Code without the court—would be akin to a sovereign without a territory and vice versa. Any artificial separation of the two would fail to do justice to the Commission's work and to the international community's aspirations to establish an international criminal justice system which was as nearly complete as possible.

22. A related issue concerned the circumstances in which the court should exercise jurisdiction. Like some other members, he believed that jurisdiction should be based on the express consent of the State or States concerned, as provided for in alternative A of article 23 and in article 24 (Jurisdiction of the Court in relation to article 22), paragraph 2. As to the crime of genocide, assumption of jurisdiction by the court, as provided for in article 24, paragraph 1 (b), might involve an amendment of the Convention on the Prevention and Punishment of the Crime of Genocide; and if that were expressly proposed, it would help to avoid legal controversy before the proposed tribunal in the future.

<sup>6</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

such as to receive the widest possible acceptance within the international community, that the provision presently contained in the statute that would allow a State not party to the statute to accept the jurisdiction of the court ad hoc with respect to a particular crime might need to be reconsidered. While such a provision, from one point of view, might be thought to be a reasonable proposal, there was also the practical consideration that there was a very real possibility that it might operate as a substantial disincentive to widespread adherence to the statute.

41. The question of the subject matter jurisdiction of the court, or in other words the categories of crime that were to be brought within the court's jurisdiction, was a difficult and fundamental question that raised several issues which were clearly not simple to resolve. A great deal of effort had gone into the formulation of articles 22, 25 and 26, yet the approach proposed in the three articles gave rise to a number of difficulties. Was it appropriate to assume that States parties to the treaties listed in article 22 would consider referring the crimes covered by such treaties to the international criminal court? Only two of the treaties there listed envisaged such a court (the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid) and provided for the possibility of there being an international criminal court. Were some of the acts covered by definitions of crimes in the treaties listed in the article of such a magnitude as to be more appropriately dealt with by the international criminal court than by a national court already possessing jurisdiction over the act in question? Would the list of treaties in article 22 and the invocation of general international law under article 26 meet the criminal law requirements regarding precision that were epitomized in the principles *nullum crimen sine lege et nulla poena sine lege*? Would it not be sensible, at least at the initial stage of the court's existence to limit its subject-matter jurisdiction only to those crimes as to whose magnitude and gravity there would be a consensus in the United Nations. In this connection, chapter II, section A, of the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993),<sup>9</sup> is informative. Mr. Calero Rodrigues had pointed out that the Commission must not foreclose the possibility of the draft Code of Crimes against the Peace and Security of Mankind providing a channel through which questions of jurisdiction *ratione materiae* could be considered.

42. The process by which an accused in a particular case is made subject to the jurisdiction of the court is made conditional on the prior consent of States having national jurisdiction in the case. Yet the provisions defining the States whose consent would be necessary (arts. 24, 25 and 63) were intricate in the extreme. It might be necessary to simplify them. One would also have to consider how the statute could be made to conform with the obligations of States under extradition agreements.

43. As to the provisions of articles 24 and 27, which contain references to the Security Council, they would

have to be considered very carefully. Article 24 in particular, which proposed that the court be accorded jurisdiction over cases referred to it on the authority of the Council, must be carefully reviewed in the light of such matters as the relevant provisions of the Charter of the United Nations; the inequality of the relationship between the Permanent and other Members of the Council in its decision-making procedures; the fact that differences of views among members might inhibit the Council from reaching decisions, along with whether the General Assembly ought to be granted a supplementary role when such differences arose and whether the fact that the decision-making process in the Council and in the Assembly was subject to considerations that should not be factors in any criminal justice system and therefore rendered those organs inappropriate for criminal justice purposes. While he readily understood the premises underlying article 27, a further look should be taken at the article's implications.

44. Mr. MAHIOU said there had been a number of answers to the question of the status of the court, some of them idealistic, others practical. An idealistic approach advocated by Mr. Tomuschat was that the court would be the equivalent, in its own domain, of ICJ. That would, of course, require revision of the Charter of the United Nations, but since the idea of changing the composition of the Security Council had been raised, and the Charter had to be revised for that purpose as well, it might be possible to kill two birds with one stone.

45. Two other solutions presented themselves: establishing the court by treaty or by a resolution of the General Assembly. After hearing Mr. Pellet's comments (2331st meeting), he had initially thought that the second solution might be the best. Achieving the adoption of a resolution by the General Assembly would be accomplished more readily and more easily than drafting a treaty and ensuring widespread ratification. On second glance, however, that solution became less attractive. The functions of the General Assembly, as outlined in Articles 10 to 13 of the Charter of the United Nations, were essentially to make recommendations: the Assembly rarely had the power to take decisions. The value of a recommendation as a sound basis for establishing an institution had frequently been called into question. Admittedly, there were precedents—the Assembly had already established subsidiary organs by recommendation, notably the United Nations Administrative Tribunal. Yet the court being envisaged by the Commission would need more sweeping powers than would a subsidiary organ of the Assembly, an organ which, under Article 22 of the Charter, was described as being “necessary for the performance of its [the General Assembly's] functions”. That seemed to imply that the work of the subsidiary organ had to be an extension of the functions of the Assembly. Those functions were essentially to regulate international affairs, and not to pronounce sentence in legal cases. The whole question was quite complex and called for much more scrutiny.

46. Even if it was decided to establish the court on the basis of a General Assembly resolution, the question of its jurisdiction then arose. Would States that had not voted in favour of the resolution be subject to the court's jurisdiction? And if the question of State consent to

<sup>9</sup> Document S/25704 and Corr.1 and Add.1.

jurisdiction was to be raised, then why not revert to the idea of establishing the court by adopting a treaty? The Working Group might also consider the possibility of both an Assembly resolution and a convention: the Assembly might, for example, recommend to all States the ratification of a convention. In any event, a decision on the matter should not be deferred too long.

47. The present text of part two of the statute was indeed excessively complex. A more straightforward approach should be followed, making it perfectly clear that States could not escape responsibility for certain crimes, and those crimes should be listed without any ambiguity. In that connection, the issue of the connection between the court and the Code of Crimes against the Peace and Security of Mankind could hardly be sidestepped. True, the Commission's work on the draft Code was at present running a little late and the emphasis had shifted to the preparation of the statute. However, the work being done on the court might actually help to advance the work on the draft Code, so that it was not unreasonable to hope that the Commission, by the end of its present term, would be able to submit both the draft Code and the draft statute to the General Assembly.

48. The draft statute erred in that it sought to cover too many crimes; a more realistic idea would be to pinpoint a hard core of crimes on which all States could agree. In the absence of agreement on a minimum number of crimes, there would be little point in having a court at all. Nevertheless, the door should be left open to the possibility of including crimes other than those forming part of the "hard core" list.

49. As to article 25, the authority of the Security Council was unquestionable in all matters pertaining to Chapter VII of the Charter of the United Nations, but he agreed with Mr. Crawford that the powers of the Security Council should not be extended beyond those limits. The General Assembly should have the power to refer to the court situations falling outside the purview of Chapter VII, including certain situations relating to international peace and security. He saw no reason why the General Assembly should be precluded from bringing before the court situations under Articles 33 and 55 of the Charter, and thought that article 25 of the draft statute should be improved accordingly.

50. On the question of the court's status (art. 4), he saw no inconsistency in the fact that the court would be permanent and the fact that it would sit only intermittently. The term of office of judges (art. 7, para. 6) should be reduced from 12 years to 9 and the square brackets in article 41 (a), on the principle of legality, should be deleted. Lastly, with reference to article 44 (Rights of the accused), paragraph 1 (h), he agreed with other members that the International Covenant on Civil and Political Rights did not prohibit trial *in absentia*. The accused certainly had the right to be present at the trial, but if he chose not to avail himself of that right, he could be tried in his absence.

51. Mr. GÜNEY said that the relationship of the proposed court to the United Nations should be determined as a preliminary question within the framework of article 2. A decision in that regard would help to resolve a number of matters which as yet remained unregulated,

such as the financing of the tribunal and the recruitment of its personnel. In defining the relationship between the court and the United Nations, full account should be taken both of the moral authority, credibility and universality of the future court and of its independence, impartiality and objectivity.

52. Endorsing the realistic and pragmatic approach adopted in article 4, which provided that the tribunal should sit when required to consider a case submitted to it, he said that, in the long term, a court remaining permanently in session might be envisaged with a view to encouraging the development of criminal law and ensuring uniformity of case-law. Article 7 (Election of judges) should provide for equitable geographical representation so as to ensure that the main legal systems were duly represented. Some limitation should be placed on the right of the accused to request the disqualification of a judge (art. 11, para. 3) in order to avoid abusive requests for disqualification on spurious grounds.

53. As to part two of the draft statute, dealing with jurisdiction and applicable law, the present structure of article 22 containing the list of treaty-defined crimes falling within the court's jurisdiction *ratione materiae* had been widely accepted. In his view, all anti-terrorist conventions of a universal nature should be included in the list, and he agreed with Mr. Crawford (2330th meeting) about the need to add the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The jurisdiction of the court should be limited to the most serious crimes which offended the conscience of the international community. In any event, the list of crimes used to define the jurisdiction of the court should not be regarded as exhaustive and it should always remain possible for States to agree to add further treaties which had not yet been drafted or had not entered into force at the time of the statute's adoption.

54. He agreed with other members that a link should be established between the court and the Code of Crimes against the Peace and Security of Mankind. In his opinion, the reference to drug-related crimes and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, now figuring in article 26, paragraph 2 (b), should be transferred to article 22. In regard to article 25, the role of the Security Council should be confined to determining situations that might require the judicial intervention of the court. Lastly, he noted that the inclusion in article 26 of a paragraph extending the court's jurisdiction to crimes under general international law not covered by article 22 had been viewed as necessary by several delegations in the Sixth Committee because it made sure that serious crimes universally condemned by the international community but not yet defined by treaty would not go unpunished.

55. Mr. ROSENSTOCK stressed the need to strike a balance between ideal solutions and those which States could actually accept, whether in the form of a treaty or in any other form. Consistent with the approach adopted

in article 27, and bearing in mind the complex nature of the Security Council's involvement in efforts to deal with a multiplicity of conflicts around the world, it might be prudent to accord a similar role to the Security Council in all situations inherently involving international peace and security. Some of the reasons adduced by Mr. Bowett (2329th meeting) with regard to aggression, such as the risk of mischievous or harassment-type litigation, was perhaps even greater in other areas relating to international peace and security, such as grave breaches of the Geneva Conventions of 12 August 1949. A further look at the consent requirements might also be prudent in that context.

56. One of the few points on which he disagreed with Mr. Mahiou was the suggestion that the role assigned to the Security Council in article 27 should be extended to the General Assembly. It was important that the organ entrusted with a role of that kind should be able to act with legal effect, and he failed to see how the General Assembly could have any such role, as legal consequences could not flow from a recommendation.

57. Attention should be paid to the relationship between the regime now being set up and existing regimes designed to facilitate international legal cooperation, including bilateral and multilateral extradition regimes and, as appropriate, status of forces agreements. In that context it should be recalled that a key aspect of the Commission's basic approach, and one which had received wide endorsement by States, was that of envisaging the court as a facility for States parties to the statute—a supplement rather than a substitute for national trial-based systems. A prosecute or extradite obligation might be regarded as not necessarily satisfied by surrendering the accused to an international criminal court. Consideration might also be given to the question whether the State of custody should be barred from opting to extradite to a requesting State with which it had a relevant treaty relationship. Another question was whether, in the context, say, of status of forces agreements, renunciations of jurisdiction might not be rendered meaningless by incidental consequences of the statute currently being elaborated.

58. The Working Group might keep in mind the overall objective of seeking to supplement, and not to preempt, national jurisdiction. The question arose whether article 63 (Surrender of an accused person to the Tribunal), paragraph 6, provided adequate protection for a State which was investigating a situation but which had not yet made an accusation or taken the accused into custody. The supply to the procurator on a confidential basis of information concerning such a situation would be a valid basis for at least a finite period of delay. A further point was whether judges should not be specifically elected to appeals chambers and sit as appellate judges, rather than follow the system that was set out in article 56 (Proceedings on appeal). In short, should not the model of the International Tribunal be followed? Studies had suggested that a system in which trial judges rotated onto and off appellate chambers might result in greater collegiality than was desirable and in each watching out for the interests of the other in expectation of being extended similar courtesies. Moreover, further details about the requisite qualifications would appear to

be necessary if the Commission was specifically aiming at trial judges, for whom criminal trial experience would seem to be indispensable, as opposed to appellate judges, for whom broader experience might be acceptable.

59. The court should be given some discretion in certain circumstances to decline to accept a particular case on specific grounds—for instance, that it did not consider the case of sufficient gravity to merit a trial at international level or that the existing national tribunals could handle the matter expeditiously. Such discretion on the part of the court might mitigate the concerns raised with regard to the inclusion in article 26, paragraph 2 (b), of crimes under national law, such as drug-related crimes and, for that matter, the "terrorism" conventions in article 22. It might be necessary to address the role of national law in greater detail, for with the possible exception of genocide, national law was likely to be an essential part of the directly applicable law, in view of the generality of the definitions.

60. Trial *in absentia* was a matter of policy more than anything else. There were ways of envisaging trial *in absentia* that did not violate fundamental human rights instruments. However, it was difficult to see what trial *in absentia* achieved and, indeed, its drawbacks had already been commented on. If a person was convicted *in absentia*, the conviction had no "bite" until he was taken into custody and, once he was in custody, another trial was needed. The second trial would confirm or overrule the results of the first, but either way, it was difficult to see how it was better than an indictment and the holding of the trial, if and when the person surrendered to custody. The person's inability to expose himself to a jurisdiction in which he would be taken into custody and handed over would be the same, whether in the case of indictment or conviction *in absentia*. In short, trial *in absentia* was not a good idea because of the highly dubious nature of any practical consequence stemming from a conviction *in absentia*, as opposed to an indictment.

61. Lastly, with regard to the problems raised by Mr. Crawford's reading of ways to deal with suspected lacunae, if the Commission deleted the reference to "general international law" in article 26, paragraph 2 (a), very little would be lost by such a minor drafting change.

62. Mr. CALERO RODRIGUES stressed that account must also be taken of dissenting views if a useful instrument was to be produced.

63. He agreed in part with Mr. Pellet (2331st meeting) who, pointing to a number of shortcomings in the text in his usual abrasive fashion, had said that the draft statute was insufficiently international and too *étatiste* and that it was very weak with regard to jurisdiction. Indeed, the court had no inherent jurisdiction, for jurisdiction must always be conferred on it by States. That approach was too narrow. At issue were crimes that offended the conscience of mankind, yet a variety of procedural obstacles had been placed in the way of the court's judging such crimes. If an international criminal court was to be established, it was difficult to conceive of States being given the power to interfere with its taking action.

64. That was all a consequence of the system adopted for defining crimes, especially in article 22. The end result was unsatisfactory. There was no point in a State being a party if it did not accept the court's jurisdiction. If a suspect went to the territory of a State of which he was a national, that State could block the action of the court for a crime under article 22. Under article 26, if the suspect was in any State other than the State of his nationality or the State in which the crime had been committed, that third State could decide that the court could not judge the case. Clearly, that was not justified.

65. It should be remembered that criminal law required precision, whereas customary law had none. It was difficult to admit that a mere affirmation that an act was a crime under international law meant the act could form a case to be tried in an international court. In his view, that situation could easily be remedied, and there he disagreed with Mr. Pellet: the draft Code of Crimes against the Peace and Security of Mankind would be just the place for a precise definition of crimes against humanity or crimes of aggression. The Code had begun as a substantive code of criminal law. At the time, the Commission had not known which jurisdiction would apply. The time was ripe to make the Code and the court complementary. Provisions under the Code could avoid all the complications created by articles 22 to 26. Even if some States still objected to the Code, they might be convinced if the Code and the court supplement each other.

66. Mr. Sreenivasa RAO said that he questioned the assumption that, if a State had the right to refuse jurisdiction, it would invariably do so. Granting that right to States was merely recognizing certain realities. The proposed statute relied on a common commitment to overcome pressing problems. The international community was outraged by certain crimes and sought to create ways to deal with them. The right of refusal was inherent in all bilateral and multilateral arrangements, but that did not mean it was always exercised. Creating a court that could drag cases before it would frighten off States.

67. Restrictions did not mean that jurisdiction was thwarted. It only meant that jurisdiction must work within certain limitations. Indeed, the very presence of restrictions made it much more likely that States would be prepared to accept the statute than would otherwise be the case. Actually, the Charter of the United Nations would not have been adopted if the United Nations had been granted greater powers.

68. He welcomed the draft statute. Its advantages certainly outweighed any negative aspects it might have.

69. Mr. VILLAGRÁN KRAMER said he agreed with Mr. Rosenstock and with Mr. Calero Rodrigues on two particular points. Two years previously, when the Working Group had been set up, the possibility had been explored of establishing a court as a United Nations mechanism and he had been asked to examine such a trial mechanism linked to the United Nations. At the time, he had pointed out in the Working Group that the General Assembly did not have more powers than those assigned to it in the Charter of the United Nations and that it could not transfer to a jurisdictional organ more authority than it possessed. Secondly, an entity of the kind envisaged required a financial commitment, some-

thing that always implied a treaty or a protocol. Accordingly, the option of such an organ being created by the Assembly had been rejected as not viable. As to the Code of Crimes against the Peace and Security of Mankind, it was not a question of whether such an instrument was or was not inseparable from the court; the court was now being viewed in a different light than it had been several years ago.

70. He proposed a simple exercise: did international crimes exist independently of treaties or not and were there international crimes described in treaties that had not been ratified? If so, such crimes should be placed in a code. It would then be possible to define from the outset what was meant by war crimes, crimes against peace, crimes against humanity, and so on. That implied that the court would have jurisdiction to try crimes without the prior consent of States. It was only logical that, if international crimes did exist, a mechanism with the requisite jurisdiction must exist to try them. International treaties were another matter. The crimes defined therein would be crimes only for those States that had ratified the treaties. Thus, there would be a great difference between crimes committed under international law and acts characterized as crimes in certain treaties.

71. The fifth report of the Special Rapporteur on the topic of State responsibility<sup>10</sup> also contemplated international crimes that were serious violations of *erga omnes* obligations, provided that those obligations had been established to protect the interests of the international community as a whole. Hence, what the Commission was doing in the field of international criminal law would also be reflected in the law on the responsibility of States. Considerable progress had been made in overcoming that duality. It might be useful, in that context, to reverse the order of articles 22 and 26 of the draft statute and to give priority to customary law over the law of treaties. He had already discussed that possibility with Mr. Crawford.

72. Mr. MIKULKA said that he had been tempted by Mr. Pellet's proposal (2331st meeting) to consider the adoption of the statute in the form of two concurrent resolutions of the General Assembly and the Security Council and to conceive of the court as a subsidiary organ of both the Assembly under Article 22 of the Charter of the United Nations and the Council, under Article 29. After careful consideration, however, he had concluded that even such a procedure would not do away with the need for a treaty form of statute to be ratified by the States parties. Yet the adoption of the statute at a given stage by the two concurrent resolutions of the Assembly and the Council might have a certain merit.

73. It was hard to see how the court could be regarded as a subsidiary organ of the General Assembly, because a careful reading of Article 22 of the Charter of the United Nations showed that such a subsidiary organ could only be created for the purpose of the performance of the functions of the Assembly. It would be an excessive interpretation to say that the court should serve the performance of the functions of the Assembly. Con-

<sup>10</sup> *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/453 and Add.1-3.

versely, the court could function as a subsidiary organ of the Security Council for the purposes of the performance of its functions under Chapter VII of the Charter when the punishment of criminals was necessary in order to maintain international peace and security. The court could thus be considered to be a subsidiary organ of the Council under Article 29 of the Charter.

74. Naturally, the question then was whether the Security Council could create such a subsidiary organ before a situation that could be regarded as a threat to international peace and security arose. In his opinion it could, because Article 29 was not in Chapter VII but in Chapter V of the Charter of the United Nations. In other words, the subsidiary organ of the Council could be created, but it could not perform functions under Chapter VII before the Council established that a situation falling under Chapter VII existed.

75. The General Assembly had adopted many resolutions which had later been submitted to States for ratification. In such cases, the Assembly acted as a diplomatic conference by adopting the text and inviting States to ratify or accede to it. That gave a political significance to the act of adoption, especially if it was done in parallel fashion with resolutions in the Assembly and in the Security Council. Such a course might allow a start to be made on the process of technical preparation, which resembled the work of the preparatory conference pending the ratification of the United Nations Convention on the Law of the Sea. However, before the number of ratifications required for entry into force was reached, the entire mechanism could only be used by the Council, and again provided it was in response to situations that fell under Chapter VII of the Charter, for in that case, the Security Council's decision served as a substitute for the approval of States that was otherwise necessary to create the jurisdiction of the court. He none the less wondered whether a court that was a subsidiary organ of the Council and, at the same time, an inter-State body, was desirable.

76. Mr. Mahiou had proposed that the General Assembly should also have the possibility of referring a situation to the court. He (Mr. Mikulka) was not sure what the utility would be of such a possibility. It should not be forgotten that the court's jurisdiction was not only a conferred, but also a concurrent, jurisdiction. In other words, it did not mean that a case must automatically be judged by the court. A case that might be under the jurisdiction of the international criminal court could well remain in the national courts. If a State decided to put a case before the international criminal court, by so doing it renounced the jurisdiction of the national courts: clearly the case could not be heard in two different courts. On the other hand, if the General Assembly was to be authorized to refer a situation to the international criminal court, what would be the legal consequences for a State concerned? After all, it could not deprive a State of its sovereign right to continue to try the case before its own courts. Conversely, the Security Council could take action when a case specifically fell under Chapter VII of the Charter of the United Nations, thus substituting for the consent of a State concerned, which would otherwise be necessary. A Council decision that a case had to be judged by the international criminal court, not by national courts, must, of course, be warranted by the need to maintain

international peace and security. Thus, Mr. Mahiou's proposal seemed to raise more problems than it solved.

77. Mr. MAHIU asked Mr. Mikulka how he could arrive at different conclusions for two articles of the Charter of the United Nations, Articles 22 and 29, that were drafted identically and neither of which formed part of Chapter VII.

78. Mr. MIKULKA said that Article 25 enjoined States to carry out the decisions of the Security Council. Those decisions were binding on States. The function of the international criminal court as a subsidiary organ of the Council was to give effect to those decisions. The General Assembly did not have such powers. Thus, there was no reason to conceive the court as a subsidiary organ of the Assembly.

### Organization of work of the session (*continued*)

[Agenda item 2]

79. Mr. CRAWFORD (Chairman, Working Group on a draft statute for an international criminal court) proposed the following composition for the Working Group: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Güney, Mr. He, Mr. Idris, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam (Special Rapporteur), Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer and Mr. Yankov. The Working Group was opened, of course, and the contributions of all members of the Commission would be appreciated.

80. Mr. BENNOUNA said that the activities of the Working Group might eventually be extended to include work in connection with the second reading of the draft Code of Crimes against the Peace and Security of Mankind. As Mr. Mahiou had just pointed out, a linkage would probably have to be established between the two facets of the topic, namely, the list of crimes and the means of punishing them. It would be in the interests of the Commission and the General Assembly if the work on both aspects could, at some point, be merged.

81. Mr. THIAM (Special Rapporteur) proposed that Mr. Fomba should be included among the members of the Working Group.

82. The CHAIRMAN invited the Commission to approve the list proposed by Mr. Crawford with that addition.

*It was so agreed.*

*The meeting rose at 6.10 p.m.*

## 2333rd MEETING

Friday, 6 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

*Present:* Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Welcome to Mr. Qizhi He

1. The CHAIRMAN congratulated Mr. He on his election and, on behalf of the Commission, extended a cordial welcome to him.

2. Mr. HE said that he was honoured to be elected to such an august body as the International Law Commission and that he intended to do everything he could to contribute, in concert with the other members, to the codification and progressive development of international law.

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

[Agenda item 4]

**DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT<sup>3</sup>**  
(continued)

3. Mr. VARGAS CARREÑO said that the debate on what was certainly a complex topic had been fruitful, but had also revealed that there were obstacles to be overcome in order to complete the drafting of the statute for an international criminal court.

4. The first obstacle was the result of pressure from the fact that the General Assembly had requested the Commission to complete its work on the subject, if possible, at the current session. The second related to the fact that the question of an international criminal court had originally been linked to the elaboration of the draft Code of Crimes against the Peace and Security of Mankind<sup>4</sup> and

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 100, document A/48/10, annex.

<sup>4</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 94 *et seq.*

that it had subsequently been decided, for understandable considerations of method and expediency and, indeed, for political reasons, to examine it separately as a matter of urgency. The statements that had been made on the draft statute, particularly those on the key articles 22 to 26, which some had regarded as unsatisfactory, showed that there were more drawbacks than advantages to such a split.

5. Moreover, the precedent of the establishment 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<sup>5</sup> welcomed by the vast majority of the international community, had unquestionably influenced the work of the Commission. Although the precedent was useful, the International Tribunal could not conceivably serve as a valid model for all of the cases that the international criminal court would have to hear.

6. In those circumstances, how could the Commission reconcile pressure to be expeditious with the care that had to be taken to draft an instrument that would be useful, effective, viable, well established and acceptable to the majority of States?

7. The first problem that arose involved the instrument through which the court was to be established and was clearly related to the court's jurisdiction *ratione materiae* and the nature of its jurisdiction. Obviously, from the point of view of legal technique, it would be best if the court were established by an international treaty concluded within the framework of the United Nations. An alternative might be to set up the court by a resolution of the General Assembly, which might be confirmed by a resolution of the Security Council. That was a valid option, provided that the court had jurisdiction only for trying and sentencing persons who had committed very serious crimes prejudicial to mankind as a whole. That would be true in only two instances: in the case of genocide and in the case of an aggression previously determined by the Security Council in accordance with Chapter VII of the Charter of the United Nations. Concerning genocide, for example, the vast majority of States would appear to agree that the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, as defined in its articles II and III, were rules of *jus cogens* and that genocide generally constituted a threat to the peace or a breach of the peace authorizing the Security Council to adopt measures that it deemed appropriate, as it had done in establishing the International Tribunal.

8. Reasons of efficiency also argued in favour of that option and were related to the compulsory nature that the court's jurisdiction must have in those two cases. Normally, the nationals of a State who had committed genocide or launched an aggression would not be brought before the court by that State, which might not even have ratified the Convention on the Prevention and Punishment of the Crime of Genocide. In those two very seri-

<sup>5</sup> Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

ous situations, the court should therefore have compulsory jurisdiction and must be able to act on the initiative of the Security Council. Otherwise, what would happen if, in several years' time, the painful events in the former Yugoslavia were to repeat themselves in some part of the world and the statute drafted by the Commission could not be applied because the State concerned had not recognized the court's jurisdiction in accordance with one or the other of the wordings of article 23 of the statute (Acceptance by States of jurisdiction over crimes listed in article 22)? Would the Commission not be discredited if the Council was again required to draft a new statute to deal with that particular situation, which the statute prepared by the Commission was unable to resolve?

9. In that connection he referred to the situation in a number of Latin American countries in the 1970s and part of the 1980s, when serious human rights violations (disappearances, summary executions, torture) had been committed and the victims had been unable to turn to the Inter-American Commission on Human Rights, which had lacked a conventional basis because it had been established by a resolution of the Meeting of Ministers of Foreign Affairs of the Member States of OAS, and they had been unable to petition the Human Rights Committee, which had been established under the International Covenant on Civil and Political Rights and whose jurisdiction had not been recognized by the persons responsible for the violations.

10. For all those reasons, he thought that the court should be established by a resolution of the General Assembly and its jurisdiction confined, at least for the time being, to genocide and aggression, which must be determined by the Security Council as provided in article 27 of the draft statute (Charges of aggression). That would leave time to consider the difficult problems raised by the inclusion of other crimes in the draft statute and would enable the Commission to fulfil its mandate by adopting the draft statute for the future court at the current or the next session.

11. Jurisdiction for the other crimes referred to in articles 22 (List of crimes defined by treaties) and 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) of the draft statute and other crimes that had not yet been included, such as torture, should be the subject of a convention or an international treaty concluded within the framework of the United Nations; establishing the jurisdiction of the court, in principle, on a voluntary basis, and following the proposed model, such an instrument would define crimes against the peace and security of mankind in a code. That was one of the priority tasks that the Commission must set itself for the years to come. The method used for articles 22 to 26 of the draft statute was therefore a good starting-point, although certain elements had to be improved.

12. In any event, the point was that, as indicated in the commentary to article 29 of the draft statute (Complaint),<sup>6</sup> the court must be a facility that would be available to the States parties to its statute and to other States, in order to prevent persons responsible for, or who had

participated in, serious international crimes from enjoying immunity. In that sense, the establishment of a court mandated to try crimes other than genocide and aggression should not mean that States would be released from their obligation to try or to extradite persons accused of committing crimes against international peace and security. The establishment of an international criminal court by no means implied that the State had to waive the exercise of its jurisdiction. Consequently, the court's jurisdiction for trying the crimes listed in the Code of Crimes against the Peace and Security of Mankind should be residual compared to that of national courts. Hence, the regime to be defined in the statute should be regarded as adding to the regime based on the option between trial and extradition; referral to the court would then be one of the options open to the State in exercising its jurisdiction over a given crime under a treaty or general international law.

13. The question of the relationship between national courts and the international criminal court had not been sufficiently developed in the draft statute. One way of building up the court, at least at the outset, would be to give it advisory jurisdiction to enable it to help national courts interpret the treaties that provided for the punishment of international crimes or the future Code of Crimes against the Peace and Security of Mankind. That would be an extremely useful exercise which the Working Group might wish to analyse in the light of the experience of the Inter-American Court of Human Rights. It was important, at least initially, for the court to be kept informed of certain situations, for instance, when national courts applied as internal law the provisions of international instruments that defined crimes against the peace and security of mankind, such as the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

14. With regard to the organization of the court and to procedure, he, like other members of the Commission, considered that a 12-year term of office for the judges was much too long. It might be better to reduce it to nine years, or six years; and, in the latter case, the term of office should be extended only once. Article 51 of the draft statute (Judgement), whereby the judges would not be able to submit individual or dissenting opinions, was contrary to the practice followed in other international courts. It would therefore be advisable to make express provision in the draft statute for that facility, which could be important in the event of an appeal. As to judgements by default or *in absentia*, whereby an offender would not go unpunished, the proposed wording of article 44 of the draft statute (Rights of the accused) seemed to be both satisfactory and balanced in that it would allow the court to go ahead with the trial in the absence of the accused if such absence was deliberate.

15. Mr. BENNOUNA said he agreed that the discussion on the draft statute for an international criminal

<sup>6</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 112.

court was productive, useful and of great interest. He would deal with the basic issues involved in the formulation of the draft and with its general structure, leaving it to the Working Group to tidy up the wording.

16. First of all, he was concerned to note that there was no agreement on the model to be adopted before tackling the technical provisions. It was above all important to situate the draft in its true context. The future court was one of the means envisaged for giving effect to the Code of Crimes against the Peace and Security of Mankind and guaranteeing its credibility. Its establishment now came within the realm of what was possible. There was therefore an essential link between the definition of crimes and their punishment. However, the draft under consideration seemed to ignore the Code of Crimes against the Peace and Security of Mankind totally. In his view, the Working Group should now review the draft statute in the light of the forthcoming consideration on second reading of the draft Code of Crimes against the Peace and Security of Mankind, which, for instance, also determined the applicable law.

17. The second problem related to the modalities for the establishment of the court and its statute. Much had been and would be said on the matter, but the Commission should not dwell on it unduly. In the end, it would be for the United Nations and the political bodies to determine how the court should be established. What was involved in the final analysis, was a political decision. Several possibilities could be envisaged, but they all had to come within the framework of the Charter of the United Nations. It was not the business of the Commission to legitimize the creeping jurisdiction assumed by the Security Council, which inevitably caused legal writers some concern. Chapter VII of the Charter did not permit everything and the Council was not a legislative body. It was not enough to say that the Council took a decision under article 25 of the statute (Cases referred to the Court by the Security Council); the Charter also had to be respected.

18. In that connection, he referred to an article by Mr. Bowett in which he analysed the line of reasoning followed by ICJ in the Lockerbie case between the Libyan Arab Jamahiriya and the United States of America.<sup>7,8</sup> ICJ had concluded, in that case, on the basis of Articles 103 and 25 of the Charter of the United Nations, that, in the event of a dispute, a decision of the Security Council would prevail over any other treaty right or obligation. Mr. Bowett demonstrated that that was not so, since it was incorrect to equate a Council decision with a Charter treaty obligation. The obligation to accept and apply Council decisions might be a treaty obligation, but a Council decision *per se* was not a treaty obligation. Council decisions were binding only in so far as they were in accordance with the Charter; they could not create totally new obligations that had no basis in the Char-

ter, for the Council was an executive organ, not a legislature. He agreed with that point of view. In the Lockerbie case, the Security Council had assumed certain powers which were not conferred on it by the Charter and it was clear that, to allow it to refer to the court not only situations, but also specific individual cases, in other words, to name criminals who could be tried by the court, would be in violation of the Charter. It was apparent from the existing wording of article 25 of the draft statute that the court would have jurisdiction to hear certain cases on a mere referral by the Council and, although paragraph (2) of the commentary to the article<sup>9</sup> stated that the Council could not refer a "case" in the sense of a complaint against named individuals, paragraph (3) of the commentary to article 29<sup>10</sup> stated that, in the light of the primary responsibility of the Council for the maintenance of international peace and security under the Charter, the Council would also be entitled to invoke the tribunal and initiate criminal proceedings with respect to international crimes under conventional or customary law. That meant that the Council could ask the tribunal directly to prosecute certain criminals. If that were allowed, there would be confusion as to the respective roles of the Council and the court. It must not be forgotten that the Council was a political organ, whereas the court was a judicial organ. The functions of prosecution could therefore not be entrusted to the Council, particularly since its five permanent Members had a right of veto, which meant their nationals could not be prosecuted.

19. He noted that the model followed for the draft statute was that of ICJ, which provided for accession to the Statute and then acceptance of jurisdiction by the States parties in each specific case. That model was, however, not suited to the needs of an international criminal court, first of all, because the court would have to try extremely serious crimes which must be clearly defined. Article 22 should therefore be amended by reducing the number of crimes it listed and indicating only those crimes which concerned all States and for which all States were prepared to impose penalties. Care should also be taken not to give States parties, as did article 26, paragraph 2, the possibility of referring to the court crimes that were not covered by the statute, so as not to bring before an international criminal court matters that should be dealt with only in hearings at the national level. The possibility should, however, be envisaged of States referring cases like the one concerning the incident at Lockerbie to the court. In such a case, an international criminal court could certainly settle a dispute between States. For the other types of crime, the States concerned should settle their disputes by agreement.

20. Lastly, he again underlined the benefits of the discussion and expressed the hope that the Working Group would revert to the question of the structure of the draft statute in the light of the comments made.

21. Mr. MIKULKA said he would like to explain, for Mr. Bennouna's benefit, that he had not referred to Article 25 of the Charter of the United Nations in order to defend the proposition that the Security Council could adopt decisions that would not comply with the Charter,

<sup>7</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 114.

<sup>8</sup> "The impact of Security Council decisions on dispute settlement procedures", *European Journal of International Law*, Law Books in Europe, vol. 5, No. 1 (1994), pp. 89 *et seq.*

<sup>9</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 109.

<sup>10</sup> *Ibid.*, p. 112.

but to contrast the right of the Council to refer a situation to the court and a similar right that would be conferred on the General Assembly. Obviously, the decisions taken by the Security Council must comply with the Charter. He had in fact referred to Article 25 to underline the difference that existed between the Council and the Assembly, whose decisions were not binding on States even if they were in conformity with the Charter, and to mark his disagreement with Mr. Mahiou's suggestion (2332nd meeting) that the General Assembly should be given the possibility of bringing certain situations to the attention of the court like the Council.

22. Mr. EIRIKSSON said that the debate was certainly the most interesting that had taken place in plenary for some years. It none the less seemed to him that the draft statute which had been submitted struck the right balance to allow work on the question under consideration to proceed, and even to be concluded, at the current session. It was therefore important not to depart from the general structure of the draft on jurisdiction, even if some choices still had to be made and some articles, in particular articles 22 and 27, had to be significantly amended. Without seeking to complicate matters unduly, it would, in his view, be desirable to incorporate a provision in the draft giving the court the possibility of exercising some discretion in deciding whether or not to take up a case even when that case clearly fell within its jurisdiction; it would then deal solely with the most serious crimes, would not encroach on the functions of national courts and would be sufficiently realistic to adapt its case-load to the resources available. That was, of course, a highly sensitive matter, but some benefit might be derived in that regard from the recent revision of the mechanism of the European Court of Human Rights. It would also be a good way of dealing with the question of trials *in absentia*.

23. He also thought that the Commission should not take up again the link between the statute of the court and the Code of Crimes against the Peace and Security of Mankind. Unlike Mr. Calero Rodrigues (2330th meeting), he did not believe that the Commission's work on the two subjects would proceed in parallel fashion in the coming two years. Moreover, it would be advisable to consider an evolutionary clause whereby jurisdiction could be extended more generously than was the case under article 21, paragraph (b), of the draft statute (Review of the Statute) concerning instruments to be adopted in the future. Those instruments should, incidentally, themselves have a clause conferring jurisdiction on the court. As to the crimes under general international law referred to in article 26, paragraph 2 (a), the Working Group should try to replace the general definition proposed in that subparagraph by definitions of three crimes—namely, aggression, genocide and crimes against humanity—that were not covered in the treaties listed in article 22. The treaties referred to in article 26, paragraph 2 (b), should be clearly listed, and the list expanded gradually, using the evolutionary clause mentioned earlier.

24. With regard to article 25 and the possibility that the Security Council might submit cases to the court, he believed that the question must be given more in-depth consideration. It might be difficult to specify in the draft

statute whether the Council could refer situations only, or individual cases as well, to the court. In any event, he did not believe that the possibility of referring cases to the court should be extended to the General Assembly. For article 23, he preferred an alternative that provided for an "opting out" procedure. Article 41, which dealt with the principle *nullum crimen sine lege*, should in his view, be revised to conform to the other articles on jurisdiction and, of course, adapted to any change in the system.

25. With regard to articles 19 and 20, he did not really understand the distinction between the rules of the tribunal and the internal rules of the court. He nevertheless thought that those articles could be developed a bit further, particularly where they dealt with rules of evidence, by drawing inspiration from the rules recently adopted by the International Tribunal. He was also of the opinion that the link between the court and the United Nations should not be referred to directly in the draft statute and that the Commission should simply set out its views and even recommendations in its report. He would not shy away from an amendment to the Charter of the United Nations or a provisional relationship and he strongly urged Mr. Mikulka to develop his ideas on that subject further to enable the Commission to draft a recommendation.

26. Mr. ARANGIO-RUIZ, noting that the idea of an international criminal court to be established by a resolution of the General Assembly or another United Nations body had been raised again, emphasized that the functions of the court and its auxiliary institutions meant that it could not be set up as a subsidiary body of any other body. That meant that it could not be established in any way other than by an amendment of the Charter of the United Nations or by a treaty. The second solution seemed to be the most practical one.

27. The United Nations Administrative Tribunal and the International Law Commission were both subsidiary bodies which operated in different ways and for different purposes within the United Nations system. The United Nations Administrative Tribunal dealt with the rights and obligations of United Nations staff, while the Commission made recommendations to the General Assembly on the rights and duties of States which did not have binding effect on those States. The decisions and recommendations of those two bodies affected States only in so far as they had an impact on the expenditure of the United Nations and the contributions required of the Member States. The situation would be completely different for an international criminal court, whose decisions would affect States more directly and more profoundly than even an arbitral tribunal with jurisdiction to settle inter-State disputes and more than ICJ itself, which had compulsory jurisdiction in certain areas of inter-State relations. There was thus an enormous difference between ICJ and the proposed international criminal court. The compulsory jurisdiction of ICJ affected States in their relations with one another as sovereign States. The jurisdiction of the international criminal court would affect States in the exclusive "control" that they exercised over their nationals and most particularly over their leaders or officials. The very fabric of States would be penetrated; there would be a break in the veil

of their sovereignty in that they would be sending individuals in high Government posts to the court for trial and possible sentencing. Those virtually surgical powers went well beyond the ones conferred, for example, on the Court of Justice of the European Union as the common judicial organ of member States of the Union. No lawyer seriously believed that the Court of Justice could have been established by a resolution of the Council of Europe.

28. It could, of course, be argued that a limitation of sovereignty, of the exclusive power of the State over its nationals, its residents and, mainly, its officials, would not be involved in the kind of cases that immediately came to mind when considering the establishment and functioning of an international criminal court. Occasions when an international criminal court would be called upon to operate would mainly be situations such as those in the territory of the former Yugoslavia, Somalia or Rwanda, namely, situations when, in addition to civil war, there was a high degree of uncertainty as to who was in charge. Whatever might be the situation in such exceptional cases, which even an international criminal court would undoubtedly be unable to resolve, what had to be borne in mind at all costs when considering the possibility of setting up a court by a resolution of the United Nations was that the individual who might be brought before the court, tried, condemned and compelled to serve a sentence could be a head of State, a prime minister, the supreme commander of the armed forces or the minister of defence of any given country. Even at the current time, specific cases in which the supreme authorities of a country might be subjected to proceedings before the international criminal court could be cited. It was easy to imagine, on the basis of existing situations, scenarios in which high-level officials or even the highest officials of a country could be brought before the court. Such procedures were envisaged, but only providing that States had been invited to put their signatures on the text of a treaty and to ratify it. Such a result could not be obtained through the adoption of a resolution by a body not empowered for that purpose—the General Assembly, for example. As to the Security Council, he believed it could do certain things if it was present in the field as a belligerent power, which, by analogy, would entitle it to behave like any other belligerent against members of opposing armed forces that were guilty of violating the rules of war.

29. He could not endorse an idea put forward by one member of the Commission who was in favour of the establishment of the court by a resolution of an organ of the United Nations rather than by a treaty. According to that view, the international criminal court should be seen as an institution of the international rather than the inter-State community, owing to the distinction between the international community of men, or what could be called the legal community of mankind, and the community of States. That approach seemed to suggest that placing the court at the highest level, as an institution of the legal community of mankind and not of the community of States, would facilitate, and be facilitated by, the establishment of the court through a resolution of an organ of the United Nations. It was hard to accept that thesis, which implied that the General Assembly or the Security Council were considered to be institutions of the com-

munity of mankind. Although the Charter of the United Nations began with the words: “We, the peoples of the United Nations . . .”, those peoples had not been present at the signing of the Charter, unlike the peoples of the 13 original colonies of the United States of America at the time of signature, first, of the Articles of Confederation, and then of the Constitution. But the thesis cited above implied that the Assembly and the Council were not only invested with inter-State functions, but that they also exercised supranational functions. In his view, it was inconceivable that the General Assembly, which, rightly or wrongly, was not empowered to impose binding obligations on States except in some very limited and closely circumscribed areas of their inter-State relations, should be authorized to impose binding obligations on States in a matter implying the penetration of international institutions into the most jealously guarded areas of their sovereign functions. Only a treaty could achieve that result. With regard to the Security Council, in particular, he had already expressed himself as to the competence of that body to establish criminal tribunals. As he had stated in the course of the debate on the Draft Code of Crimes against the Peace and Security of Mankind at the forty-fifth session of the Commission, there was no provision in the Charter under which one could consider the Council to be empowered to establish tribunals of any kind. The only hypothesis by which a criminal tribunal could be established by a decision of the Council would be if the Council were directly engaged in military action against a State or a similar entity under Article 42 of the Charter, in order to maintain or to restore international peace and security. By analogy with the situation of a belligerent State, the Council would, in such a case, be entitled under general international law to set up ad hoc organs for the prosecution, trial and eventual punishment of the members of the opposing party’s armed forces (or even civilians) accused of violations of the laws of war.

30. The Commission’s essential function was the progressive development of international law, rather than its mere codification. His firm conviction on that point was in accordance with the opinion eloquently put forward by Mr. Brierly at the time of the drafting of the Commission’s statute. That viewpoint explained the audacious nature of some of his own proposals, which had sometimes been criticized as revolutionary. But nothing would be more revolutionary than to attempt to establish an international court with criminal jurisdiction by assuming the existence of legislative or even constituent functions on the part of certain organs of the United Nations. The Commission must, of course, produce a draft statute for an international criminal court, and a good one, but it would seriously jeopardize the chances of such a draft becoming a part of international law if it did not do away with the idea that a supranational criminal court could be successfully set up by mere resolutions of the Council or the Assembly.

31. The CHAIRMAN, speaking as a member of the Commission, said he wished to make a number of comments on the item under consideration.

32. With regard to the title of the future international court with jurisdiction in criminal cases, he supported the Working Group’s proposal that the term “tribunal” should be used for the entire structure made up of three

23. Referring to paragraph (2) of the commentary to article 25,<sup>7</sup> he said that, unlike other members of the Commission, he had no difficulty with the powers to be given to the Security Council to refer a situation for investigation by the court's procuracy. Such powers were appropriate as long as the procuracy's right to formally try a case before the court was subject to consent on the part of the State concerned, in accordance with articles 23 and 24. Under the Charter of the United Nations as currently worded, it was not within the Security Council's powers to refer a case to the tribunal. Yet article 25 of the draft statute could be interpreted to mean that the court had jurisdiction "under the authority of the Security Council", and the article should therefore be re-examined very carefully. The Security Council had powers only to deal with situations that threatened international peace and security and to seek advisory opinions from ICJ, powers that could not be stretched to permit it to bring formal criminal cases against individuals. The International Tribunal could not—and was not expected to—serve as a precedent. A judicious interpretation of the powers of the Security Council was essential in order to protect its vital function of preserving international peace and security and to ensure wide recognition and respect from the international community.

24. He experienced no difficulty with article 27 (Charges of aggression), but would suggest that the procuracy might also be given the right to refer charges of aggression to the Security Council through the Secretary-General, to gain the benefit of its guidance at times when the Security Council did not have the option of considering the same issue. When the Council was unable or unwilling to decide on a claim of aggression in a given case, the tribunal would be well advised not to entertain charges of aggression against an individual in the same case.

25. Jurisdiction should be based on cooperation among the States concerned, which would mean that the court could not act if the States concerned were willing and able to exercise their own jurisdiction over the offence. He would add, unlike Mr. Bowett (2329th meeting), that that should be the case as a basic principle, and not as a matter of first instance. Any abuse that States were likely to commit must be dealt with as a matter of State responsibility, with appropriate remedies.

26. The statute should be further elaborated to provide for the right of the requested State to refuse to surrender the accused or render judicial assistance by virtue of the sovereign discretion of the State, a principle well recognized in international law and in bilateral and multilateral treaties on extradition and mutual judicial assistance. Due regard must be paid to the laws and regulations of the State of nationality of the accused in matters of evidence and sentencing.

27. The court's jurisdiction should be available to all States equally under a given set of conditions, and not be subject, either directly or indirectly, to discrimination, which would be the case if the Security Council was granted the right to bring cases directly before the court

under its own authority, without first dispensing with the right of veto enjoyed by some States.

28. In the final analysis, the international criminal court would be acceptable to most States only if it was designed to deter crimes committed wantonly, without regard for the integrity and human rights of victims and innocent civilians, no matter what the provocation. It would be acceptable only as an option for prosecution when the States concerned were not willing or able to do so, and only if careful provision was made against its being used to serve narrow political or sectarian interests—in other words, as a political tool. The court and its statute should not be seen as a way of pursuing political goals. The draft statute in its present form certainly was not open to such criticism, but further efforts must be done to make sure that such accusations could never be levelled. He had no doubt that the Working Group would achieve that aim.

29. Mr. de SARAM said that he was mindful that specific questions and details of drafting were to be considered in the Working Group, rather than in plenary debate, and his observations would therefore be of a general nature. Members of the Commission had before them the comments made in the Sixth Committee (A/CN.4/457, sect. B), and 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) in its present form. Affording Governments the opportunity to comment on the draft statute at an early stage in its preparation had been a very useful approach. Adequate consultations with and among Governments would be necessary if wide agreement on the statute, particularly the more problematic aspects, was to be achieved. It would also be useful if Governments were furnished a similar opportunity to make further comments on the draft statute at a later stage, when it was refined still further but before it was finalized and submitted for adoption by the General Assembly. If the statute of the court was to be commended to States by the General Assembly, and the court was moreover to be a meaningful institution within the international community, it was essential that the statute be so formulated as to receive the widest possible adherence; and, considering matters in that perspective, there were a number of fundamental matters of form and substance that still needed to be fully addressed.

30. While a number of comments had already been made in the debate on the important subject of the jurisdiction of the court, it had to be remembered that in preparing a statute for an international criminal court the Commission was in fact formulating an instrument for the establishment of what would be a new intergovernmental institution. Thus, aside from the subject of jurisdiction, there were a number of organizational matters for which provisions would need to be considered; and it was to some of those matters that he wished to refer.

31. First, the question of the general structure or pattern of the statute (the manner in which the provisions of the statute should best be divided into chapters and sub-chapters) would have to be fully considered.

32. The expression "tribunal", which was widely used in practice to denote an exclusively adjudicatory body,

<sup>7</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 109.

was used in the draft statute to include the court, the procuracy and the registry. This had been found to be disconcerting by some as it seemed inconsistent with what was generally viewed as a fundamental requirement in criminal justice systems: that judicial and prosecutorial authorities ought to be separate and distinct from one another in status, function and in the public perception. In the absence of a better expression, the term "tribunal" might have to be retained, but a clear distinction must be drawn between the court and the procuracy in terms of their status and functions.

33. In establishing the tribunal as the overall entity, with the court, the registry and the procuracy as sub-entities, the draft statute needed to provide (in the appropriate chapters and subchapters) for such matters as: the structure, composition, responsibilities and essential administrative procedures of the sub-entities. As now worded, it did not do so, and many provisions on those matters were scattered throughout the draft.

34. In its present form, the draft statute gave rise to some uncertainty as to the identity and functions of the States parties. If the tribunal was to be established by treaty, States parties to the treaty would also, presumably, be States parties to the statute. That point must be made explicit. The States parties would have to meet regularly for administrative and budgetary purposes, yet the draft statute contained no provision for a general deliberative body. If that was not to be done in the statute itself, the treaty establishing the statute should, of course, provide for the States parties to convene at appropriate intervals.

35. The comments in the Sixth Committee and those received from Governments showed that many specific points relating to the structure and organization of the court, procuracy and registry would need further review. Considering and deciding on those issues would be a time-consuming process.

36. The tribunal as a whole, as well as each of its principal organs, would need to maintain formal and informal cooperative relations on a number of administrative, operational and other matters with other entities: States parties, and possibly States not parties to the statute, and organizations like the United Nations. It might prove necessary for the tribunal and its principal organs to conclude agreements for such purposes; and the statute should include an appropriate general section allowing for the conclusion of such agreements.

37. A matter to which consideration was not given, due to time constraints at the previous session of the Commission, but to which statements in the Sixth Committee and Governments, in their comments, had drawn attention as a consideration of importance, was that of the funds and other resources that would be required for the establishment, maintenance and the various operational and administrative requirements of an institution such as the tribunal. An early identification, at least in general terms, should be possible of cost-components: such international institutional and other administrative requirements that should be permanently in place; and the facilities (investigatory, prosecutorial, judicial, incarceration) that would need to be available for use when necessary. If the tribunal was to be established as a prin-

cipal or subsidiary organ of the United Nations, its funding would be carefully examined in the Fifth Committee of the General Assembly. If it was established by treaty, the funding provisions would be among the most important ones and would have to be satisfactorily drafted. If the Commission did not feel competent to consider the financing, it should at least, in the commentaries to the articles, propose how the question might be studied. However, whether such a tribunal were established as a principal or subsidiary organ of the United Nations or as a treaty body, it would be essential, having in view the importance of ensuring the objectivity and integrity of the tribunal, and of the public perception thereof, that it should have independent financial viability and that, accordingly, its funding ought, to the greatest extent possible, be self-sustaining.

38. Moreover, having regard to the extraordinary nature and significance an international criminal tribunal would have in the public perception, and the extent to which its standing within the international community would depend on its receiving the widest possible support, it seemed necessary that the statute should only enter into force after a very substantial number of States from all regions of the world had become parties—and only after the number of parties were such as to ensure the clear financial viability of the tribunal.

39. Before commenting on the question of jurisdiction, he wished to express his reservations with respect to a point made by another member to the effect that the General Assembly, acting under Article 22 of the Charter of the United Nations, which authorized the creation of subsidiary organs by the Assembly, might establish the court as a subsidiary organ. He was inclined to take a different view of such a matter, in the absence, as he saw it, of a necessary implication empowering the Assembly to do so. He did not consider that the advisory opinion of ICJ on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*<sup>8</sup> could be viewed as an authority for the proposition that the Assembly might establish an international criminal court as a subsidiary organ. ICJ, in that case, had considered the much narrower and quite different question of whether the Assembly's authority to regulate relations between the United Nations and its staff, and to establish regulations for the purpose (having in view also the jurisdictional immunity which the United Nations enjoyed under the terms of the Charter) implied for the Assembly the competence to establish a tribunal, of, in effect, a judicial nature, to adjudicate disputes arising out of contracts of service of United Nations staff. He was, of course, also of the view that it would be inappropriate for the Security Council to establish a court of the nature now being considered by the Commission. He would also agree that the most appropriate manner in which a court of the nature presently being considered by the Commission might be established, though such a modality might be considered too unrealistic at the present time, was by amendment of the Charter.

40. As to the important and difficult subject of the jurisdiction of the court, he was of the view, having regard to the overall consideration that the statute should be

<sup>8</sup> *I.C.J. Reports 1954*, p. 47.

components, namely, the court, the procuracy and the registry. The title was broadly in keeping with the practice which had developed following the Second World War and using it would make a clear distinction between ICJ in The Hague and the international criminal court.

33. Secondly, he knew full well that it would not be easy to try to establish the court by a special treaty, but he nevertheless believed that that approach was the most appropriate for establishing and adopting the statute of the future international criminal court, while not excluding the adoption by the General Assembly of resolutions to open the treaty for signature. Other methods could be envisaged, but they would either be too complicated, requiring the amendment of the Charter of the United Nations, for example, or they might give rise to disputes about the legitimacy of the new body.

34. His third comment related to the draft articles on the jurisdiction of the future court, particularly its jurisdiction *ratione materiae*. The Working Group should try to simplify the articles, which were too complicated, as much as possible or, at least, make them more accessible and comprehensible. He endorsed the general premise that the court should have permanent jurisdiction which would be subsidiary in relation to that of national criminal courts. He nevertheless agreed with the members of the Commission who thought that efforts should be made to define a "core" of the most serious crimes for which the States parties to the statute would be bound by stronger obligations, owing to their status as parties to the statute. That might constitute the part of the court's jurisdiction which had been described as "inherent", with the crimes most likely to be within such jurisdiction being those of the Nürnberg "triad". With regard to other, relatively less serious crimes, the approach could be more flexible, as in the current draft. Any other solution would place crimes that were absolutely not comparable for the international community on an equal footing, such as the crime of aggression and crimes connected with the hijacking of aircraft.

35. His position on the question of crimes under general international law was likewise determined by the desire to pinpoint a group of particularly serious crimes in respect of which the optional nature of acceptance by States of the court's jurisdiction would be limited. He shared the view that, after the Nürnberg and Tokyo trials, it would be inappropriate, if not dangerous, to cast doubt on the possibility of punishing the perpetrators of the most serious international crimes simply because no treaty definition of those crimes existed at present; to do so would be tantamount to challenging the very existence of the court. Moreover, a reference to general international law did not mean only customary law. General international law had been customary when neither the Charter nor many universal conventions had existed. Today, however, it included not only customary norms, but also those contained in treaties of a nearly universal nature.

36. He was also convinced that rapid completion of work on the draft Code of Crimes against the Peace and Security of Mankind would help to solve the problems connected with the jurisdiction *ratione materiae* of the court. In any event, a reference to the Code should be in-

corporated in the statute of the court, if only by way of reaffirming that the Code was to see the light of day some time in the future. He did not, however, think it appropriate to make the fate of the court and its statute dependent on the progress the Commission made on the Code. In concrete terms, that meant that the Commission had to assume the onerous task of including not only procedural rules, but also basic rules, in the draft statute.

37. With regard to the court's internal and procedural rules and the rules of evidence, he agreed with other members of the Commission that the statute should contain only essential provisions, leaving it to the court itself to draw up detailed rules, subject, possibly, to their being submitted for the approval of the States parties to the statute.

38. Referring to the discussion of articles 25 and 27 on the relationship between the court and the Security Council, he said that the Working Group would have to review those articles, although, in his view, the general approach they reflected was the right one.

39. He had been convinced by Mr. Mikulka's argument that the General Assembly was not competent to bring cases before the court. The Security Council was, of course, competent to do so in some cases, but it went without saying that both the Council and the Assembly had to act within the limits of the powers conferred on them by the Charter.

40. Reserving the right to make more specific proposals during the consideration of the draft articles in the Working Group, he recalled that the General Assembly's instructions on the question of the completion of work on the draft statute were couched in rather flexible terms: the Commission had to complete its work during the current session or the next one. He nevertheless thought that both the Working Group and the Commission should do everything in their power to ensure that work on the draft statute was completed at the current session.

41. Mr. THIAM (Special Rapporteur) said that he did not want to enter into the theoretical debate on realism versus idealism, which was so inherent in the development of international law that, whatever the topic, the Commission's work could only be a compromise between those two schools of thought. It was more to the point to study the specific provisions of the draft statute proposed by the Working Group. With regard to the way in which the court was to be set up, the proposal for establishment by a resolution dated back to the origins of international criminal law, but, in so far as the exact legal effect of United Nations resolutions was still unknown, it might be wiser to reconcile the two proposals by having the General Assembly adopt a resolution recommending the adoption of the statute of the court by treaty. As to the organization of the court, he had tried unsuccessfully to convince the Working Group that it would not be good to place the powers of prosecution and investigation in the same hands, namely, those of the procuracy. In criminal matters, there was always a balance to be struck between the various organs of a court and between the rights of the prosecution and those of the defence. The problem was all the more serious in that, according to the proposed text, the procuracy was to be composed only of a prosecutor and a deputy prosecu-

tor. How were those two officials to perform the important administrative duties of running the procuracy and conducting investigations at the same time? Short of establishing a separate investigatory body, which would be the best solution, the procuracy should at least be enlarged. A concern to make savings was entirely justified, but it should not take precedence over the proper administration of justice.

42. With regard to the jurisdiction of the court, he agreed that the proposed provisions lacked clarity and rigour. To take just one example, article 22 related to crimes defined by treaties and article 26 to crimes under general international law. Yet article 22 expressly referred, *inter alia*, to the crime of genocide, and that seemed to suggest that genocide was not a crime under general international law. In general, he also had some misgivings about the rules requiring that the jurisdiction of the court should be conferred on it by States. States always tended to protect their own and there was thus a risk that the rules would quite simply prevent the court from functioning. It would be better to assume that jurisdiction was conferred on the court by any State which became a party to the treaty establishing the court and, possibly, to make a distinction between two categories of crimes, those for which conferment of jurisdiction would be compulsory and those for which it would be optional. There would also be a risk of preventing the court from functioning if it was denied the right of trial by default, which some members seemed to confuse with trial *in absentia*. If trial by default were ruled out, a person could avoid prosecution simply by refusing to appear, since, as the text now stood, all that the court could do was to verify that notification of the indictment had been duly delivered.

43. Submission of cases to the court was a right that belonged to States, but legal entities, such as an association for the protection of human rights, should also be able to refer matters to the court. The Security Council was also a legal entity which would, although it was political in nature, be able to exercise the right of referral without in any way undermining the court's jurisdiction or independence. The question did arise, however, whether that right could be extended to the General Assembly. If the risk of excessive politicization, which some members feared, was mitigated by the requirement of a qualified majority, there seemed to be no reason why the Assembly should not be able to bring certain cases before the court. With regard to the applicable law, it should be recalled that some members of the Commission had categorically refused to envisage the adoption of a code unless a court was established for the purpose of implementing it. That showed to what extent there was a close, historic and legally well-founded link between those two elements, in the sense that a court could not very well be established without it being made clear what law it was supposed to apply. It was not enough to state, as was done in articles 22 and 26, that crimes defined by such and such a treaty came under the jurisdiction of the court: those crimes had to be defined with precision. There again, the Commission could proceed restrictively by listing only a few crimes that supposedly represented a threat to the peace and security of mankind or it could draft a genuine international criminal code. It was that work of precise definition that had delayed the

drafting of the Code of Crimes against the Peace and Security of Mankind. Much had already been done in that regard, but what needed to be done now was to choose from among the results of that difficult first process in order to arrive at a sound code, pruned of all the political and ideological concepts that still weighed it down.

44. Mr. YAMADA expressed the hope that the Working Group would complete its task reasonably soon, so that the Commission might have ample time to consider the definitive draft statute and forward it with the commentaries thereto to the General Assembly before the end of the session, thus proving itself capable of meeting the international community's expectations. The establishment of an international criminal court differed from the Commission's traditional topics by its highly political aspects involving creative legislation. Many elements would have to be left to be decided by States. It might suffice for the Commission to present a framework of what, from the legal point of view, would be a desirable modality of an international criminal court. The fact that States were generally eager to preserve their sovereign rights made it necessary to adopt a realistic approach, but the establishment of such a court was none the less a kind of revolution and the Commission must therefore try to present a vision for the future.

45. On the basis of the assumption that the court was to be established by a treaty, he said that it should be left to States to decide whether the court should be a judicial organ of the United Nations or an independent institution linked to the United Nations. States should also be left to choose between the practical solution of a non-standing permanent body and that of a full-time body, the latter alternative being more desirable from the point of view of criminal justice. As to the rest of the articles of part one, the principles of independence and impartiality of judges were clearly established, but the power of judges to remove prosecutors from office, as provided in article 15 (Loss of office), paragraph 2, would certainly not contribute to the independence of the procuracy.

46. With regard to the jurisdictional provisions central to the statute, he generally agreed with the draft. The list of treaties in article 22 should be regarded as purely illustrative so as to accommodate future treaties or amendments to existing treaties relating to crimes against humanity. He wondered whether article 24 (Jurisdiction of the Court in relation to article 22), paragraph 2, which placed an undue restriction on the jurisdiction of the court and on its possibilities of effective action, was necessary. In current practice, a State did not have to seek the consent of other States in exercising its criminal jurisdiction. Why should it be otherwise for an international criminal court which took over that jurisdiction from a State? It would, of course, be necessary to obtain the cooperation of the State in whose territory the suspect was present, the State of which he was a national or the State where the alleged offence had been committed, but that was a matter of judicial assistance rather than of the court's jurisdiction. Article 53, paragraph 4, on the use to be made of fines paid should be deleted or transferred to the part dealing with miscellaneous or budgetary provisions. As to the rules of procedure to be applied, it would be better to state certain basic principles,

such as the right to a fair trial and the protection of the rights of the accused, without going into detail.

*The meeting rose at 1 p.m.*

## 2334th MEETING

*Monday, 9 May 1994, at 3.10 p.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 4]

**DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT<sup>3</sup>**  
(continued)

1. Mr. HE said it was widely hoped that a new form of international criminal trial mechanism would be established to counter international criminal activities and to prosecute, try and punish the criminals concerned, thereby creating a deterrent and strengthening the cooperation of the international community in that area. Such a mechanism must take into account current international realities, particularly the question of how to supplement and coordinate the existing system of universal jurisdiction so as to guarantee broad acceptance of the court by States. On the whole, the draft statute for an international criminal court was an important step in that direction and he expressed appreciation to the Working Group for its achievement.

2. A number of differences on major legal issues had emerged in both the Commission and the Sixth Committee. Dealing with those problems was an important task for the present session.

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

3. He took the same view as many members of the Commission that the court should be established by concluding a special international convention. In view of the sensitive issue of national criminal jurisdiction, all States should be able to decide whether or not to accept the statute and the jurisdiction of the court.

4. Yet another important issue to be resolved was the relationship between the court and the United Nations. He shared the opinion that it was difficult to conceive of the United Nations having the competence to establish a permanent criminal court of a universal character. Formal incorporation of the court within the United Nations structure might also imply that States Members of the United Nations would be *ipso facto* parties to the court's statute. A court conceived as a permanent judicial organ of the United Nations lacked flexibility and, in that case, the wording in the second set of square brackets in article 2 (Relationship of the Tribunal to the United Nations) would be more practical. Obviously a close relationship between the United Nations and the court was indeed necessary and such an objective could be achieved through an appropriate arrangement.

5. He understood the reasons for separating the two strands of crimes as listed in articles 22 (List of crimes defined by treaties) and 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) but felt that the concept of "crime under general international law" as stated in article 26, paragraph 2 (a), was ambiguous, failed to meet the criterion of precision in international law and gave the court too much discretion. Actually, the crimes referred to in paragraph 2 (a) were serious, such as aggression as defined in the draft Code of Crimes against the Peace and Security of Mankind.<sup>4</sup> The draft Code would be considered on second reading at the present session—an important step towards the requisite precision in criminal law. In view of the basic reason for establishing the court, the jurisdiction *ratione materiae* would certainly include the crimes listed in the draft Code, but in accordance with the principle *nullum crimen sine lege* the court in the initial stage should only exercise jurisdiction over crimes as defined in international conventions, leaving aside for the time being the crimes enumerated in the draft Code or the so-called crimes under general international law. Once the draft Code was adopted and entered into force, the court could bring it within the court's jurisdiction *ratione materiae*. The appropriateness of the provision in paragraph 2 (a) might well need further consideration. Personally, he was very doubtful about the wisdom of extending jurisdiction to crimes other than those that were of a most serious nature.

6. Bearing in mind the realities of the criminal jurisdiction of States and the need for States to cooperate with the court, it was of great importance for the acceptance of the court's jurisdiction by States to be voluntary. A distinction must be drawn between acceptance of the statute and acceptance of the jurisdiction of the court. Acceptance of the statute should only mean undertaking certain obligations to offer judicial assistance and engage in financial cooperation, whereas acceptance of the

<sup>4</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

court's jurisdiction depended on the express consent of States. As to the acceptance by States of jurisdiction over the crimes listed in article 22, he was inclined to prefer alternative A of article 23 (Acceptance by States of jurisdiction over crimes listed in article 22).

7. Concerning the matter of which State's consent was required for the court to exercise its jurisdiction, as far as the cases in article 22 were concerned the system adopted in article 22 was more or less based on the consent of the State in whose territory the alleged offender was found. The need for such consent in order to ensure the presence of the suspect before the court was self-evident. On the other hand, prosecution and a fair trial of the accused would be impossible without proper investigation, the gathering of evidence and other related matters, which in turn often required very close cooperation with the State in whose territory the crime had been committed. Accordingly, the importance of consent by those two jurisdictions in a given case under article 22 should be emphasized. Article 24 (Jurisdiction of the Court in relation to article 22), paragraph 2, attempted to repair somewhat the inadequacy apparent in paragraph 1, but the whole article did not make the two categories of States a necessity in all circumstances. In addition, the consent of the State of which the accused was a national should not be overlooked in so far as the investigation and the collection of evidence by the court were concerned. That issue would seem to require further clarification.

8. In accordance with the principle *nulla poena sine lege*, the statute should stipulate specific penalties for each crime falling within the court's jurisdiction. However, owing to the lack of a uniformly applicable criminal code, the statute failed to establish specific penalties, and set out that the court, in determining penalties, might have regard to the relevant provisions of the domestic criminal law of the States concerned. That approach could only serve as a temporary solution. In the long run, an arrangement of that kind would probably lead to inconsistencies in the application of penalties by the court, something which was neither compatible with the nature of the court nor in keeping with the fair administration of justice. Thus, it would be difficult to resolve the issue of an applicable criminal code.

9. Considerable differences remained, both in the Commission and in the Sixth Committee, about trial *in absentia*. Article 44 (Rights of the accused), paragraph 1 (h), maintained the possibility of holding trials *in absentia*. But it was a principle common to the criminal law of many States that such trials were not allowed. That was also provided for in article 14 of the International Covenant on Civil and Political Rights. The barring of trials *in absentia* was an important judicial guarantee of the rights of the accused. If such trials were allowed, even with limitations, it would make it very difficult for many States to ratify the statute. The provision thus needed further consideration. To create a deterrent for potential criminals, an alternative might be to allow the prosecuting authority to issue a wanted persons circular or to make public disclosure of the decision to prosecute and the preliminary evidence of the suspect's crimes, as was the practice in municipal law in a number of countries.

Of course, once the accused was apprehended, the court would start the trial.

10. Article 45 included the principle *non bis in idem* and the commentary contained a reference to the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.<sup>5</sup> He fully endorsed paragraph 1 of the article, but under paragraphs 2 and 3, the international criminal court would actually serve as a higher court or a court of review for national courts, something that would have a significant impact on the traditional sovereignty of States. In view of the politically sensitive nature of that issue and the fact that the international community consisted of sovereign States, the international criminal court and national courts should be parallel and complementary to each other. Moreover, the backgrounds of the international criminal court and the International Tribunal were essentially different. The court should be established by a statute voluntarily accepted by States, and its legal, binding force should be confined to the contracting parties alone, whereas the International Tribunal, directed at a specific situation, had been set up pursuant to a resolution of the Security Council that contained mandatory measures for maintaining international peace and security and was binding on all the United Nations Member States. Careful consideration should therefore be given to whether it was feasible to make provisions in the statute of the international criminal court analogous to those in the statute of the International Tribunal.

**The law of the non-navigational uses of international watercourses (A/CN.4/457, sect. E, A/CN.4/462,<sup>6</sup> 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]

#### SECOND REPORT OF THE SPECIAL RAPporteur

11. The CHAIRMAN said that the Commission was undertaking the second reading of the draft articles it had adopted on first reading in 1991.<sup>7</sup> At the forty-fifth session, in 1993, the Commission had, in the light of the Special Rapporteur's first report,<sup>8</sup> considered the first 10 articles of the draft. All 10 articles had been referred to the Drafting Committee, which had adopted the texts of articles 1 to 6 and 8 to 10.<sup>9</sup> They had been introduced in plenary by the Chairman of the Drafting Committee but had not been acted upon by the Commission.<sup>10</sup>

<sup>5</sup> Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.

<sup>6</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>7</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

<sup>8</sup> *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/451.

<sup>9</sup> For the titles and texts of the draft articles adopted by the Drafting Committee on second reading, see *Yearbook* . . . 1993, vol. I, 2322nd meeting, para. 5.

<sup>10</sup> *Ibid.*, para. 14.

12. In postponing action the Commission had borne in mind, *inter alia*, the request addressed to the Special Rapporteur to undertake a study on the possibility of including unrelated confined groundwater within the scope of the topic and the fact that the articles adopted by the Drafting Committee might therefore have to be reviewed. He invited the Special Rapporteur to introduce his second report (A/CN.4/462).

13. Mr. ROSENSTOCK (Special Rapporteur) said that he had continued the approach of changing as little as possible of the draft that had emerged from the first reading. His first report had already been discussed in plenary and good progress had been made in the Drafting Committee at the forty-fifth session of the Commission under the leadership of Mr. Mikulka.

14. In his second report, he had made only five suggestions that could be regarded as substantive. The first was to delete the phrase "flowing into a common terminus", a concept that had not been present in the drafts submitted by either his predecessor, Mr. McCaffrey, or any of the earlier Special Rapporteurs. That was no accident, but simply a reflection of the fact that deeper knowledge of the topic ruled out inclusion of the concept. It was difficult to sum up the matter more precisely than had the ILA Committee on International Water Resources Law, which had stated, in response to the draft produced on first reading, that the notion that the waters of a watercourse must always flow into a common terminus cannot be justified in light of today's knowledge of the behaviour of water. As noted in paragraph 7 of his second report, at certain times of the year, the waters of the Danube flowed into Lake Constance and into the Rhine, something that had now been recognized for more than half a century.

15. His second suggestion concerned the inclusion of unrelated groundwaters or aquifers. The importance of confined groundwater could not be overestimated. The existing dependence on groundwater in such diverse areas as Scandinavia and North Africa and the increasing demand due to population growth and industrial use made the case for the elaboration of rules beyond debate. The calls for such action from the United Nations Water Conference,<sup>11</sup> the United Nations Interregional Meeting of International River Organizations<sup>12</sup> and from elsewhere underscored the timeliness of the issues. The only question that could be debated was whether the Commission should cover such waters in its current exercise or should it initiate a new exercise to respond to that need. In his view, the Commission should undoubtedly do so in the current exercise. In the first place, it had already concluded that related confined groundwaters were to be included in the articles, and it had drafted them accordingly. He defied anyone to explain why the general terms of a framework agreement dealing with underground aquifers that were directly related to an interna-

tional watercourse could not or should not be applied to a transboundary aquifer that was not so related. The importance of such aquifers made it reasonable to put the burden of proof on anyone who would deny that the rules for related confined groundwaters applied equally to unrelated confined transboundary aquifers. The two most detailed efforts to elaborate rules for groundwater, in general, were the Seoul Rules<sup>13</sup> and the Bellagio draft treaty on transboundary waters—a model bilateral agreement.<sup>14</sup> There were also bilateral and regional arrangements to which reference was made in the annex to the second report. A detailed study of those instruments revealed no rules applicable to related confined groundwaters that were not applicable to unrelated confined groundwaters and no rules applicable to the latter that were not applicable to the former.

16. To anyone who might contend that the Commission should none the less elaborate a separate instrument for transboundary aquifers, his reply was that it would be a wasteful duplication of time and effort. It took several years to commence an exercise and several more to have the first and second readings, and there was no excuse for creating such a delay, given existing needs. He believed he had amply demonstrated by the drafting changes suggested in his report that it was very simple to add transboundary aquifers to the existing draft. It would not be a responsible approach to fail to do so.

17. A third suggestion related to notice. Article 12 established an obligation on the part of a State that intended to implement or permitted the implementation of planned measures which might have an adverse effect on other watercourse States to provide them with "timely notification", and articles 13 to 16 contained the matrix for the process. The problem with the regime contained in those articles was that it did not provide a notifying State with protection from potential harm caused by the failure of a notified State to respond. Whereas failure to respond should not diminish the responsibility of the notifying State, neither should it increase that responsibility or create an undue burden for the notifying State. New paragraph 2 of article 16 was an attempt to safeguard the notifying State from damage flowing exclusively from the failure of the notified State to respond. The intended protection for the notified State contained in the articles was in no way diminished. The provision contained in his proposed new paragraph had the added advantage of encouraging a response and thus consultation, something which should enhance the prospects for optimal utilization of the resource to the benefit of all concerned. He could think of no reason why the addition should be controversial.

18. As to the fourth suggestion, he still believed that the proper place for paragraph 1 of article 21 was in the article 2 (Use of terms), but that was a matter for the Drafting Committee to examine once it had completed its consideration of all the articles. Whatever the final

<sup>11</sup> See *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12 and corrigendum).

<sup>12</sup> See Proceedings of the United Nations Interregional Meeting of International River Organizations, held at Dakar, Senegal, from 5 to 14 May 1981 (United Nations, *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (Sales No. E.82.II.A.17), part one).

<sup>13</sup> Rules on international groundwaters, adopted by ILA in 1986; see ILA, *Report of the Sixty-second Conference, Seoul, 1986* (London, 1987).

<sup>14</sup> R. D. Hayton and A. E. Utton, "Transboundary groundwaters: The Bellagio Draft Treaty", *Natural Resources Journal* (Albuquerque, N.M.), vol. 29, No. 3 (1989), p. 663.

decision in that respect, paragraph 3 should be strengthened by adding the word "energy" to cover the thermal consequences of certain activities. By way of example he would refer to a scheme devised by Consolidated Edison to pump water from the Hudson River in New York State to the top of the abutting palisade during off-peak periods of use and then to generate power during peak periods by allowing the water to fall back into the Hudson River. Although there had been no loss of water from the river, and no substance had been added to the water, the ecology of the stream had been adversely affected because the water returned to the river had been significantly warmer. The question whether the resultant damage had been offset by the benefits of producing more electricity was one of equitable and reasonable use. There was no doubt, however, that the thermal consequences of the activity should be treated in the same way as "substances" for the purposes of article 21, paragraph 3.

19. His fifth point concerned dispute settlement. The Commission could not, in his view, propose articles which depended on cooperation between States without making provision for resolving differences that would inevitably ensue. He frankly regretted that the Commission had not accepted the proposals for joint management arrangements put forward by his predecessors. Such arrangements lay at the heart of, for example, the Bellagio draft treaty<sup>15</sup> and had proved indispensable in solving most of the water-related problems that had arisen between the United States of America and Canada and between the United States and Mexico. He appreciated that, inasmuch as not all regions enjoyed the fraternal relations that existed between the three North American States, or between Italy and Switzerland, which maintained a joint control commission, the Commission was not prepared to accept the imposition of detailed arrangements over and above what was provided for in the existing draft in general and in articles 6 and 8 in particular. The lack of detail was unfortunate, however, and underlined the need for provisions on dispute settlement. His own preference was for the proposal by the previous Special Rapporteur, Mr. McCaffrey, contained in his sixth report, under which arbitration or judicial settlement would be made binding and would not be dependent on the agreement of the parties.<sup>16</sup> He also drew some inspiration from the Inter-State Water Disputes Act, 1956 whereby the Government of India was empowered to establish a tribunal if a negotiated settlement among the States in its federal system proved impossible.<sup>17</sup>

20. Since the draft articles proposed by the previous Special Rapporteur, Mr. McCaffrey, along with the annexes thereto, were already before the Commission, and since his own proposed amendment with regard to arbitration was simple to grasp, he had merely put forward a skeleton proposal on dispute settlement. He trusted that the discussion in plenary would indicate where the centre of gravity lay as between the proposal of the previous Special Rapporteur and his own, so that the Drafting

Committee could then take the appropriate action. In that connection, consideration should be given to the extent to which appropriate conflict resolution mechanisms could help to point the way out of the difficulty over the possible clash between draft articles 5 and 7. Where State A claimed that it was covered by the criterion of equitable and reasonable utilization, consistent with optimal utilization, and State B objected on the ground of potential or actual significant harm, it might perhaps be useful to provide that State A must offer to submit the dispute to a tribunal for a final and binding decision.

21. Some drafting points were not discussed in his second report. They included the introduction of the terms "sustainable development" and "rational and optimal" in article 25 without any clarifying reference to the basic criteria in article 5, of the kind set forth in paragraph 1 of article 6. The Drafting Committee might wish to resolve any possible confusion that could arise either by adding the words "subject to article 5" in paragraph 2 of article 26 or by incorporating the words "sustainable development" and "optimal utilization" in new subparagraphs to paragraph 1 of article 6, or again, though it was perhaps less desirable, by way of the commentary to article 5 and/or article 26.

22. The Drafting Committee should be asked to consider, when putting the final touches to the draft, whether the word "extent", in article 3, paragraph 2, and article 4, paragraph 2, could be seen as unintentionally suggesting that serious localized harm might not be covered. It might likewise wish to re-examine the words "applies to" in article 4 with a view to clarifying whether they meant "affects significantly" or alternatively, "governs" or "regulates", in which case was it anything but a statement of the *pacta tertius* norm? Subject to the Drafting Committee's guidance, that point could perhaps be dealt with in the commentary.

23. He trusted that his statement would provide the basis for a fruitful discussion in plenary and thus enable the Drafting Committee to complete its work on the topic at the current session. In his view, the Commission should, if necessary, subordinate its other work, other than that on the international criminal court, to that goal.

24. Mr. THIAM noted that the Special Rapporteur, in referring to the expression "flowing into a common terminus", had cited just one example, that of the Danube which flowed both into the Rhine River and into Lake Constance. He asked whether the Special Rapporteur could give any other examples.

25. Mr. ROSENSTOCK (Special Rapporteur) said that, at that stage, the example of the Danube was the only one he could quote in specific terms. All the contemporary writing on the subject indicated that the constant flow of water through the ground was such that the expression "common terminus" was wrong and misleading. He would be interested to know why the term should be included in the draft.

26. Mr. CALERO RODRIGUES pointed out that an explanation for the inclusion of the expression "common terminus" was to be found in paragraph (7) of the commentary to article 2 (Use of terms), which stated: "This requirement was included in order to introduce a

<sup>15</sup> Ibid.

<sup>16</sup> *Yearbook... 1990*, vol. II (Part One), document A/CN.4/427 and Add.1, pp. 66-79.

<sup>17</sup> *The Gazette of India, Extraordinary* (New Delhi), No. 44 (28 August 1956), part II, sect. 1, pp. 717-721.

certain limitation upon the geographic scope of the articles. Thus, for example, the fact that two different drainage basins were connected by a canal would not make them part of a single 'watercourse' for the purpose of the present articles."<sup>18</sup> As he understood it, the expression complemented the idea of a physical relationship between watercourses which could form a unitary whole. The most characteristic feature was the fact that they flowed in the same direction to a common terminus.

27. Mr. YANKOV congratulated the Special Rapporteur on his invaluable introduction to his second report and on a concise and lucid report which adequately reflected the observations and suggestions made by the Commission at its forty-fifth session and by the Sixth Committee of the General Assembly. The proposals made in the report were particularly relevant for a second reading.

28. The study which appeared in the Special Rapporteur's second report (A/CN.4/462, annex) made an important contribution to the elucidation of the scientific and legal aspects of the concept of unrelated confined groundwaters as an independent water system or "independent" reservoirs which "do not interact significantly with existing surface water" (ibid., para. 3). It also provided sufficient scientific evidence for the statement that: "A number of transboundary groundwaters are not related to surface water, and do not flow into a common terminus . . ." (ibid.). The brief but pertinent reference to topical issues relating to pollution of groundwater and to State practice concerning transboundary groundwater deserved special consideration.

29. The chief merit of the second report lay in the integrated approach the Special Rapporteur had consistently applied to several interrelated phenomena, an approach that resulted in a comprehensive concept of watercourses, their uses and conservation. The Special Rapporteur first considered surface and underground waters, and that approach was reflected throughout the whole set of draft articles and particularly in articles 1 and 2. He then applied the same integrated approach to the relationship between protection of watercourses and their management. That method was in keeping with emerging environmental law, in which the environment and sustainable development were integrated—a law that was reflected in recent international instruments and had led to the United Nations Conference on Environment and Development, Agenda 21<sup>19</sup> and the Rio Declaration on Environment and Development<sup>20</sup> with respect to fresh water. He had noted in particular that principle 4 of the Rio Declaration on Environment and Development stated: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."<sup>21</sup>

<sup>18</sup> *Yearbook . . . 1991*, vol. II (Part Two), p. 70.

<sup>19</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: *Resolutions adopted by the Conference*, resolution 1, annex II.

<sup>20</sup> *Ibid.*, annex I.

<sup>21</sup> *Ibid.*, p. 4.

30. The Special Rapporteur had also suggested a number of general principles and specific rules for the uses of international watercourses and transboundary aquifers and of their waters, and for their conservation and management. Following the methodology of his predecessor, the Special Rapporteur had gone further into the application of the integrated approach to international watercourses and confined groundwater.

31. In the introduction to the second report, the Special Rapporteur suggested that efforts should be concentrated on three issues: the inclusion of unrelated confined groundwaters within the scope of the topic; the inclusion in the draft of provisions on dispute settlement; and consideration of certain proposals concerning various draft articles.

32. So far as the scope of the draft was concerned, the Special Rapporteur had come to the conclusion that unrelated confined groundwaters should be considered from the standpoint of their close relationship with the surface water system, although, in many instances, groundwater was not related to surface water and did not flow into a common terminus. The reference to waters that flowed into a common terminus would not therefore be justified on scientific and legal grounds, and the proposed terms "transboundary aquifer" or "aquifer" would suffice. At the Commission's previous session he had been among those who had expressed doubts whether, by simply amending the initial draft articles and without adding the word "groundwaters",<sup>22</sup> a viable result could be achieved. The Special Rapporteur had, however, now convinced him that that approach could work. He agreed with the Special Rapporteur that the rules on surface and groundwaters should therefore be harmonized and embodied in one legal instrument—a framework convention or model rules.

33. The importance of arrangements for the settlement of disputes was self-evident. It was hard to conceive of a legal regime governing the uses of international watercourses and transboundary aquifers that did not provide for such arrangements and for the relevant fact-finding machinery. He was in favour of the more concise set of rules put forward by the Special Rapporteur in a proposed new provision, article 33 (Settlement of disputes), having regard to the fact that the draft articles would most probably be embodied in a framework convention or in model rules. However, a reference to ICJ should be added at the end of paragraph 2 (c) of the article. There was no valid reason for overlooking ICJ's role of adjudication. The word "applicable" before the word "agreement", in the first line of paragraph 2, could be deleted as it was a statement of the obvious; moreover, the use of dispute settlement machinery that might be embodied in an agreement not necessarily confined to international watercourses should not be excluded.

34. He saw no need to provide a definition in article 2, subparagraph (b) *bis* of "transboundary confined groundwaters", as that term was not used elsewhere in the text. In keeping with the integrated approach, the words "and management" should be inserted after the word "protection" in the final sentence of article 5,

<sup>22</sup> *Yearbook . . . 1993*, vol. I, 2312th meeting, para. 36.

paragraph 1, in order to ensure concordance with article 1, paragraph 1. The same thing should be done in article 8. In the title of article 7 and in the first sentence of article 12, the word "appreciable" should be replaced by "significant", to maintain consistency with the other articles.

35. In his view, the scope of article 22 was confined to two forms of interference with the ecological balance of the watercourse or aquifer resulting in significant harm to other watercourse States. The use of certain new technologies might have the same effect, however. On the advice of qualified experts, article 196 of the United Nations Convention on the Law of the Sea had been made to refer explicitly to the use of technology "which may cause significant and harmful changes". He therefore suggested that, in article 22, the phrase "prevent the introduction of species" should be replaced by the following phrase: "prevent, reduce and control pollution resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species". The words "resulting in" should then be replaced by "which may cause".

36. He agreed with the Special Rapporteur that article 29, on international watercourses and installations in time of armed conflict, should be retained. The provisions set out therein were of practical importance in international and internal armed conflicts as was to be seen from recent events in the world. Lastly, he recalled the view he had already expressed that institutional arrangements at the regional and local levels were of great importance.

37. The second report constituted a reliable basis for the work of the Drafting Committee. It was at the present time necessary to give the Committee adequate time to complete its work on the draft on second reading. The commentaries to the articles adopted in 1991<sup>23</sup> could provide useful material for the commentaries to be adopted on second reading.

38. Mr. IDRIS said it was gratifying to note that the Sixth Committee and the General Assembly had welcomed the progress made by the Commission on the topic and the adoption of articles 1 to 6 and 8 to 10 by the Drafting Committee.<sup>24</sup> It was to be hoped that the momentum would be maintained at the present session, with a view to completing the work as soon as possible.

39. The Special Rapporteur was to be congratulated on the simplicity and clarity of the second report, which was short but full of substance. The study annexed to the report, on unrelated confined groundwaters, was very useful. It had been instrumental in guiding the Special Rapporteur to his conclusion that it would be useful to incorporate unrelated confined groundwaters in the work on international watercourses. How to incorporate them was the question that remained to be answered.

40. The Special Rapporteur's idea of deleting the phrase "flowing into a common terminus" from article 2, in order to expand the scope of the topic, was a

revolutionary one. As the ILA Committee on International Water Resources Law had pointed out, the term "flowing into a common terminus" seemed to reflect a concern that a national watercourse artificially connected to an international watercourse system might be considered to have become part of that system. Thus, the concept of "flowing into a common terminus", which might be dubious from the scientific point of view, had taken on specific significance in legal reasoning, and had acquired a solid conceptual basis. Deletion of the phrase at the present stage could undermine the general acceptability of the draft articles and it should, accordingly, be retained.

41. Another approach to the formidable challenge of including unrelated confined groundwaters in the definition of an international watercourse might be, as the Special Rapporteur also suggested, to add a reference to groundwater in such articles as might require one. If that method was adopted, the Commission would have to examine closely the legal content of each article and look at the overall structure of the draft. It should be noted that, though the report argued for the inclusion of such references to unrelated confined groundwaters, the modified articles proposed in the draft referred only to transboundary groundwaters. In his view, it might be less problematic to include transboundary groundwaters in the present scope of the draft articles, but a decision on the matter had to be taken by the Commission in plenary before the draft articles could be referred to the Drafting Committee.

42. Article 16 (Absence of reply to notification) must be read jointly with article 13 (Period for reply to notification) and article 15 (Reply to notification), paragraph 2. As he understood it, article 16 stated that if, within six months, the notifying State received no communication from the notified State, the notifying State could proceed with implementation of the planned measures. If that interpretation was correct, there was a built-in protection mechanism for the rights of the notifying State. He appreciated the concern that had prompted the Special Rapporteur to suggest a new paragraph 2, but believed it could be better met by stipulating that the notified State was under an obligation to reply to notification. In his view it was not a question of incentives to the notified State or of sanctions to be applied, as the Special Rapporteur had suggested.

43. Dispute settlement was a complex issue, but he fully agreed with the Special Rapporteur that at least a minimum provision was required in the draft. Otherwise, the draft articles would lack credibility. With the diminishing supplies of water throughout the world, there would certainly be disputes over watercourses and the draft articles must envisage a mechanism for settling such disputes. Proposed article 33 formed a sound basis for discussion, pending drafting changes. The Special Rapporteur was proposing a simple mechanism for the settlement of disputes by peaceful means, through consultations and negotiations and, if necessary, binding arbitration by either an ad hoc or a permanent tribunal.

44. He was not convinced that the introduction of the reference to "energy" in article 21, paragraph 3, was appropriate or advisable and requested further clarification

<sup>23</sup> *Yearbook . . . 1991*, vol. II (Part Two), pp. 70 *et seq.*

<sup>24</sup> See footnote 9 above.

from the Special Rapporteur of the reason behind the proposal.

45. Although the Special Rapporteur had spoken of articles 5 and 7, in his introduction to the report, the report itself was silent about them. Those two articles were central to the draft, and the delicate balance struck between them must be maintained. They set out serious obligations and they stood in need of further discussion before they were referred to the Drafting Committee. Mr. Yankov had just reminded the Commission that a decision had yet to be taken on whether the term “significant” or “appreciable” was to be used.

46. Mr. ROSENSTOCK (Special Rapporteur), said that the term “energy” he was proposing for inclusion in article 21, paragraph 3, referred to thermal energy, which was well known to have pernicious effects on watercourses. As to articles 5 and 7, he thought that they had been discussed thoroughly, indeed exhaustively, in the Drafting Committee at the previous session, and that it was not necessary to go into them again.

*The meeting rose at 4.35 p.m.*

## 2335th MEETING

*Tuesday, 10 May 1994, at 11 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, 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. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, 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,<sup>1</sup> 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]

SECOND REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. BOWETT said that he found the Special Rapporteur’s conclusion that the draft articles should be extended to cover unrelated confined groundwaters quite compelling. It followed that the requirement of a “com-

mon terminus” should be dropped because it certainly did not work in the case of confined groundwater. The two points which concerned him, however, were the impasse in which the Drafting Committee found itself over articles 5 and 7 and the question of the settlement of disputes. With regard to the first point, the Commission appeared to have made two propositions which were *a priori* irreconcilable. Under article 5, States must utilize watercourses in an equitable and reasonable manner; and, if they did so, they could not be held liable for harm caused to others even if such harm was significant. Under article 7, States had an obligation not to cause significant harm, which implied that a utilization which caused such harm must be inequitable and unreasonable. That contradiction was perhaps not so insoluble as it might seem if it were recognized that, in certain situations, and even without liability, an obligation to compensate could arise. A provision could therefore be incorporated in article 6 stipulating that any use which involved an imminent threat to human health and safety could not be equitable and reasonable and article 7 could then be broken down into a series of propositions that would allow for greater flexibility. First, it would provide that States had an obligation to use due diligence not to cause significant harm, and a breach of that obligation would give rise to international responsibility. Secondly, if, despite the use by the State of due diligence, significant harm was caused, then, on the one hand, the other riparian States affected by such harm could require immediate consultation with a view to an agreed ad hoc adjustment of the use of the watercourse and, on the other, compensation might be agreed for harm caused or likely to result despite the ad hoc adjustment agreed. That was the concept of compensation even where there was no liability which lay behind the “polluter pays” principle.

2. The second point of concern to him related to article 33, which dealt with the settlement of disputes. Paragraph 2 (c) of the article provided that, where neither fact-finding nor conciliation had resolved the dispute, any of the parties could submit the dispute to binding arbitration by any permanent or ad hoc tribunal that had been accepted by all the parties to the dispute. There would be no difficulty with that wording if the dispute was referred to ICJ, but, in the case of arbitration, there had to be a *compromis d’arbitrage*, in other words, an agreement defining the issue to be litigated. That was the problem the Commission had faced in connection with the Model Rules on Arbitral Procedure, proposed by the Commission in 1958,<sup>2</sup> when it had decided that, in the absence of an agreement by the parties defining the matter in dispute, the arbitral tribunal could itself undertake such a definition on the basis of the written pleadings of the parties. That system had not received the support of States which had regarded it as a dangerous intrusion into their freedom of action. Another attempt should therefore be made to resolve that particular difficulty with arbitration, perhaps by adding a clause to article 33 to supplement the initial agreement to arbitrate by a clear commitment by the parties to the new convention that it should be read as an agreement to refer all disputes arising from the interpretation or application of the new convention to the

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> *Yearbook . . . 1958*, vol. II, document A/3859, p. 83, para. 22.

arbitral process. It could take the form of an additional paragraph of article 33, which would read:

“3. Where the parties have accepted reference to the International Court of Justice or to arbitration as a means of resolving legal disputes by means of an agreement which does not already embrace disputes arising from the present Convention, this Convention shall be deemed to supplement such agreement and the parties hereby agree that their acceptance of judicial settlement or arbitration shall extend to any dispute as to the interpretation or application of the present Convention.”

3. Mr. CALERO RODRIGUES noted that the second report (A/CN.4/462) dealt with three separate issues: articles 11 to 32, which followed on from the first report;<sup>3</sup> new article 33 on the settlement of disputes; and unrelated confined groundwaters which was dealt with in an annex. With regard to the first, only articles 16, 21 and 29 had really been questioned, since the other changes, which affected seven articles, merely resulted from the inclusion of “aquifers” within the scope of the topic. That approach greatly facilitated the Commission’s work and it should be possible to complete the second reading of the draft articles at the current session, as planned.

4. The Special Rapporteur had again proposed the deletion of the phrase “and flowing into a common terminus” in article 2, subparagraph (b), and had stated that it was a hydrologically unsound oversimplification which served no useful purpose. At the previous session, he himself had explained,<sup>4</sup> on the basis of the Commission’s commentary on that point during its consideration of article 2 on first reading, why that phrase had been a useful complement. The Drafting Committee for its part had not felt inclined to delete that phrase. The Special Rapporteur’s proposal could have been explained by a wish to extend the scope of the draft articles to confined groundwaters, but the Special Rapporteur also stated that the inclusion or exclusion of that phrase was not critical in that regard. At all events, the argument that the common terminus requirement had not been proposed by any of the preceding Special Rapporteurs was certainly not relevant. Once a provision had been approved by the Commission, as that one had been on first reading, its origin was totally immaterial. As to the new paragraph proposed for article 16, which should be paragraph 2, the Special Rapporteur explained, in paragraph 12 of his report, that the intent was to create an incentive for the State which received a notification under article 12 to reply to that notification. In his view, the second sentence of the proposed paragraph was quite acceptable, but the first gave rise to some drafting problems.

5. With regard to article 21, it seemed logical, as the Special Rapporteur proposed, to transfer paragraph 1, dealing with the definition of pollution, to article 2 (Use of terms), even though the term “pollution” appeared for the first time in article 21. Article 2 would then contain an explanation of all the terms used in the articles. The Special Rapporteur further proposed that the word

“energy” should be added in article 21, paragraph 3, so that it would refer to watercourse States consulting “with a view to establishing lists of substances or energy”. The Commission was not unaware that the introduction of energy into the waters of an international watercourse could be a source of pollution. It would have mentioned energy as a pollutant if it had not chosen to define pollution in general terms in paragraph 1, explaining that pollution meant “any detrimental alteration in the composition or quality of the waters . . . which results directly or indirectly from human conduct”. As explained in the commentary drafted during the consideration of article 21 on first reading, paragraph 1 “does not mention any particular type of pollution or polluting agent (e.g. substances or energy)”.<sup>5</sup> Paragraph 3 was thus not intended to indicate categories of pollutants: it merely dealt with establishing lists of what was commonly called “dangerous substances”, such lists being found in a number of international instruments. The notion of dangerous substances was, moreover, explained in the commentary to the article. He could easily imagine a list of substances, but did not see very clearly what a list of types of energy could be. Perhaps the Special Rapporteur could tell the Commission whether he knew of examples of such lists in other international instruments.

6. In paragraph (1) of the commentary to article 29<sup>6</sup> provisionally adopted on first reading, the Commission explained that the article did not lay down any new rule and was only a reminder that the rules of international law applicable in international armed conflicts should be observed with regard to the use of watercourses and the protection of related installations. The Special Rapporteur had noted, perhaps with a certain degree of approval, that several States had considered the provision superfluous. That might be so, but the deletion of article 29 at the present stage could give the impression that the Commission was unwilling to reaffirm a non-controversial position it had adopted during the first reading.

7. Turning to the question of dispute settlement, he noted that the statement by the Special Rapporteur in paragraph 14 of his report, that the Commission had declined, owing to lack of time or otherwise, to accept the sophisticated and complex provisions of previous Special Rapporteurs on dispute settlement, was not entirely incorrect, but it was not quite correct either. The proposals made by the previous Special Rapporteurs, Mr. Schwebel<sup>7</sup> and Mr. Evensen,<sup>8</sup> had never been fully developed enough to be considered for decision; the proposals made by Mr. McCaffrey<sup>9</sup> had been left aside at the last minute for lack of time, since the Commission had not wished to delay the final approval of the articles beyond the established deadline. In no case had the Commission declined to accept the articles, and the description of them as complex and sophisticated might,

<sup>5</sup> Article 21 was initially adopted as article 23. For the commentary, see *Yearbook . . . 1990*, vol. II (Part Two), pp. 61-63.

<sup>6</sup> *Yearbook . . . 1991*, vol. II (Part Two), pp. 76-77.

<sup>7</sup> *Yearbook . . . 1982*, vol. II (Part One), pp. 181-186, document A/CN.4/348.

<sup>8</sup> *Yearbook . . . 1984*, vol. II (Part One), pp. 123-127, document A/CN.4/381.

<sup>9</sup> *Yearbook . . . 1990*, vol. II (Part One), pp. 77-79, document A/CN.4/427 and Add.1.

<sup>3</sup> *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/451.

<sup>4</sup> *Yearbook . . . 1993*, vol. I, 2311th meeting, para. 13.

moreover, be disputed: they were merely intended to be comprehensive.

8. The Special Rapporteur's proposals now under consideration could in no way be described as sophisticated and complex, though they did seem satisfactory, or nearly so. It was virtually impossible nowadays to innovate in matters of dispute settlement and the proposed text followed the traditional three-part scheme: consultation and negotiation; fact-finding and conciliation; and third-party settlement. The proposal actually comprised only two stages, however, because binding third-party settlement would come into play only if the parties had a previous commitment to recourse to arbitration. That was what had been proposed by the previous Special Rapporteur, Mr. McCaffrey, as well as by his predecessor, Mr. Evensen, although he had offered the parties a choice at that point between arbitration and adjudication by ICJ or another international court. The only proposal under which recourse to third-party settlement had been truly compulsory for the parties, independent of a previous commitment, had been the draft submitted by Mr. Schwebel. That text was incomplete, however, and referred to optional procedures that were to have been set out in an annex, which had never been submitted to the Commission because of Mr. Schwebel's election to ICJ.

9. That was the heart of the matter: a dispute might never be settled unless, everything else having failed, the parties were bound to accept the solution dictated by a third party, an arbitrator or a court. Yet no one was unaware that States were extremely reluctant to make such far-reaching commitments. The Commission thus had two choices now: not to go beyond what it believed States were prepared to accept or to recommend an effective system under which arbitral or judicial settlement would be compulsory if all other procedures had failed. The choice was certainly a difficult one. He would be in favour of the second option, though with considerable hesitation, and would not oppose the adoption of the more cautious approach recommended by the Special Rapporteur.

10. Referring to the crucial issue of confined groundwaters, he said that, both in the report and in the annex, the Special Rapporteur had emphasized the importance of underground waters and the Commission had recognized their importance by adopting provisionally, article 2, subparagraph (b), on first reading; it read:

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole . . . .

The problem raised by the Special Rapporteur was in reality not that of underground waters in general, but the specific and limited issue of confined groundwaters or, in other words, groundwater unrelated to the system of waters that constituted the watercourse. It would be difficult to imagine that something located outside the system could be treated as if it was part of that system and that rules designed to be applied to components of the system should also be applied to something outside it.

11. The Special Rapporteur had indicated in his first report<sup>10</sup> that he had been tempted to change the scope of

the articles by redrafting article 2 (Use of terms) in order to include unrelated confined groundwaters in the concept of "international watercourse". In the second report under consideration, he developed that idea, proposing changes in article 1 (Scope of the present articles) and article 2, as well as in 14 other articles. Those changes were indeed minor and consisted in adding a reference to "aquifers" or "transboundary aquifers". He wondered why the words "aquifer" and "transboundary aquifer" had been used instead of "confined groundwaters" and "transboundary confined groundwaters". Was it because an "aquifer" was more than the water it contained, just as a watercourse was more than its water? Strictly speaking, that would be a valid reason, but the advantages would be more than offset by the difficulty of speaking of a "confined aquifer"—which did not seem to be a commonly used term—or the need always to add the words "containing confined water" after the word "aquifer". If anything was new in the articles, it was the concept of "confined groundwaters", that is aquifers containing such waters. The concept of watercourse already included aquifers related to watercourses, as could be seen in article 2, subparagraph (b), provisionally adopted on first reading. The word "aquifer" even appeared in paragraph (5) of the relevant commentary—in the English version at any rate.

12. The distinction between "confined" and "unconfined" groundwaters was essential and must be maintained if the word "aquifer" was used. According to the Special Rapporteur, "aquifer" meant a subsurface, water-bearing geologic formation from which significant quantities of water may be extracted; and the waters therein contained (see art. 2, subpara. (b) *bis*). That was a good definition. It would therefore seem that any formation containing groundwater was an aquifer. Yet article 2, subparagraph (b) *bis*, defined the expression "confined groundwaters" in the following way: "Confined groundwaters" means waters in aquifers". As that expression did not appear in the articles, it was logical to conclude that it was referred to only as a further explanation of the word "aquifer". Did that mean that an aquifer was a geological formation that contained only confined groundwaters? He did not think that that was the intention behind the redrafting of article 2, but the text, as proposed, inevitably led to that conclusion. It was ambiguous and confusing. The Special Rapporteur had undoubtedly done his best, but had encountered insurmountable obstacles.

13. The problem was not simply one of a lack of clarity or of presentation that could easily be resolved by drafting changes. It went much deeper. It was impossible to graft onto articles meant to regulate the uses of watercourses—which were perfectly definable surface and groundwater systems—provisions to regulate the totally independent systems of confined groundwaters and the aquifers containing them.

14. He was in complete agreement with the Special Rapporteur and others on the importance of confined groundwaters and the need to require States to cooperate in order to regulate the uses of those waters when they were situated below international borders. He stressed, however, that such a regulation should be established through international instruments other than the draft

<sup>10</sup> See footnote 3 above.

articles under consideration. Different rules were needed, even if the principles that had guided the Commission through its current exercise might be the basis for those rules. The Commission should seriously consider drafting in the not-too-distant future a new instrument on transboundary confined groundwaters and their uses, conservation and management. If, for some reason, the Commission insisted on addressing that subject immediately in the framework of the current draft, he would suggest, although he doubted that there was any point to such an approach, that, instead of engaging in a patchwork exercise that might well affect the integrity of the draft articles on watercourses without even attaining, in relation to confined groundwaters, the desired goal, it should quite simply include a provision in part six of the draft articles reading more or less in the following way:

“Relations between States concerning transboundary confined groundwaters and their aquifers shall be guided by the principles embodied in the present articles. Where feasible, the provisions of the articles shall apply *mutatis mutandis*.”

Clearly, that provision was only temporary in nature. The first sentence did not pose any problem: the principles embodied in the draft articles could certainly be applied to confined groundwaters. As to the second sentence, the reservation introduced by the expression “where feasible” was explained by the fact that, in certain cases, it would not be possible to apply some of the articles to confined groundwaters: that was, for example, the case of article 23 (Protection and preservation of the marine environment), article 24 (Prevention and mitigation of harmful conditions), article 25 (Emergency situations), article 27 (Regulation) and article 32 (Non-discrimination).

15. He fully agreed with the opinion expressed by Mr. Idris (2334th meeting) that the question whether confined groundwaters should be included in the draft articles was so important that a decision of principle on the matter should be taken in plenary. If the Commission decided to keep the original scope of the articles, the matter was closed, but, if it decided to accept the Special Rapporteur’s views or if it found some merit in his own compromise proposal, the Drafting Committee might see to the actual drafting of texts. In any event, the Commission should decide in plenary.

16. The CHAIRMAN invited the members of the Commission to give their opinions, for the benefit of the Drafting Committee, on the compromise proposal which Mr. Calero Rodrigues had just made and which he would ask the secretariat to distribute to the members of the Commission in writing.

17. Mr. ROSENSTOCK (Special Rapporteur) said that he would have no objection if the compromise proposal made by Mr. Calero Rodrigues was distributed, although it did not provide an appropriate solution to the problem whether unrelated confined groundwaters should or should not be included in the draft articles. In any event, the practice was that all views expressed in plenary, whether concurring or diverging, were referred to the Drafting Committee.

18. Mr. GÜNEY said he thought that it would be premature to call the proposal by Mr. Calero Rodrigues a compromise proposal, especially as it had not even been formally submitted. It was not proper to prejudice the position of the other members of the Commission: it was only at the end of the debate that a compromise wording might emerge.

19. Mr. VARGAS CARREÑO said that he supported the Chairman’s suggestion: the proposal by Mr. Calero Rodrigues was one solution among many and did not prejudice the Commission’s decision.

20. The CHAIRMAN said that he withdrew his suggestion, which did not seem to meet with unanimous support. The text of the proposal by Mr. Calero Rodrigues would be made available to the members of the Commission who so wished, but not as an official document of the Commission.

21. Mr. YAMADA, expressing his gratitude to the Special Rapporteur for his excellent report, stressed the need, as decided by the Commission at the forty-fifth session, to complete the second reading of the draft articles at the current session, not only so as not to lose the momentum that Mr. Rosenstock’s appointment had brought to the Commission’s work on the topic with which the Special Rapporteur was entrusted, but also to demonstrate the efficiency of the Commission, which had already spent a great deal of time on the topic.

22. Although he was in favour of the inclusion of unrelated confined groundwaters in the draft articles from a theoretical point of view, he understood that the question was of critical importance for the national interests of some countries and, in order not to delay the Commission’s work unduly, it might be better to consider it separately. He shared the Special Rapporteur’s views on the importance of groundwaters for human life and also for economic and social development and agreed with him that pollution of transboundary aquifers could be catastrophic for the countries sharing such waters. Furthermore, the Special Rapporteur demonstrated convincingly in his second report that the recent trend in the management of water resources had been to adopt an integrated approach. For all those reasons, he believed that unrelated confined international groundwaters needed regulation in some fashion and that the best way to do so would be for the Commission to draft a complete framework convention or overall model of all water resources in an integrated manner.

23. As to the changes to be made to the draft articles to include unrelated confined groundwaters in their scope, he shared the view expressed in paragraph 7 and paragraph 10 of the report that, in draft article 2, the words “flowing into a common terminus”, should be deleted because they might well be misinterpreted, and that a reference to “groundwaters” should be added to the various articles, as necessary.

24. So far as the other recommended changes were concerned, particularly the question of the obligations of the notified States dealt with in paragraph 12 of the report, he agreed in principle with the Special Rapporteur’s proposal that provision should be made for sanctions against a State which, having been notified, failed

to respond to the notification within the prescribed period. Some States might, however, have reasons for not responding to the notification. Some of them would not invoke the terms of article 15, paragraph 2, because they would feel that the adverse effects of the planned measures would not justify a request for the cancellation of those measures. Other States would not be able, because they lacked the scientific knowledge, to ascertain the causal link between the damage they would suffer and the operation of the planned measures. Such States must not be penalized, particularly since the introduction of the penalties provided for in new paragraph 2 of article 16 might increase the number of negative replies by notified States and place an undue burden on the notifying States. The wording of the new paragraph should therefore be reviewed and refined.

25. He shared the Special Rapporteur's view that, at a minimum, a tailored, bare-bones provision on the settlement of disputes was an indispensable component of any convention the Commission might put forward on the topic. In his view, disputes concerning the uses of international watercourses would be of a specific nature and would therefore call for specific settlement procedures, since the disputes would most probably arise with respect to the "equitable and reasonable utilization" of a particular international watercourse. Special importance should therefore be given to fact-finding procedures and to procedures for the evaluation of the uses in conflict. It would, moreover, be appropriate to provide for amicable third-party settlement with the possibility of recourse to arbitration. In that sense, the Special Rapporteur's proposal was very much to the point.

26. Mr. FOMBA said Mr. Rosenstock was to be commended on his excellent report and, in particular, on his study on unrelated confined groundwaters, which had convinced him of the need to take that category of international waters into account in the draft articles. The Special Rapporteur referred, in the annex to the report, to the favourable position adopted by the United Nations Interregional Meeting of International River Organizations, held at Dakar from 5 to 14 May 1981,<sup>11</sup> in that connection. For his own part, he would like to add to the list of instruments quoted in section IV of the annex the Convention and Statutes relating to the development of the Chad Basin, article 4 of which expressly included groundwaters for the first time among the resources to be exploited, and the African Convention on the Conservation of Nature and Natural Resources, article 5, paragraph 1, of which adopted the same approach to the question.

27. The Special Rapporteur's study showed that it was desirable to include confined groundwaters in the draft articles. For reasons with which he agreed, the Special Rapporteur was opposed to the formulation of a separate instrument for those waters. In order to include groundwaters within the scope of the draft articles, he proposed either that the words "and flowing into a common terminus", in article 2 of the draft articles, should be deleted, or that the draft should be amended by defining the

expression "watercourse" so as to cover "unrelated confined groundwaters" or by adding a reference to "groundwaters" in the various articles as and when necessary. He had opted for the last solution, and had applied it to articles 1 to 11, 20 to 22 and 26 to 28. He himself had no great difficulty in accepting that approach, which seemed to be perfectly reasonable in the context of a framework agreement which was in keeping with the principle of speciality that was a feature of the subject-matter under consideration.

28. As to the other changes to the draft articles the Special Rapporteur had recommended, he agreed in principle with the proposal that new paragraph 2 should be added to article 16, but reserved his position with respect to its exact wording. At all events, it was important to ensure that the overall balance of interests of the two groups of States—the notifying States and the notified States—was respected. He was not sure that it was really necessary to add the word "energy" to article 21, paragraph 3, but was prepared to be persuaded by the Special Rapporteur's explanations. He supported the Special Rapporteur's position on the settlement of disputes according to which, in the context of a framework agreement, the Commission should confine itself to a tailored, bare-bones provision, in other words, one that was fairly general in scope. He therefore had no difficulty in accepting draft article 33 as simplified, subject to any possible changes, having regard, for example, to Mr. Yankov's proposal (2334th meeting) to provide for recourse to ICJ. Lastly, he would not oppose the retention of article 29 as worded, as the Special Rapporteur proposed, since a restatement of the principles and rules of international law or a reference to those principles and rules was common practice in treaty matters.

29. Mr. RAZAFINDRALAMBO expressed his thanks to the Special Rapporteur for a very concise and clear report. The conclusions he drew from the detailed and well-documented study of the question of unrelated confined groundwaters which was annexed to it afforded the basis on which he had reshaped the draft articles. The Special Rapporteur also proposed that the draft should conclude with provisions on the settlement of disputes, and that proposal was bound to meet with approval, since it was in keeping with the general approach to prevention and the peaceful settlement of disputes between States concerning the uses of watercourses. It was a particularly important point, given the risk that such disputes might increase in the current climate of the breakup of States, watercourse States included, and the emergence of new States which could, rightly or wrongly, make new demands in that connection. Moreover, the Commission had itself already accepted the principle of peaceful settlement in the framework of the consultations and negotiations concerning planned measures by a watercourse State as provided for in article 17 and there was therefore no reason why the application of that principle to the draft as a whole should not be allowed.

30. Turning to the draft articles as reshaped and proposed in the second report, he noted that the Special Rapporteur proposed that the words "transboundary aquifer" or "aquifer" should be incorporated in the relevant articles and that a new paragraph defining those terms should be included in article 2 (Use of terms). As a

<sup>11</sup> *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.82.II.A.17).

consequence, the "common terminus" requirement would be deleted from article 2, subparagraph (b). With regard to article 3, he had no objection to the word "appreciable" being replaced by the word "significant" (*sensible* in French). On the other hand, there was no point, in his view, in redrafting article 7 in the way suggested by the Special Rapporteur. In the first place, the French version of the article did not make for clarity. The words *font preuve* should be replaced by *doivent faire preuve* or *feront preuve* because what was involved was not a statement of fact, but a prescription. The remainder of the article was no clearer. The effect of the proposed new wording seemed to be to exempt States which used an international watercourse in an equitable and reasonable manner from the obligation not to cause significant harm to other States on the watercourse except in the case of pollution; and even then, if there was a clear showing of special circumstances indicating a compelling need for ad hoc adjustment and if there was no imminent threat to human health and safety, the utilization was not presumed to be inequitable or unreasonable. In his view, article 7 as adopted on first reading<sup>12</sup> was less open to controversy. With regard to the question of pollution, he agreed with the proposal that article 21, paragraph 1, which defined pollution, should be transferred to article 2. New article 33 was mainly designed to extend the scope of the settlement measures provided for in article 17 to the draft articles as a whole by supplementing them, in the absence of prior agreement between the parties, by a more detailed mechanism which would consist of three phases: consultations and negotiations, recourse to impartial fact-finding or conciliation and, lastly, binding arbitration by a permanent or ad hoc tribunal. The Special Rapporteur did not provide for recourse to judicial settlement, and rightly so: as submission to binding arbitration was optional, the parties could always agree that the arbitral award could be the subject of a remedy before an international court. He appreciated the difficulties, to which Mr. Bowett had referred, inherent in the consensual nature of a referral to arbitration, but wondered whether it would be realistic to go beyond the option provided for by the Special Rapporteur in article 33.

31. He again thanked the Special Rapporteur for his very detailed second report, which would facilitate the Drafting Committee's task and would enable the Commission to adopt quickly the draft articles on second reading.

#### Organization of work of the session (*continued*)\*

[Agenda item 2]

32. The CHAIRMAN drew the attention of the members to the programme of work which had been circulated to them. He said that when preparing it, the Enlarged Bureau had tried to take account of a large number of factors, but in particular of the mandate the General Assembly had entrusted to the Commission and

of the wishes of the Special Rapporteurs. The programme was, of course, tentative and would be implemented in the most flexible manner. He said that if there was no objection, he would take it that the Commission was prepared to adopt it.

*It was so agreed.*

*The meeting rose at 12.35 p.m.*

## 2336th MEETING

*Wednesday, 11 May 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, 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. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, 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,<sup>1</sup> 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]

SECOND REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

1. Mr. TOMUSCHAT thanked the Special Rapporteur for his second report (A/CN.4/462) whose succinctness and clarity had already received praise. The fact that no major changes were proposed with regard to the draft articles adopted on first reading<sup>2</sup> was particularly welcome. The rules proposed by the Special Rapporteur's predecessor had undergone close scrutiny, so that little room was left for improvement, as the wide approval of the draft articles in the Sixth Committee demonstrated (A/CN.4/457, para. 380). The question now was whether the amendments proposed by the Special Rapporteur could enhance even further the quality of the draft articles adopted on first reading in 1991.

\* Resumed from the 2332nd meeting.

<sup>12</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>2</sup> *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

2. It should be recalled that article 2 (Use of terms) had been adopted at a very late stage in the drafting process. Until that time, the Commission had worked on the basis of the layman's understanding of the term "watercourse" as a river flowing through a landscape. Hence, every provision of the draft had been debated and adopted by the Commission in relation to rivers and lakes, and to canals as artificial watercourses. That was particularly obvious with regard to the articles of part four, starting with article 20. Most of the provisions of part four were actually inapplicable to groundwater. The specific problems of groundwater regimes had never been discussed in a thorough fashion. The definition in article 2 had been approved because the then Special Rapporteur had succeeded in persuading the Commission that a river flowed towards its terminus not only in its bed but also in the zones adjacent to its bed where it was plainly visible as a river. Groundwater had been dealt with as an appurtenance of the surface water system. Were groundwater to become the main or only object of legal regulation, the Commission would have to undertake an in-depth study of the specific problems raised by the utilization of that medium. While he appreciated the study annexed to the second report, he was still not convinced that members of the Commission were sufficiently well-informed of the intricacies of groundwater. The step that was being proposed was an important one, and he would not feel safe in approving an extension of the scope *ratione materiae* of the draft articles. To his regret, he therefore felt obliged to pronounce himself against the amendments suggested by the Special Rapporteur. Nor did he believe that the use of a *mutatis mutandis* formula would be helpful.

3. The next point concerned the second sentence of article 5, paragraph 1. Why, he wondered, should watercourse States be placed under a legal obligation to use and develop a watercourse with a view to attaining optimal utilization thereof? The proposition seemed incompatible with the requirements of environmental protection. In most instances, the best course of action would be simply to leave a river or other watercourse in its natural state. Every interference by man impaired a natural habitat. States should not be encouraged, still less, obliged, to subject watercourses to human exploitation. He would appreciate it if the Drafting Committee could reconsider the issue.

4. Again, he failed to understand the logic behind proposed paragraph 2 of article 16. Generally, the notified State had six months in which to make a reply, and if it did not respond to the notification during that period it could no longer object to the planned works. Accordingly, there was no room for any responsibility on account of an internationally wrongful act, unless article 15 was taken to mean that the notified State was required to reply as soon as it had completed its examination of the planned measures. That, however, should be left to the general rules on State responsibility, and there was no need to include a special rule on it in the present draft.

5. He was more inclined to agree with the Special Rapporteur in respect of proposed article 33. Since the Commission's intention was to produce a framework agreement, the rules on dispute settlement had of necessity to

be framed in a cautious and somewhat loose manner. As he understood the proposed provision, no method of dispute settlement other than negotiation was to be compulsory under the watercourse agreement. The second stage of the process would involve fact-finding or conciliation, which meant that neither party could unilaterally initiate either a fact-finding or a conciliation procedure. Paragraph 2 (c), which presupposed that a unilateral request for fact-finding or conciliation had not met with a positive response for a whole year, none the less called for some clarification. It made mention of a "permanent or ad hoc tribunal that has been accepted by all the parties to the dispute". A distinction had to be drawn between agreement to the establishment of such a judicial body—which could be described as "acceptance"—and the acceptance of its jurisdiction, only the latter being relevant. But why was it necessary for "all the parties to the dispute" to accept the jurisdiction? Would the watercourse agreement purport to render bilateral arbitration clauses inoperative? That certainly would be going too far, all the more so as the first two stages could be interpreted as limiting, by procedural preconditions, access to an arbitration procedure that would otherwise be available. Thus, on the whole, article 33 required careful consideration.

6. Lastly, it was his hope that the draft articles would be finally adopted at the present session.

7. Mr. ROSENSTOCK (Special Rapporteur) said that if Mr. Tomuschat's reading of article 16 and the related articles was widely accepted—if, in other words, article 16 was universally taken to mean that a notified State which failed to reply to a notification within six months lost its right to complain about an activity which caused significant harm—he would agree that the proposed addition was unnecessary. In his view, however, it would be difficult to place such a construction upon article 16 as it now stood. The addition therefore served the purpose of avoiding a risk of undue harm to the notifying State.

8. Mr. TOMUSCHAT said that the question of the correct interpretation of article 16 should be clarified by the Drafting Committee.

9. Mr. GÜNEY said that he wished to associate himself with the congratulations addressed to the Special Rapporteur on his efforts. However, the assumption referred to in paragraph 11 of the second report, namely that unrelated confined groundwaters were to be included in the draft articles, was premature. It should be recalled that, during the consideration of the Special Rapporteur's first report,<sup>3</sup> several members of the Commission had not been entirely happy with the reference to "underground waters" in article 2, subparagraph (b). As for the proposal to include a reference to unrelated confined groundwaters, most members of the Commission, including himself, as well as most of the representatives who had spoken on the subject in the Sixth Committee, had opposed the proposal because they failed to see how unrelated groundwaters could be viewed as part of a system of waters which, by virtue of

<sup>3</sup> Yearbook . . . 1993, vol. II (Part One), document A/CN.4/451.

their physical relationship, constituted a unitary whole. The Commission had considered that more information was needed on the subject and had therefore requested the Special Rapporteur to undertake a study, on the question of unrelated confined groundwaters in order to determine the feasibility of incorporating it into the topic.<sup>4</sup> The Special Rapporteur had, in conformity with his mandate, carried out the study, but contrary to his mandate and to well-established practice had anticipated the Commission's decision by incorporating his conclusions in the draft articles, going so far as to propose the deletion of the crucial words "and flowing into a common terminus" from the definition of "watercourse".

10. The steady increase in the world's population and the depletion or pollution of surface waters did not, in themselves, warrant the codification of legal rules relating to confined groundwaters. State practice concerning transboundary groundwater, in particular, was scanty, as the Special Rapporteur himself pointed out in the annex to his second report, and State practice on the management of groundwater resources had been found to be lacking. The evaluation and proper management of an aquifer could only be achieved by investigations across the national boundaries of the countries concerned, failing which the collection of data on groundwater under different geological and hydrological conditions was well-nigh impossible.

11. For all those reasons and with all due respect to the Special Rapporteur, he felt that the proposal to include provisions on unrelated confined groundwaters in the draft articles was a mistake and both legally and technically unfounded. The general acceptability of the draft was extremely important. The proposal actually ran counter to the evidence provided in the annex by the Special Rapporteur himself, and his insistence upon a provision which was sure to arouse controversy and therefore to postpone completion of the draft as a whole was to be deprecated.

12. He saw no need for the proposed article on the settlement of disputes, in an international framework agreement, which should leave the parties the greatest possible freedom in choosing the means of settling any dispute that might arise between them.

13. Mr. VARGAS CARREÑO congratulated the Special Rapporteur on the calibre of his second report, which could serve as the basis for adopting a text at the Commission's present session. He said that the Special Rapporteur was to be commended in particular for the excellent study he had produced on the complex subject of unrelated confined groundwaters. His own brief comments would be limited to some of the proposed changes.

14. The Special Rapporteur was right to point to the need to impose some type of sanction upon a State which, having received notification, did not respond within an established time-limit. It would cause unnecessary prejudice to the notifying State if it was unable to introduce the planned measures for six months because the notified State had not replied. Accordingly, he

endorsed the proposal to add a new paragraph to article 16, although the Drafting Committee should make some changes to the text, especially in the light of the interesting dialogue between Mr. Tomuschat and the Special Rapporteur. He was also in complete agreement about adding the words "or energy" after "lists of substances", in article 21, paragraph 3.

15. It was indispensable to include a dispute settlement provision. As a general rule, all international conventions should have provisions of that kind. The text proposed by the Special Rapporteur represented the bare-bones requirement. However, it would be more appropriate for article 33, paragraph 2 (c), to include a reference not only to binding arbitration by any permanent or ad hoc tribunal but also to judicial settlement, which would afford greater latitude and would explicitly provide for access to ICJ if the States parties to the dispute recognized its jurisdiction.

16. Lastly, he shared the concern expressed by many members of the Commission to include unrelated confined groundwaters in the draft articles in order to adopt an integrated approach. However, the subject at issue was complex, as was recognized by the scientific world. Further studies were therefore needed to obtain a better grasp of the subject. Accordingly, given the importance of transboundary groundwaters for States and the need for such groundwaters to be regulated by international law, it would be better for the definition of "watercourse" not to cover unrelated confined groundwaters for the time being. When it proved appropriate, any reference to such groundwaters should be made as necessary in the articles concerned, case by case. That alternative, which the Special Rapporteur himself regarded as preferable to adoption of a strained definition of a watercourse, was more suitable, although the application of a general regime to groundwater must be carefully studied for each situation. In that regard, Mr. Calero Rodrigues (2335th meeting) had proposed a valid course: that it be stated in a general provision that the draft articles were also applicable, where necessary, to unrelated confined groundwaters. In his view, that alternative should also be given careful consideration in the Drafting Committee.

17. Mr. CRAWFORD said that, notwithstanding the reservations expressed by some members of the Commission, he thought the Special Rapporteur had made a case for the inclusion of unrelated confined groundwaters in connection with transboundary aquifers. The usual, if not invariable, situation was that the aquifer, unlike an oil deposit, which was not replenished in historic time, was replenished by interaction with the environment. That implied the need for cooperation in the sustainable use of the resource, and, combined with the compelling data on the significance of transboundary aquifers for the water supply of populations around the world, it made a *prima facie* case for including unrelated groundwaters in the draft. He understood the reticence of some members with respect to what was undoubtedly an extension of the scope of the draft articles at so late a stage, but on the other hand it would surely be unfortunate if the framework agreement produced by the Commission left out of account one of the world's most important sources of water supply. He would urge the Drafting Committee to consider whether some accept-

<sup>4</sup> Yearbook . . . 1993, vol. II (Part Two), paras. 441-442.

able way might be found, possibly along the lines suggested by Mr. Calero Rodrigues (*ibid.*), of incorporating that category of transboundary waters within the scope of the draft. He agreed with the Special Rapporteur that, whatever the Commission's decision on the question of confined groundwaters, the words "and flowing into a common terminus" should be deleted from article 2, subparagraph (b).

18. He continued to have doubts about article 7 in its present form, and associated himself with the comments made on that score by Mr. Bowett (*ibid.*). The Drafting Committee should investigate possibilities of making the wording of the article clear enough to encompass all situations in which unforeseen but significant harm was being caused. A reasonable solution in some cases might be to allow the harm to continue in the short or even in the medium term, provided that compensation was paid to the State suffering the harm. In a sense, the topic might be said to contain an element of the problem of liability for injurious consequences arising out of acts not prohibited by international law.

19. He agreed with Mr. Tomuschat that the words "optimal utilization" in article 8 might lend themselves to misinterpretation; the Drafting Committee should consider whether the words "sustainable utilization" might not be more appropriate in the context. He did not interpret article 16 as excluding the possibility of responsibility notwithstanding the failure of a State to respond to a notification. If that were the case, he would be opposed to the article. He accepted that the notifying State was entitled to rely upon the notification in the absence of a reply, so that some system of adjustment of the position in the interim was reasonable. Article 16 as it stood did, in his view, make it clear that the notifying State's activity was subject to obligations under articles 5 and 7, which were of a continuing character. Some clarification in the commentary might be appropriate.

20. As to proposed article 33, he agreed with the Special Rapporteur about the desirability of including provisions on the settlement of disputes. It was true that States continued to be reticent about regulating the settlement of disputes involving natural resources, but it was also true that international law needed to be developed in a progressive manner and, still more important, that the very serious and continuing disputes which arose over the use of common resources should not be left to be resolved merely by the exercise of competing power. Some form of independent settlement, preferably by ICJ, was desirable. The Drafting Committee should certainly look into the matter. In any event, article 33 as proposed by the Special Rapporteur should apply only if there was no other means of peaceful settlement applicable to the particular dispute between the parties in question. If such a means did exist, article 33 should not derogate from it.

21. Mr. VILLAGRÁN KRAMER said that he was worried that when a period of six months elapsed and the State concerned had not replied it might lead to a situation of estoppel, that is to say, the State affected would lose every right to lodge a complaint. The Commission must be careful if it intended to impose severe rules, particularly in such a sensitive matter as that of groundwater. If a State did not reply in the brief period of six

months on the use that was to be made of such waters, the result would be that the other State would be deprived of the benefit of that natural resource. He was not sure that the Commission was fully aware of the entire significance of the Special Rapporteur's proposal in that regard. The developing countries did not have such a rigid notion of general international law, and there was currently no such rule in international law that bound States to reply within a given period. The Commission must show flexibility in introducing a rule for it to be acceptable to all States.

22. Mr. ROSENSTOCK (Special Rapporteur) said the point made by Mr. Tomuschat and Mr. Crawford was that the Commission, in producing relatively weak dispute settlement provisions, must make sure that existing agreements were not affected adversely. That was certainly the intention of article 33, paragraph 2, in the absence of an applicable agreement. Perhaps drafting changes were needed to make that clearer. It seemed obvious to him that, if States A and B had a more rigorous arrangement than the one in paragraph 2 (and such an arrangement could hardly be less rigorous), there would be no risk of the paragraph taking precedence over that more rigorous agreement. He would not object to a strengthening of article 33.

23. With regard to article 16, it seemed to be a matter of policy whether or not the Committee determined, as Mr. Tomuschat suggested, that failure to reply stopped all claims on the part of the notified State. That was not his interpretation of the article and he sympathized with Mr. Villagrán Kramer's opinion that that should not be the case. However, it was unacceptable for the notifying State to be harmed as a result of failure of the notified State to reply. A case of that kind was unlikely to concern a developed country giving notice to a developing country, one side being more capable of making the scientific judgement than the other, thereby causing prejudice in some sense. It was more than likely that in all but a few cases two developed or two developing countries would be involved. If there was concern that the developing country could be placed at a disadvantage by the consequences of a failure to reply, there must also be concern that the notifying developing country should not suffer harm as a result of such failure. He had proposed inserting an additional paragraph to article 16 in order to mitigate the consequences of failure to reply to notification, so as not to burden unduly a notified State which failed to reply and not to disadvantage unduly a notifying State that acted when no reply was forthcoming.

24. Mr. THIAM said that the setting of a time-limit for the notified State to reply had been the subject of long discussions, in which it had been pointed out that if the notified State was a developing country, it did not have the technical means to produce a reply within the requisite period. It had been concluded that a period of six months was too short. The Commission would be too strict if it introduced sanctions for failure to reply. The Commission should either make the period longer or refrain from introducing sanctions. As it stood, the article was unacceptable.

25. Mr. HE said that the key issue raised in the Special Rapporteur's concise yet lucid second report was whether unrelated confined groundwaters and transboundary aquifers should be included in the draft articles. He could agree with the proposal made by Mr. Calero Rodrigues (2335th meeting). The advantages of the "compromise proposal", so called by the Chairman, was that it kept the original text and title intact but added an article that the provisions or principles of the draft articles could also be applied in inter-State relations in connection with transboundary aquifers. In that way, it could meet the Special Rapporteur's wish for transboundary aquifers to be included in the articles. The second advantage of the compromise proposal was that the phrase "and flowing into a common terminus" could still be used. In dealing with international watercourses, it was important to have a certain scope which included both surface water and groundwater to form a unitary whole. The concept of "watercourse" encompassed broad geographic areas, and keeping the phrase "flowing into a common terminus" could introduce limitations on the geographic scope of the draft articles. The Special Rapporteur quoted the views of the ILA Committee on International Water Resources Law that the concern voiced on that point would be better met by a statement excluding broader interpretation. In his view, a clear provision in the article itself would carry more weight than an explanation in the commentary or elsewhere. In that way, the phrase "flowing into a common terminus" could be retained, while at the same time the same principles could be applied to transboundary aquifers, which was the Special Rapporteur's intention.

26. He could accept the provisions suggested for dispute settlement. However, Mr. Bowett and other members had proposed the insertion of an additional provision for referral of a dispute to ICJ for judicial settlement. He did not object to the suggestion, but would point out that the jurisdiction of ICJ was also based on voluntary acceptance by States. Hence, if there was a need to add such a provision, it should be followed by another to the effect that States parties could express reservations on the jurisdiction of ICJ. In that way, the draft articles would command broad acceptance.

27. Mr. ROSENSTOCK (Special Rapporteur) said he had not been suggesting that the Commission had acted wrongly in changing the text. It had merely been his intention to point out that those who had delved most deeply into the matter had not found the inclusion of the "common terminus" concept necessary. He could think of no situation in which deletion of the phrase "and flowing into a common terminus" would have an adverse effect on any State's obligation or rights. If two separate systems were connected by a canal, that did not make them a single system under article 2, whether the term "common terminus" was retained or not. However, when two systems were connected by a canal and, as a result, the quality of the water was adversely affected in one system, then the provisions were applicable. He could not understand the fear that it would lead to the two systems being considered as one, and even if that fear were valid, he did not see how it could limit or adversely affect any of the rights of the State that had not been part of the original water system. If a plant were built upstream and polluted the canal and the other sys-

tem, rights and responsibilities would be affected, whether or not the term "common terminus" was retained. To allay the fears of colleagues, something could be added to the commentary, but he regarded it as superfluous to do so.

28. Mr. BOWETT said there were three possible ways of including unrelated confined groundwaters in the draft. The first way, which was the one the Special Rapporteur had adopted, was to amend each article to include such waters. The second, suggested by Mr. Calero Rodrigues (*ibid.*), was to have one general provision that would apply *mutatis mutandis*. The advantage of that second technique was that it would be easier, should States wish to accept a convention but not the obligations regarding groundwater, to enter reservations to one particular article rather than have to pick particular words or phrases out of a number of articles. The third possible method was to have a separate protocol on unrelated confined groundwaters. It could be quite short and could simply lay down the basic obligations. States would then be free to accept the main convention with or without the protocol.

29. As far as the settlement of disputes was concerned, ICJ had recently established a special chamber for environmental disputes. In his view, to show some recognition for that initiative in its report, the Commission should include a reference to the Court in article 33. A quite separate point concerned the nature of the obligation to be included in article 33. In that connection, he had not meant to suggest that some kind of compulsory jurisdiction should be introduced. His concern was merely to ensure that the existing commitment on the part of States to accept either judicial or arbitral settlement would extend to disputes arising out of the new convention: some device would therefore be required to link the convention to that pre-existing commitment.

30. Mr. Sreenivasa RAO expressed his congratulations to the Special Rapporteur on a well-prepared report, which was, however, perhaps a little too brief in some respects. Because of that brevity he experienced some difficulty in accepting the Special Rapporteur's recommendation that the very important matter of unrelated confined groundwaters should be included in the scope of the articles. His hesitation on that score stemmed from the historical evolution of the draft and the fact that, from the outset, unrelated confined groundwaters had never really entered into the scheme of things. Those members who favoured the inclusion of unrelated confined groundwaters in the draft had proceeded on the assumption that such an important body of water, on which much of mankind depended for its daily needs, must be subject to regulation. But it was for those very reasons that the matter must first be the subject of a separate and thorough study. It seemed as though an attempt was being made to expedite matters simply by a fine-tuning of the articles; but a major undertaking such as the regulation of unrelated confined groundwaters could not be achieved in that way.

31. The compromise proposal which had been put forward was also unacceptable. Not a single piece of State practice had been studied, nor had any conclusion been reached as to the problems that really exercised the

minds of the decision-makers. In many areas of human activity, of course, scientific facts provided the basis for the initial projection of policies. But scientific facts had to be subordinated to other policy guidelines in the interests of optimum resource management within a given region, and the final choice depended not only on scientific facts but on other equally important considerations. The problem was further compounded because scientists held widely differing views on certain subjects. Hence there were no hard and fast rules on the basis of which a conclusion could be reached rapidly.

32. He therefore stood by his initial views. The Commission had worked on the draft articles for many years and had not included the concept of unrelated confined groundwaters within their scope; it was too late to do so now. Furthermore, a strong body of feeling, both in the Commission and in the General Assembly, was opposed to any digression into such a major subject. He, for one, would not stipulate for regulation without knowing more about what was involved.

33. The expression "common terminus", too, had always been considered on the basis of certain assumptions, one of them being that each riparian State was entitled to equitable and reasonable utilization of the water of the river concerned. The only time that one riparian State actually entered into a relationship with another was when the utilization of a watercourse had an adverse effect or where cooperative arrangements were required. The problem was one of *locus standi*, which had to exist if other riparian States were to enter the picture as far as a particular utilization was concerned. The previous Special Rapporteur had spoken of scaffolding, but that scaffolding—which some had actually regarded as a foundation—had ultimately been allowed to collapse. Now, the only link left was the one afforded by the "common terminus issue". If the fears and problems of certain countries were not taken into account, those countries would be left by the wayside, which was certainly not the intention of the Commission. He would therefore urge caution and would call upon the Special Rapporteur, at a time when the Commission was on the point of achieving a major breakthrough in a matter that involved such disparate interests, to curb his enthusiasm somewhat, failing which he would miss a great opportunity.

34. The proposed new paragraph 2 of article 16 posed no problem. If he embarked upon a project which he knew might cause his neighbour harm, he would notify that neighbour accordingly and await his reaction; he would not merely proceed with the project and argue about estoppel later. It was not just a question of one project, however, but of several projects and also of shared expectations. None the less, if the Special Rapporteur wished to introduce a certain balance between the notifying State and the notified State, he could go along with that, subject to any changes the Drafting Committee might wish to suggest.

35. The introduction of the word "energy", in article 21, paragraph 3, was directly related to the introduction of the concept of unrelated confined groundwaters. He was not sure whether the Commission could introduce that new idea on the basis of the one specific

instance concerning the Hudson River, which was cited earlier by the Special Rapporteur (see 2334th meeting, para. 18). In the circumstances, and in the interests of disposing of the draft articles promptly, he would recommend that the reference to "energy" should be deleted.

36. He saw no need for elaborate provisions on the settlement of disputes in a framework convention. His own preference had always been to allow the parties to choose the forum and type of settlement with which they were most comfortable. The main thing was to endeavour to germinate the idea that disputes should be settled peacefully and not by force. Once that was rooted in the hearts and minds of States, a relaxed attitude could be adopted as to the actual modalities. After all, what purpose would be served by substituting the arbitrary decision of a third party for a decision of the two parties directly concerned? He failed to see the rationale for that.

37. Mr. SZEKELY said it was disturbing to see that the question of unrelated confined groundwaters was being dealt with almost as an afterthought, thereby diminishing the importance of a resource that accounted for almost one quarter of the world's fresh water. He was also concerned to note that, during the discussion, the question had not been given its due weight, that the differences between that resource and watercourses and their waters, including related waters, had still not been recognized and that the difference in the dynamics of the relations between riparian States, depending on the types of waters involved, had not been identified. The possibilities for modalities of cooperation and joint use were also very different in the case of unrelated confined groundwaters, as were the possibilities of interfering with, and even of doing harm to, the quality of such waters.

38. He had an open mind about the three suggestions made, by the Special Rapporteur, Mr. Calero Rodrigues (2335th meeting) and Mr. Bowett, but was concerned that all three proposals had been couched in rather definitive terms. The question of unrelated confined groundwaters could not just be omitted from the final draft articles; nor, however, could the Commission hope to cover everything pertaining to such waters by putting a last-minute touch to the draft. He would revert to the matter, which was of great importance.

*The meeting rose at 11.45 a.m.*

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## 2337th MEETING

*Friday, 13 May 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, 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. 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,<sup>1</sup> 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]

SECOND REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. KABATSI expressed his congratulations to the Special Rapporteur on his clear and precise second report (A/CN.4/462) and on his introduction, which had demonstrated his in-depth understanding of the subject-matter. The Special Rapporteur had been wise to take account of the work done by his predecessors and the Commission by restricting his endeavour almost entirely to "fine-tuning" with a view to the early completion of the Commission's work on the topic, preferably at the current session.
  2. As to the changes proposed by the Special Rapporteur, he said he wished to make five comments.
  3. Referring to the inclusion of unrelated confined waters, he said that, having regard to the fact that virtually all countries shared a groundwater system with one or more other countries and the fact that groundwater was the largest source of fresh water available in storage on earth, he shared the view of the Special Rapporteur and of the proponents of the development of the emergent international environmental law that the most sensible and viable way of attaining the proper utilization and management of water was through integrated management of all water resources above or below the surface of the earth. A regulatory regime that would help States in that endeavour and help them settle disputes peacefully would be extremely welcome. The Special Rapporteur had attempted to meet that need by eliminating the concept of a "common terminus" in the definition of an "international watercourse" in article 2 and by adding the words "transboundary aquifer" or "aquifers" wherever the terms "international watercourse" or "watercourses" appeared in the articles. Looking at the report as a whole, that approach seemed compellingly persuasive and the Special Rapporteur should be congratulated on his brave attempt. However, by the Special Rapporteur's own admission, State practice concerning transboundary groundwaters was generally scanty and only a few treaties dealing with shared water resources included groundwater. The main reason was inadequate understanding of the hydraulic cycle and other factors relating to groundwater and it was precisely for that
- reason that caution had to be exercised in approaching the subject. It might well be that the subject of unrelated confined groundwaters would be fully dealt with by the method of inclusion advocated by the Special Rapporteur, but he personally was not convinced at the present stage. Mr. Bowett's idea (2336th meeting) of choosing one out of three or possibly more solutions was in itself indicative of the complexity of the subject and of the need to study it more fully and separately, as an independent topic.
4. He personally would have liked to see a comprehensive regime dealing with the non-navigational uses of all transboundary waters above and below the ground and he therefore found the Special Rapporteur's idea of including unrelated confined groundwaters attractive, but, like a number of other members of the Commission, he felt that the proposed inclusion was premature. He would prefer, although reluctantly, to see the subject of unrelated confined groundwaters treated separately and independently.
  5. Secondly, with regard to the phrase "flowing into a common terminus", he noted that the main reason advanced for its proposed deletion was the Special Rapporteur's view that it connoted an oversimplification in the definition of "watercourse" from the hydrological point of view. The Special Rapporteur was, however, quick to accept that the inclusion or deletion of the phrase was not a critical issue. His own view was that maintaining it would better convey the concept of the system of surface waters and groundwaters as a "unitary whole". The solitary example of unusual seasonal flows of the Danube into Lake Constance and the Rhine suggested, rather, an occasional overflow to which most rivers were subject from time to time and which did not detract from their natural and usual directional flows. He was therefore in favour of maintaining "flowing into a common terminus" in the definition of "watercourse" in article 2, subparagraph (b).
  6. Thirdly, he found it unacceptable that the proposed new paragraph 2 of article 16 sought to penalize notified States for non-response or late response to the notification. Since planned measures must at all times be in conformity with articles 5 and 7, he could not agree to a provision which introduced an element of estoppel in the event of a breach of those requirements solely because the victim State had failed to respond to the notification. For a variety of reasons, including technological ones, a notified State might be unable to react in a timely manner. The notifying State should not take that inability as a licence to do whatever it wished in total disregard of its obligations under general international law and under articles 5 and 7. In that connection, he failed to see how the notifying State might suffer injury as a result of the notified State's failure to react in good time or at all. Any planned measure had to be in conformity with articles 5 and 7 and subsequent operations also had to conform to those provisions. Therefore, if the planned measures or operations had to be abandoned, that could be only because of fault on the part of the notifying State and not because of silence on the part of the notified State.

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

7. Fourthly, he agreed with the Special Rapporteur's proposal that the definition of pollution in article 21 should be transferred to article 2 on the use of terms. On the other hand, the addition of "energy" to article 21, paragraph 3, was, in his view, superfluous, since energy was already covered by the definition of pollution now contained in article 21, paragraph 1.

8. Lastly, he accepted the Special Rapporteur's proposals for a new article 33 on the settlement of disputes. Provided that no new binding obligations were envisaged, referral to ICJ could be mentioned in paragraph 2 (c) of that article.

9. Mr. EIRIKSSON said he was prepared to accept the Special Rapporteur's recommendation that the scope of the articles should be expanded to include aquifers not related to watercourses. That would be somewhat daring in that it would implicate a number of States which had not been specifically affected by the articles as previously envisaged. At the least, it would oblige a great number of States to consider the effects of activities not previously covered. That, was, however, just as well, particularly in the light of considerations concerning pollution, which certainly called for bold measures, and of disappointment at the banal results of the United Nations Conference on Environment and Development, held at Rio de Janeiro from 3-14 June 1992, referred to in the annex to the second report.

10. His support for the Special Rapporteur's recommendation was founded not so much on the second report, including the annex, which was more of an exposition than an attempt to persuade, as on the views the Special Rapporteur had expressed in the debate, namely, that, on the one hand, all the principles contained in the draft articles which would apply to "related groundwaters" should apply equally to "unrelated groundwaters" and, on the other hand, that he could not envisage any principles which should apply to "unrelated groundwaters" that were not already contained in the draft. Even if the Commission were mistaken in the latter assumption, the necessary additions to its work could be made at a later stage by other bodies whose task, he hoped, would have been made easier by the Commission's efforts.

11. He relied on the Drafting Committee to deal with the implications of the Special Rapporteur's recommendation and would simply make a few suggestions.

12. First, he generally preferred the approach advocated by Mr. Calero Rodrigues (2334th meeting), namely, that the Commission should adopt a separate provision extending the scope of the articles. He would even envisage such a provision forming a separate paragraph of article 1, with a first sentence stating that the articles also applied to international aquifers, including their waters, not forming part of international watercourses. The phrase "including their waters", preferable to the words "and of their waters", which were meaningless in relation to aquifers, usually did not appear in texts relating to aquifers and were included only for the sake of consistency. The Drafting Committee might consider adopting the same wording in respect of watercourses in article 1, paragraph 1.

13. A second sentence could provide that, to the extent feasible, any reference in the articles to international watercourses, watercourse States and watercourse agreements would apply *mutatis mutandis* to international aquifers, aquifer States and aquifer agreements. An explanation of the words "to the extent feasible", as proposed by Mr. Calero Rodrigues (*ibid.*), would be given in the commentary, which would, for example, point out which provisions of the articles would not by their very nature, apply to aquifers.

14. In article 2, he would leave the existing wording unchanged, but would add two subparagraphs to define, first, the term "international aquifer" as an aquifer parts of which were situated in different States and, secondly, the word "aquifer", as already found in subparagraph (b) *bis* of the Special Rapporteur's proposed amendment. He would further recommend that the term "aquifer State" should be defined as a State in whose territory part of an international aquifer was situated. In that connection, he would prefer, for the sake of consistency and after consulting one of the recognized experts in the field, to use the term "international aquifer" rather than the term "transboundary aquifer" and, in general, to follow the model of the terms already used in article 2 for watercourses.

15. If the Commission went along with that recommendation, the title of the articles would, of course, have to be changed.

16. Also with regard to the use of terms, he would caution against the inclusion of the word "management" in article 1, paragraph 1, and in article 5, paragraph 2, since that might disturb the concept of "conservation", as referred to in paragraph (3) of the commentary to article 1,<sup>2</sup> and the term "use" in general, in view of the special use of the word "management" in article 26, paragraph 2.

17. It would also be inadvisable, in his view, to move the definition of pollution, which appeared in article 21, paragraph 1, to article 2, just as it would be to move any other term which was used in only one article, such as "emergency" in article 25 and "regulation" in article 27.

18. He was not convinced by the reasons the Special Rapporteur had given for the deletion of the "common terminus" concept, but trusted that some satisfactory solution could be found in the Drafting Committee.

19. Turning to article 16, he said that, in his view, the proposed new paragraph, whereby any rights of a notified State which had failed to reply might be "offset by any costs incurred by the notifying State" would be going further than the Commission intended. The articles of part three still provided a procedural framework by instituting a system of notification and possible consultation, but they remained silent so far as the results of any consultations or the consequences of failed consultations were concerned. The consequences of a notified State's failure to reply were referred to in paragraph (2) of the

<sup>2</sup> Article 1 was initially adopted as article 2. For the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 25-26.

commentary to article 13,<sup>3</sup> which stated that that State could reply after the six-month period had elapsed, but that such a reply would not prevent the other State from proceeding with the implementation of its plans. The commentary to article 16<sup>4</sup> also stated that, if the notified State did not reply within the required period, it would be precluded from claiming the benefits of the protective regime established in part three of the draft, which included the obligation of the notifying State to enter into consultations.

20. In that connection, he was of the opinion that the reference to "tacit consent" in paragraph (1) of the commentary to article 16 should be reviewed.

21. So far as the proposed inclusion in article 21, paragraph 3, of a reference to "energy" was concerned, it was unquestionable that the idea was already covered by the word "pollution" in paragraph 1 of the same article. He also had doubts about the need for lists of energy, as referred to in paragraph 3. That, however, would be for the Drafting Committee to decide.

22. He did not believe that article 29 should be deleted and he doubted whether its wording could be improved after the great amount of time already spent on it by the Drafting Committee during the discussion on first reading. He wondered, however, why the article did not apply to aquifers as well.

23. He agreed with the bare-bones draft provision on the settlement of disputes as contained in article 33 and with the amendments proposed by other members of the Commission during the debate.

24. Mr. ARANGIO-RUIZ said he was sure that the Drafting Committee would be able to find, together with the Special Rapporteur, the appropriate solution for the possible extension of the scope of the articles to groundwaters and transboundary aquifers, particularly on the basis of the *mutatis mutandis* approach which had been proposed by Mr. Calero Rodrigues (*ibid.*) and with which he sympathized, notwithstanding some reservations.

25. He had two brief comments to make, in the form of a question to the Special Rapporteur and a proposal to amend article 33, and specifically paragraphs 1 and 2 (c).

26. He wondered whether paragraph 1 performed any real normative or regulatory function. In using expressions such as "peaceful settlement of international disputes" and "settlement of disputes by peaceful means" the obvious fact was overlooked that the word "peaceful" did not perform any real function within a dispute settlement instrument. The use of any non-peaceful means of dispute settlement was clearly unlawful under the Charter of the United Nations. The proposed article 33 was an arbitration clause and, as such, should indicate in more or less mandatory terms one or more means of settlement, which was what it did in paragraph 2. He would therefore ask the Special Rapporteur whether it was necessary to refer in paragraph 1 to the peaceful nature of the means to be used and whether it

was not pleonastic to do so. The prohibition on resort to war and on armed reprisals was sufficiently clear from Article 2, paragraphs 3 and 4, of the Charter of the United Nations. It therefore did not seem appropriate to reiterate those prohibitions in a watercourse convention. It also seemed odd that peaceful means of settlement should be prescribed particularly for watercourse disputes, as though States displayed a particularly bellicose attitude in that area.

27. Thus, if the Special Rapporteur agreed that paragraph 1 was indeed pleonastic, he would propose that it should be deleted and that draft article 33 should start, more simply, with paragraph 2, which could also be amended slightly. He would suggest, first, that the words "such disputes, the disputes . . ." should be replaced by the words "their watercourse disputes, such disputes . . ."; and, secondly, that the last part of subparagraph (c) of paragraph 2 beginning with the words "submit the dispute . . ." should be replaced by the following: ". . . propose that the dispute should be submitted to binding arbitration by an ad hoc tribunal. Failing the establishment of an arbitral tribunal within six months from the proposal, either party may submit the dispute by application to the International Court of Justice."

28. His proposed amendment and, in particular, the deletion of paragraph 1 was not simply a matter of style or aesthetics. To persist in using the vague language which was typical of so many dispute settlement instruments was not the best way to enhance the effectiveness of dispute settlement obligations. Care should be taken, in particular, not to justify the belief of some that, in order to comply with those obligations, it sufficed to refrain from war and armed reprisals.

29. Mr. VILLAGRÁN KRAMER expressed appreciation to the Special Rapporteur for the work he had carried out in submitting the draft articles, which contained important changes that called for close examination.

30. It would be advisable to include definitions in article 2 that were perfectly clear, such as the definition of the term "confined groundwaters" which covered the waters of aquifers, and, consequently, to delete the "common terminus" requirement.

31. Commenting on general principles, he said that he would like the Commission to strengthen the principle of the equitable utilization of and reasonable participation in the waters of international watercourses by extending it to subjacent waters and groundwaters. That principle would unquestionably enable disputes in the matter to be settled, and more easily as there would be no undue pressure or tension. And it was in that sense that the imposition of mandatory time-limits might complicate matters. He was not opposed to the provision submitted by the Special Rapporteur in article 16, far from it. It was a useful provision, but, if the criterion of equity applied in resolving all the problems of participation in and use of waters, it should also apply to participation in the risks and responsibilities. It was not right that a watercourse State should undertake a major project on an international watercourse, make investments, look for the best possible solutions and then one day encounter the refusal of other watercourse States and so have to bear all the expenditure should the project be discontinued. The Spe-

<sup>3</sup> *Yearbook . . . 1988*, vol. II (Part Two), p. 49.

<sup>4</sup> *Ibid.*, p. 51.

cial Rapporteur provided for a six-month period for reply to notification of planned measures. That period could not be enforced everywhere, however, since speed of action was by no means a universally shared trait. Furthermore, international case-law held that silence on the part of a State should be deemed to be consent, consent could lead to estoppel and estoppel could result in acceptance of consequences to which no objection had been raised. That meant that the State concerned could not back down and that estoppel would come into play. As a result, the State would lose a right of objection and would have to bear the consequences of its silence. Admittedly, those consequences arose under any legal system, national or international, but it might be advisable to increase the prescribed period to one year. The Drafting Committee might wish to reflect on the matter.

32. With regard to the settlement of disputes, the Commission should adopt the course followed when the draft articles on the law of treaties and on diplomatic relations had been formulated, in other words, it should include provisions on the settlement of disputes in the draft articles under consideration. In so doing, however, it should depart from rigid models, including Article 33 of the Charter of the United Nations, and concentrate on the Special Rapporteur's viable and timely proposal, inasmuch as the criterion of equity was also present in the mechanism for the settlement of disputes (art. 33, para. 2 (a)). His only doubt was whether that equity criterion could be applied to the settlement of a dispute that arose over the interpretation of the articles.

33. Mr. SZEKELY said he was pleased to note, from the footnote to article 3, paragraph 2, in paragraph 20 of the report, that the replacement of the word *appreciable* by the word *sensible*, in the Spanish text, would not have the effect of "seeking to raise the threshold". The Spanish translation of the footnote was, however, not a faithful rendering of the English original and he therefore requested that the words *y sus derivados* and *y no derivados* should be deleted from the footnote.

34. Turning to the Special Rapporteur's proposed articles, he expressed his continued regret at the fact that the obligations with regard to notification, as provided for in articles 11 to 16, derived more from article 12 than from article 11, inasmuch as the effect would be for the nature and possible extent of the effects of a planned measure on other watercourse States to be determined by an essentially unilateral act on the part of the State that took the measure rather than by a prior joint decision taken by all the riparian States concerned. That defect was further compounded by the absolute character and quasi-punitive connotation of the obligations the other States on the watercourse were required, under articles 13 to 16, to perform within a mandatory time-limit. Those articles did not take account of the fact that the nature of the planned measure could be such that the notified States would have great difficulty, owing to a lack of resources perhaps, in making their own assessment and in being able to give a properly documented and well-founded response within the prescribed time-limits. By contrast, the notifying State would perhaps have had more than six months to make its own assessment of the possible effects of the planned measure. Article 16 as adopted on

first reading<sup>5</sup> had already disregarded those considerations, so that the notified State might have seen the measure applied unilaterally without really having had the possibility of exercising its right of reply effectively.

35. The new paragraph which the Special Rapporteur proposed to add to article 16 was even more severe, since, in the event of the notified State's failure to reply, it provided for very serious consequences concerning reparations for damage suffered by that State; in particular, it provided for those consequences as a kind of penalty, as though failure to reply could be due only to negligence or irresponsible indifference on the part of that State.

36. The Special Rapporteur's proposal would be less open to question, and even acceptable, if the period for replying to the notification were more flexible. In that connection, he proposed that a second paragraph should be added to article 13, reading:

"2. The notified States may inform the notifying State that the special nature of the planned measure is such that they have particular difficulty in giving a properly documented and well-founded reply in time and that they therefore request a reasonable extension of the period for replying. If that communication is not satisfactory to the notifying State, the parties shall engage without delay in consultations and negotiations with a view to agreeing on a reasonable period for reply."

37. In the absence of any objection, that proposal—or any other proposal along the same line—could be examined by the Drafting Committee. The new paragraph, which the Special Rapporteur proposed to add to article 16, could even be developed to make it clear that, in the interests of equity, the notifying State could claim compensation for the expenditure made with a view to commencing the implementation of the planned measure in cases where the notified State had not exercised its right to reply to the notification or its right to request an extension of the period for reply and where it sought to oppose the measure once the two periods had elapsed, on the ground that there might be damage, even if such damage had not yet occurred, in other words, even if there was still no damage to make good.

38. Having heard the various opinions on the words "or energy" that the Special Rapporteur proposed to add to article 21, paragraph 3, he proposed that those words should be replaced by the words "or other elements".

39. He fully supported the Special Rapporteur's proposal that the words "flowing into a common terminus" in article 2, subparagraph (b), should be deleted because they meant nothing in hydrology.

40. Turning to the possible inclusion of transboundary confined groundwaters (aquifers) in the scope of the draft articles, he recalled that he had already expressed concern (2336th meeting) about the last-minute inclusion of such an important resource as the waters of

<sup>5</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

unrelated transboundary aquifers, which were the largest source of fresh water available in storage on earth and, owing to their geological characteristics, established a legal interrelationship between riparian States that differed from the one created by watercourses. To his credit, the Special Rapporteur had tried to defend that addition on the grounds that the specific characteristics of aquifers did not seem to preclude it. Yet it raised substantive problems which were precisely the result of those specific characteristics of aquifers and which made it impossible to deal with the legal regime for the use of unrelated transboundary aquifers and the legal regime for the use of international watercourses in exactly the same way. To try to do so would hamper the progressive development and future codification of the regime. It would therefore be unacceptable to extend the scope of the draft articles to transboundary confined groundwaters by a simple stroke of the pen.

41. The inclusion of a reference to aquifers would inevitably create drafting problems. In article 2, subparagraph (a), for example, it was obviously incorrect and a contradiction in terms to state that the expression "international watercourse" covered aquifers as well, even though the waters in aquifers were confined waters and, by definition, could not form part of an international watercourse. That was, however, simply a problem of form with which the Drafting Committee could easily deal. He was more concerned about insufficient awareness of the fact that, in the case of confined groundwaters all riparian States were in a position to act as "upstream riparian States", contrary to what happened in the case of a watercourse, and that, inevitably, any step taken by one of those States, irrespective of its geographical position would affect the formation as a whole, at the expense of all other riparian States. The fact that such groundwaters were confined meant that their exploitation, utilization and preservation took on a completely different dimension than that of unconfined waters flowing permanently across a border or along the border between two or more States. Digging a well alongside an aquifer could affect structures, spaces and water flow patterns all along it and could prevent other wells from being dug at other points. Opportunities for the joint development of the waters of an international watercourse were not the same as those for the joint administration and management of a formation in which the waters were a relatively stable unit and over which riparian States had rights that were more community-based than territorial and dependent not solely on the surface area of the aquifer found under their territory. The introduction of pollutants downstream in an international watercourse would hardly affect riparian States upstream, whereas, in the case of an aquifer, all riparian States would inevitably suffer harm. By their very nature, a number of unilateral measures that would be viable in the case of a watercourse should be prohibited by law in the case of confined groundwater and should be taken only jointly or by consensus. It was even possible that the development of the waters of an aquifer might be advisable only on one side of the aquifer, in the territory of one of the riparian States, owing to the specific nature of and conditions in underwater geological formations or the risk of pollution, and that the distribution of water volumes in an integral and equitable

manner among other riparian States would have to be achieved by extracting water from foreign territory.

42. In such circumstances, it would be unthinkable, as envisaged in articles 3 and 4, for aquifer agreements to be concluded between some riparian States only and not among all of them. The concept of the equitable and reasonable development, utilization and protection of a transboundary aquifer, which was a general principle that all riparian States would have to respect under article 5, and that of the optimal or lasting utilization of the aquifer could have a radically different meaning than the one they would normally have in the case of a watercourse. The consultations provided for in article 6, paragraph 2, would have to be compulsory for all riparian States. The "due diligence" referred to in article 7 and the reservation which was provided for in that article and which was still causing the Commission so many problems even in the case of watercourses might be completely inadequate in the case of confined groundwaters, for which unilateral measures or measures not agreed on in advance would be virtually useless in most cases. The entire system provided for in articles 11 to 16 ultimately amounted to the obligation provided for in article 11—and not in article 12—and the time-limits for replying to notification must be set by all of the parties, on a case-by-case basis.

43. Having said that, he in no way rejected the principles that had guided the Special Rapporteur or the alternatives proposed during the discussion by Mr. Calero Rodrigues (2334th meeting) and Mr. Bowett (2335th and 2336th meetings). As long as it was not claimed that the draft articles were a legal regime governing the use of international watercourses identical to the one required for transboundary aquifers and as long as the possibility was not ruled out of engaging in future in the progressive development and codification of the law of the use of the waters of aquifers, he would not object to the idea of including a provision at the end of the draft articles, or in an optional protocol, stating essentially:

"Nothing in the present articles shall affect the right of an unrelated transboundary aquifer State to agree, either in its instrument of ratification or accession or in a separate instrument, to extend to the use of the waters of said aquifer, *mutatis mutandis*, some or all of the provisions of the present articles, either on a permanent basis or pending the conclusion of bilateral or multilateral agreements on the progressive development or codification of the law of the use of the waters of transboundary aquifers."

44. Mr. KUSUMA-ATMADJA said that the original topic, namely, the law of the non-navigational uses of international watercourses, had been supplemented first by groundwater related to such watercourses and now by unrelated confined groundwaters. That shift had been inevitable if only because of environmental concerns, which had resulted in priority being given to the rational, global and sustainable use of water resources. The third and final component of the topic had been investigated at the request of the Commission and the Special Rapporteur had shown how important it was. The Commission could therefore not take the view that it was not relevant. On the other hand, its incorporation in an appropriate

manner, including by changing the title of the topic, as Mr. Eiriksson had proposed, would require in-depth and time-consuming study, but the Commission wanted to move ahead rapidly. Mr. Bowett's proposal to make unrelated confined groundwaters the subject of an optional protocol might be a good solution, but the Commission should discuss it fully before taking a decision.

45. The Special Rapporteur was proposing that the expression "flowing into a common terminus" should be deleted from the list of definitions, but that concept might be extremely useful in cases involving contiguous States which had a watercourse as a common border. Emphasis had always been placed on situations where a watercourse ran through several States in succession and the attention devoted to groundwater in general logically led to the proposal that the phrase in question should be deleted. Nevertheless, the notion of a common terminus might prove to be important in border demarcation cases between contiguous States. The Special Rapporteur's other major proposal dealt with dispute settlement. The article he proposed was conciliatory in tone, focusing as it did on peaceful settlement, but that tone was somewhat at variance with the provisions relating to notification (art. 13) and the sort of penalty clause introduced by article 16, paragraph 1. The Special Rapporteur was, of course, trying to strike a balance between the interests of the notifying State and of the notified State, but it should be kept in mind that the developing countries did not necessarily have the resources in terms of information particularly scientific information, to respond to notification within the period set by article 13. It was to be hoped that wording more in line with the interests of all States would be found by the Drafting Committee.

46. Mr. MIKULKA said that if the Special Rapporteur had found that there was a recent trend towards integrated approaches to water resource management and concluded that it was useful and timely to include confined groundwaters in the scope of the draft articles, the Commission could not reject his conclusion only because it was now on the second reading of the draft. The problem was, rather, to see how the new element could be incorporated in or associated with the draft articles. The Special Rapporteur proposed that the concept of a "common terminus" should be deleted and Mr. Calero Rodrigues had pointed out (2334th meeting) that the purpose of that concept was to avoid an unduly broad interpretation of the term "watercourse" in the event that there was an artificial link between two watercourse systems. However, "common terminus" was not a legal term: it had been borrowed from the vocabulary of the natural sciences. If it was being abandoned by the natural sciences the Commission could very well do likewise. The risks that the concept was intended to mitigate could be avoided by an explicit provision ruling out situations where two systems were artificially linked for navigational purposes only, or by dealing with the problem in the commentary.

47. The crucial issue was in fact something else: the Special Rapporteur's hypothesis that the principles and rules applicable to watercourses under a framework convention were also applicable to unrelated confined

groundwaters. That hypothesis was indubitably valid for articles 3 to 19 and for article 26, but, in articles 20 or 22 of part four, for example, or in part six, simply including the term "transboundary aquifer" in the original text gave rise to a number of problems. Could reference be made to ecosystems, alien species or flows in respect of groundwaters that were completely enclosed and might, for all practical purposes, be independent of any surface water system? The method adopted by the Special Rapporteur highlighted *a contrario* the difficulties involved in adapting special rules to unrelated confined groundwaters and might give rise to an extremely long debate in the Drafting Committee. The protocol solution that was favoured by Mr. Bowett would solve the drafting problems, but failed to do away with the problem of deciding which specific articles would be listed in that protocol. And the phrase that Mr. Calero Rodrigues proposed to include in the future framework convention might be a solution if it could be considered that the notion of application *mutatis mutandis* would be enough to create a legal framework governing the use of confined groundwaters. All in all, he was not opposed to the inclusion of the third aspect in the scope of the draft articles, but he would prefer the solution proposed by Mr. Bowett, as long as the Drafting Committee could very carefully examine the extent to which the rules contained in the draft could be applied by analogy to confined groundwaters and as long as the protocol to be drafted would incorporate both references to the articles in the framework convention and amended provisions, in other words, the specific provisions that the Drafting Committee might have been able to identify.

48. Mr. de SARAM, referring to the question whether the concept of a "common terminus" should or should not be retained in article 2, paragraph 2, said that it seemed that the definition of "international watercourse" in that paragraph was intended to serve a dual purpose: first, to take into account the physical relationship of surface and underground waters (the definition's first part); but, secondly (the definition's second part), to have regard as well to the relations between riparian States. The common terminus qualification in the definition, as he saw it, sought to limit the extraordinarily wide scope, in terms of the riparian States, that an exclusively physical definition of "international watercourse" could otherwise have. It was unquestionable that if the definition was considered in its entirety from the exclusively physical point of view there was an inconsistency apparent in its terms: between the physical and the political component. Yet would the Commission prefer a definition formulated exclusively from the physical point of view? He said he did not think so. It seemed clear that in international watercourse usage a great deal depended on satisfactory and full exchange of information, consultation, accommodation of divergent interests, and above all amicable relations between the riparian States. It seemed to him that if there were not the common terminus limitation there might well be the possibility of an unreasonably large number of riparian States to be consulted on a matter of watercourse usage. It seemed to him that this might be one of the reasons why introduction of the common terminus limitation, in the otherwise exclusively physical definition of "international watercourse" was deemed necessary by the Commission

when the draft articles were adopted on first reading.<sup>6</sup> There were also, of course, the organizational and procedural considerations that had been raised by earlier speakers against an amendment of the definition of watercourse at this late stage in the Commission's consideration of the draft articles.

49. He said that the Special Rapporteur quite rightly raised the problem of a natural or artificial interconnection which might unite two otherwise separate international watercourse systems, a situation for which the draft articles did not provide, but there was no information on that question, including on the exact number of cases of that kind. Such information might be obtained through a questionnaire sent to Governments and the relevant international agencies, but, for the time being, the Commission might take note of that type of situation in the commentary, for example, in the one on the scope of the draft articles, perhaps making the point that, in such a situation, it was for the riparian States affected by that interconnection of two systems to consult and settle any such problems in the light of the applicable provisions of the draft articles.

50. The second main question raised by the Special Rapporteur concerned transboundary groundwaters unrelated to surface waters. The fact that such unrelated transboundary aquifers also contain water, and that, conceivably, the principles presently stated in the draft articles might in large measure be found applicable to the utilization of transboundary aquifers might well be true. Yet it seemed to him that the physical characteristics of such transboundary aquifers, the relatively recent history of their utilization and the sparseness, therefore, of information on State practice made it more sensible that the Commission should allow some further time for consideration of such a new subject. He shared the Special Rapporteur's concern, however, that the question of transboundary confined groundwaters, to which all or many of the principles of the draft articles may well apply, should be considered in relation to the Commission's work on international watercourses. The suggestion that the Commission should request the Special Rapporteur to prepare a protocol on transboundary confined groundwaters, in the light and as a continuation of the Commission's work presently being completed on the draft articles on the law of the non-navigational uses of international watercourses, might achieve such a purpose. It would, of course, be useful if the Commission were also to have before it as much information as might be available as to the present and proposed uses of transboundary confined groundwater. It was customary in Commission practice, where subjects with technical ramifications were considered, for a questionnaire to be sent to Governments and relevant international organizations.

51. The provisions of article 5 (Equitable and reasonable utilization and participation) and article 7 (Obligation not to cause appreciable harm) were of much importance. The Special Rapporteur had not proposed that they should be considered in plenary debate at that time as they were then under consideration in the Drafting

Committee. A few members had, however, referred to those articles. He said he would like it to be noted that it was his understanding that the articles were not under discussion in plenary at that time, that they also had relevance to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and they would be discussed, at the appropriate time and once the Commission had received the report of the Drafting Committee.

52. The provisions of articles 13 and 16, paragraph 1, adopted on first reading,<sup>7</sup> seemed to have a rigidity (particularly because of the introduction of time requirements) which many countries (unsophisticated in water resource management and development—where environmental considerations were now one of the predominant aspects) might find unsympathetic to their needs. One example was the requirement that a watercourse State, notified by another watercourse State of a planned measure, which could be substantial, should, unless otherwise agreed, respond within a period of six months as to whether the proposed development was acceptable. Such a time-limit would certainly not suit the States that did not have a long-established sophisticated system of institutions, infrastructures and expertise in water resource management and development. Moreover, the time needed to reply to notification would also depend on the magnitude of the measure planned by a notifying State, its impact on the environment and development and the adequacy and clarity of the information provided in the first place. He shared the reservations voiced by other members as to the proposed paragraph 2 to article 16. It would establish prescribed financial consequences for a failure on the part of a notified State to respond to a notification within the time-limit in article 13. This would compound the present difficulties in articles 13 and 16, paragraph 1, to which he had referred earlier.

53. The Special Rapporteur had rightly drawn attention to the likelihood that the provisions of article 21 in their present form might not adequately alert States to the fact that significant water-temperature change in a watercourse, usually through use of the water for cooling in electricity-generating plants, could be seriously destabilizing and damaging to the ecology of the watercourse.

54. The proposals made by the Special Rapporteur in article 33 were in his view appropriate. They provided, of course, for dispute-settlement procedures. There was emphasis given to conciliation and fact-finding which was as it should be in a field where amicable relations between riparian States was of such great importance. He said he would have liked, however, to see somewhat more emphasis given in the articles to joint fact-finding possibilities prior to the stage where a "dispute" had arisen: the interposition of joint fact-finding and conciliation possibilities when differences in points of view first seemed likely—and before differences had crystallized into a "dispute". As to particular dispute settlement procedures, he said it seemed useful for a reference to be made, in a footnote or in the commentaries to the articles, to the Handbook on the Peaceful Settlement of

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

Disputes between States,<sup>8</sup> the preparation of which the Sixth Committee and the United Nations Office of Legal Affairs had given considerable attention.

55. Mr. BENNOUNA thanked the Special Rapporteur for his very detailed report and, in particular, the annex on unrelated confined groundwaters. It was, however, unfortunate that, at the end of the annex, the Special Rapporteur had concluded that the question should be included in the draft articles, for that meant that last-minute changes would need to be made to them. Such changes were not compatible with the very spirit of the original conception of the draft, which had not been expected to cover all water resources. He therefore did not agree with the inclusion of unrelated confined groundwaters in the draft articles in the way proposed by the Special Rapporteur. He would be in favour of another arrangement, such as an optional protocol on the question or a separate article whose exact wording might be worked out by the Drafting Committee.

56. As to the new paragraph that the Special Rapporteur had proposed adding to article 16, he thought that it was not very comprehensible as it now stood, at least in French, and it raised substantive problems which were out of place in a procedural provision. Such a mixture might well complicate the Commission's task.

57. He would like to know what the real point of proposed article 33 on the settlement of disputes was. If its purpose was merely to recall that a dispute between States must be settled by consultation, negotiation, conciliation or even arbitration, it was superfluous because it did not establish any binding obligations. It would therefore suffice to limit that provision to a few lines indicating that States parties should try to settle their disputes by using the means provided for in Article 33, paragraph 1, of the Charter of the United Nations. He was also not in favour of a compulsory dispute settlement procedure such as recourse to ICJ that was unsuitable for a framework convention, which, by definition, must be very flexible. He would prefer a general arrangement, unless the Special Rapporteur cared to specify in which case fact-finding would be necessary, what it would entail and how it would be carried out because, in cases in which the facts were in dispute, fact-finding often helped in reaching a settlement.

58. In closing, he expressed the hope that, with the Special Rapporteur's assistance, the Drafting Committee would be able to finalize the text of the draft articles so that they could be adopted on second reading at the present session.

59. Mr. THIAM said that, at the forty-fifth session of the Commission, he had already made his position known on the substantive issues raised by the draft articles under consideration, particularly with regard to confined groundwaters and the concept of a "common terminus".<sup>9</sup> He noted that the Special Rapporteur proposed that that concept should be deleted, probably because he did not regard it as very important, and had referred to a

single example, which constituted an exception, that of the Danube, which sometimes emptied into Lake Constance and the Rhine River. It should be borne in mind that the definition of a watercourse had not been changed since 1970 and that the concept of "common terminus" had never been challenged. In fact, it was an absolutely fundamental concept that could not be rejected or amended without careful consideration; the Special Rapporteur should therefore provide more convincing arguments in support of his proposal.

60. It had not originally been planned to include unrelated confined groundwaters in the draft articles. The Commission had simply requested the Special Rapporteur to carry out a study on the question to determine whether their inclusion in the topic would be feasible. However, the Special Rapporteur went well beyond what had been asked of him because he already proposed amendments to the draft articles in order to include such waters. The Special Rapporteur had himself said that he had recast the draft articles on the assumption that such an inclusion had been necessary. The compromise solutions proposed by Mr. Calero Rodrigues (2334th meeting) and Mr. Bowett (2335th and 2336th meetings) were based on the same assumption and hence were merely technical solutions that related not to the actual substance of the problem, but only to the form of the articles. Yet 23 years of work could not be destroyed on the basis of a mere assumption. The question deserved to be studied thoroughly and he therefore requested the Special Rapporteur either to review his position so as to propose draft articles to the Commission that were consistent with the objectives sought or to justify his proposals fully.

61. Mr. MAHIOU said that the Special Rapporteur's second report contained not only the text of the draft articles already adopted on first reading with several amendments, but also two new elements, namely, the inclusion of unrelated confined groundwaters in the draft and provisions on the settlement of disputes.

62. With regard to the draft articles as recast, he said that, bearing in mind the earlier discussion on the question, he was prepared to accept all the proposed amendments. He was in favour of including a provision on the question of the settlement of disputes in the draft and was confident that the Drafting Committee would find the appropriate wording. The third point was the most important. In absolute terms, the ideal solution would be to provide for one convention on rivers, another on groundwaters related to those rivers and a third on unrelated confined groundwaters, although certain provisions might be common to the three instruments. He had himself wanted a separate convention to be drafted on the second category of groundwaters, given their special nature, but to avoid delaying the Commission's work too much, he would not be opposed to including those waters in the scope of the current draft articles. In his view, everything would depend on how that was done. For example, consideration might be given, on the basis of the proposal made by Mr. Calero Rodrigues (2335th meeting) or the one made by Mr. Bowett (2336th meeting), to the possibility of including a provision allowing States to decide whether certain rules might apply to that type of groundwater. Without prejudice to the reaction of

<sup>8</sup> *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 33 (A/46/33), annex.*

<sup>9</sup> See *Yearbook . . . 1993*, vol. I, 2313th meeting.

States, that would be a way to avoid adopting a position on the question that was too clear-cut or rigid, since it would be left to States to decide for themselves.

63. Mr. AL-KHASAWNEH said he shared the Special Rapporteur's opinion that groundwater was an essential source of fresh water for human consumption as well as for industrial and agricultural use. However, a distinction had to be drawn between unrelated confined groundwaters and those referred to in draft article 2, subparagraph (b), which were really part of the watercourse itself and whose inclusion was essential, for example, to determine whether the utilization of the watercourse was equitable and whether significant harm had resulted from a given utilization. Extending the scope of the draft to include unrelated confined groundwaters would create confusion in that regard and would not take account of the fact that the draft had been prepared on the basis of the principle that a watercourse was itself an ecosystem and that watercourse States were easily identifiable, thus making it possible to determine whether they were in fact complying with the obligations they had assumed. Such a conclusion might well have adverse effects on the acceptability of the draft by States, particularly at a time when the utilization of transboundary confined groundwaters was a relatively new phenomenon. In his view, it would be preferable to deal with the question in a separate draft which would still be closely linked to the draft under consideration.

64. With regard to the question of the settlement of disputes, he said that it should be borne in mind that, generally speaking, States that agreed to become parties to a convention should also agree that any disputes they might have would be settled through negotiation, conciliation and arbitration and that specific obligations not to cause significant harm and to ensure the equitable utilization of watercourses required the setting up of a sophisticated and effective fact-finding mechanism and a binding dispute settlement procedure. To that end, a much more precise and detailed provision should be envisaged than the minimal one proposed by the Special Rapporteur. It was for the Drafting Committee to finalize a more appropriate and effective text.

*The meeting rose at 1.05 p.m.*

## 2338th MEETING

*Monday, 16 May 1994, at 3.10 p.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, 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. Rosenstock,

Mr. Szekely, Mr. Thiam, 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,<sup>1</sup> 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]

### SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ROSENSTOCK (Special Rapporteur), summing up the debate, said he had yet to hear any convincing arguments for retaining the notion of a common terminus. He had mentioned the example of the Rhine and the Danube because it represented an annual occurrence, not an occasional event, and had arisen, not in some scientific study by a hydrologist, but in a law case, a context most relevant to the Commission's work.

2. A number of examples could be given in support of the idea of deleting the notion of a common terminus. For instance, there was a river in Paraguay that flowed into Argentina and then split into two, with one branch going underground, reappearing as surface water and then returning underground. The other branch remained as surface water and flowed directly to the sea. It was all one system—but where was the common terminus? The Irrawaddy River in Myanmar separated into a number of streams, some of which reached the sea over 300 kilometres away from the point where the others terminated. Where was the common terminus? The Ganges, the Mekong, and to a lesser extent the Nile, ran into a number of streams that reached the sea at great distances from one another, some as many as 250 kilometres away. They were each unitary systems, but did not have a common terminus. The Tonlé Sap Lake in Cambodia was a lake which at certain times of the year flowed by way of the Tonlé Sap River into the Mekong River, while at other times, the Mekong flowed into the Tonlé Sap. Where was the common terminus?

3. One member had said that no one had challenged the idea of the common terminus over the many years of the Commission's work on watercourses. That was not surprising, since the idea of a common terminus had been incorporated only at the forty-third session in 1991. He hoped the Drafting Committee would examine article 2 with a view to considering whether there was a need for any phrase other than "a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole".

4. He had listened in vain for convincing arguments against the inclusion of transboundary unrelated confined groundwaters. Indeed, one harsh attack had left the impression that it was not only unrelated groundwaters,

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

but all groundwaters, that should be excluded from the draft. He had heard nothing to indicate that any of the rules applicable to related confined groundwaters were not applicable to unrelated confined groundwaters.

5. As to whether article 22 on the introduction of alien or new species should apply to aquifers, he had been concerned that micro-organisms might be capable of being introduced. If no species could be introduced, however, then no harm would be caused by the prohibition set out in the article. As far as article 27 was concerned, the case for not extending it to aquifers was somewhat stronger. The fact that excessive withdrawals from an aquifer could alter the pressure, resulting in complete obstruction of the passage of water, had convinced him that it was safer to extend article 27 to encompass aquifers. If members had strong objections, however, he would not insist. It should be borne in mind that inclusion created no rights or obligations, as long as there was no flow of water.

6. He had no difficulty whatsoever with the suggestion that the Commission should indicate it was not foreclosing the option of doing better work in the future by doing intensive and good work now. He was sure the Drafting Committee would be able to put that suggestion into an appropriate formulation. While he believed the detailed approach in his second report was clearer and preferable, he was prepared to consider with an open mind the proposals by Mr. Calero Rodrigues (2334th meeting), Mr. Bowett (2336th meeting) and Mr. Eiriksson (2337th meeting) involving, *inter alia*, the drafting of a separate article.

7. The simplest way to solve the clash between articles 5 and 7 was still to delete article 7. In view of the contents of article 21, such a course would not produce a system which permitted or condoned pollution. Actually, it would create a system which gave equitable and reasonable use its proper place as a guiding principle in an instrument which must be responsive to the growing needs of countries, facilitate economic development and avoid according *de facto* primacy for existing uses in a way that would block optimal utilization for all concerned. In his first report,<sup>2</sup> he had suggested a compromise formula that would permit the retention of article 7 in a less counterproductive form. He had reiterated the suggestion in his second report.

8. Mr. Bowett (2335th meeting) and Mr. Crawford (2336th meeting) had proposed yet another approach, namely retaining the concept of due diligence, permitting some uses that caused significant harm, but ascribing to the State causing harm an obligation to provide compensation. The advisability of that approach depended on whether the notion could be comprehensibly and concisely drafted. He was prepared to attempt such an endeavour or to look at any other proposal for article 7. On the whole, however, he believed his formulation of article 7 would not be inconsistent with achieving the goals pursued by Mr. Bowett and Mr. Crawford if and when the articles on international liability for injurious consequences arising out of acts not prohibited by international law were adopted.

9. The comment by one member that article 5 put an obligation on States to achieve optimal utilization, and to do so without regard for the consequences, appeared to be a misreading of the article. It ignored the phrases “with a view to” and “consistent with the adequate protection of the watercourse”, as well as the commentary.<sup>3</sup> However, if other members believed article 5 was open to the interpretation suggested by the comment, then the Drafting Committee should take another look at it.

10. He would reconsider article 21 in response to the comments made and in the light of the broader question of whether thermal pollution was adequately covered. It was gratifying that his addition to article 16 had received a generally favourable response. To those who had expressed concern, he wished to point out that what he proposed was not estoppel: quite the contrary. If there were estoppel *vis-à-vis* the notified State, there would be no need for his addition. Mr. Szekely’s suggestion concerning article 13 (2337th meeting) could be helpful in every respect.

11. He was pleased at the very wide support for including a provision on the peaceful settlement of disputes. Draft article 33 was put forward merely to give the Commission a full range of choices between a relatively detailed and rigorous position and a bare minimum. There was plenty of room to strengthen the proposed article, with his wholehearted support, starting with the addition of a suitable reference to ICJ. He was favourably inclined towards the suggestion by Mr. Arangio-Ruiz (*ibid.*) on the deletion of paragraph 1 and would also welcome any specific suggestions on how to strengthen paragraph 2.

12. Finally, with regard to the use of the term “significant”, he assured Mr. Szekely that he was fully prepared to maintain the commitment made at the forty-fifth session of the Commission.

13. The CHAIRMAN said the Commission had concluded its general debate on the present topic. He suggested that, in accordance with the usual practice, the Commission should refer the draft articles proposed by the Special Rapporteur in chapter IV of his second report to the Drafting Committee. The Committee would consider them in the light of the debate and weigh up the advantages and disadvantages of the various approaches to unrelated confined groundwaters, bearing in mind that during the discussion in plenary, some members of the Commission had supported inclusion of the concept as proposed by the Special Rapporteur, others had opposed it, and still others had made compromise proposals.

14. Mr. GÜNEY said the debate revealed that the articles were not ready to be referred to the Drafting Committee, which was not empowered to decide on matters relating to substance. Clearly, there were still important issues to be resolved. Specifically, most members of the Commission were opposed to including the notion of unrelated confined groundwaters.

15. Mr. THIAM said he fully endorsed Mr. Güney’s comments. The Commission was now into the second

<sup>2</sup> *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/451.

<sup>3</sup> For the commentary to article 5, initially adopted as article 6, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31-36.

reading of the draft articles. At such an advanced stage in the work, it was not for the Drafting Committee to resolve outstanding issues. If any questions or contradictions remained in the draft articles, a solution should be sought through a vote in plenary.

16. Mr. PAMBOU-TCHIVOUNDA said he supported the arguments advanced by Mr. Güney and Mr. Thiam. The Commission should resolve the remaining substantive issues in order to enable the Drafting Committee to play its proper role.

17. Mr. ROSENSTOCK (Special Rapporteur) said the diverging views expressed in plenary were not so far apart that the Drafting Committee would be unable to find grounds for broad agreement. He still believed the articles should be sent to the Drafting Committee. Holding a vote in plenary would set a very dangerous precedent.

18. Mr. CALERO RODRIGUES said it was true that the Commission rarely put the issues before it to the vote. Usually, the debate in plenary provided ample guidance for the Drafting Committee, which made changes in accordance with the views expressed. There was all the more reason to follow that approach in the present instance, for the text was not new and had already been adopted on first reading; it was simply a matter of making small adjustments. The discussion had clearly demonstrated that there was no support for the Special Rapporteur's proposals on including the concept of unrelated confined groundwaters, but a number of compromise proposals had been made. He had no objection to the articles being sent to the Drafting Committee, on the understanding that the Committee could adopt a compromise proposal.

19. Mr. MAHIOU said that, if the point at issue was merely a drafting matter, he would have no objection to its being referred to the Drafting Committee. The question of references to aquifers and confined groundwaters was a substantive one, however. It might be advisable to establish a small working group to look into the compromise proposals with a view to finalizing a text for submission to the Drafting Committee.

20. Mr. PAMBOU-TCHIVOUNDA said he was opposed to the idea of establishing a working group. The general trend of the Commission's thinking was already clear. A working group would not advance the discussion any further.

21. Mr. THIAM, replying to a query from the CHAIRMAN, recalled that on one occasion a vote had been taken on a text being discussed during the second reading of the draft articles on succession of States in respect of State property, archives and debts.<sup>4</sup>

22. Mr. IDRIS said the problem under discussion required further thought. Personally, he was not ready to decide either way and, if a vote were taken, he would be obliged regretfully to refrain from participating. He proposed that the Chairman should be requested to undertake consultations in order to ascertain the Commission's feelings.

23. Mr. SZEKELY said he agreed the time was not ripe for radical measures. The Commission should ask the Drafting Committee to explore the possibilities offered by the compromise proposals which the Special Rapporteur had received in an open-minded spirit.

24. Mr. EIRIKSSON said he, too, thought it would be undesirable to take a vote at the present stage. On many occasions in the past, the Commission had referred matters to the Drafting Committee when no final decision had been taken on them, with a request for the views expressed in the debate to be taken into account. There was no reason why the same procedure should not be followed now.

25. Mr. MAHIOU reiterated his proposal for the establishment of a working group. The vote referred to by Mr. Thiam had been taken after extensive discussion on second reading. Problems of substance could not be resolved simply by a vote. The working group would consider all aspects of the matter in depth and report back to the Commission before the end of the session.

26. Mr. GÜNEY, noting Mr. Calero Rodrigues' observation to the effect that the debate had shown a majority of Commission members were against including unrelated confined groundwaters in the draft, said that, in the circumstances, a vote at the present stage was likely to prove to the Special Rapporteur's disadvantage. The difference of opinion on how best to proceed showed that the question as a whole was not ripe for decision. He continued to be opposed to referring the matter to the Drafting Committee, but was prepared to discuss it further in any suitable framework that the Commission might choose.

27. Mr. THIAM said his previous position should not be taken to mean that he was in favour of voting at the present stage. Like Mr. Güney, he was still opposed to referring the matter to the Drafting Committee. The establishment of a small but representative working group would be the best solution.

28. Mr. VILLAGRÁN KRAMER said that the Commission was under no obligation to complete the second reading of the draft articles at the present session. The inclusion of groundwaters was not the only new proposal in the Special Rapporteur's second report. Other changes in articles 11 to 32 were recommended and required in-depth consideration. Referral of the matter to the Drafting Committee or setting up a working group would inevitably involve the same persons. It would be preferable for the Chairman to sound out informally the views of all members.

29. Mr. MIKULKA said that he was strongly opposed to a vote. At the previous session, the Commission had requested the Special Rapporteur to undertake a study on the question of unrelated confined groundwaters in order to determine the feasibility of incorporating them in the topic. If, at the present session, it simply voted the question out, it would make itself look ridiculous in the eyes of the Sixth Committee.

30. Mr. YANKOV supported by Mr. Sreenivasa RAO and Mr. HE, proposed that the discussion on the pro-

<sup>4</sup> See *Yearbook* . . . 1981, vol. I, 1692nd meeting.

cedure to be adopted should be suspended in order to enable the Chairman to conduct informal consultations with a view to arriving at a satisfactory solution.

31. The CHAIRMAN said that it appeared that further discussion in plenary was pointless and several members were reluctant to vote at the present stage. The choice was between meeting in a working group or holding informal consultations. He was in favour of the latter. He was prepared to organize the informal consultations and would ask the Special Rapporteur, the Chairman of the Drafting Committee, Mr. Calero Rodrigues, Mr. Güney and Mr. Thiam to participate. The consultations would of course be open-ended and everyone was welcome to join in them.

32. Mr. GÜNEY said that he agreed with the procedure proposed by the Chairman. By "open-ended" he understood that no time-limit should be fixed.

33. Mr. EIRIKSSON said that it would even be possible to place everything else before the Drafting Committee and leave the unresolved question pending. The Committee could carry on with the work for the second reading. He saw no reason to be pressed for time.

34. Mr. MAHIU agreed with Mr. Eiriksson. He had already suggested that all the articles should be referred to the Drafting Committee, leaving the unresolved question aside. That would not interfere with the work of the Committee.

35. Mr. ROSENSTOCK (Special Rapporteur) said that the matter should be decided one way or the other, without delay. He had no particular preference and did not wish to interfere with the search for a compromise. He had never done so with regard to any topic. It was important not to prejudice the work of the Commission on other important topics by prolonging the one currently under discussion, and he did not think that much progress was possible in the Drafting Committee until the issue was resolved.

36. The CHAIRMAN said that guidance could be given to the Drafting Committee the next day on the basis of the interim results of the informal consultations. If he heard no objection, he would take it that the members of the Commission agreed to proceed in that fashion.

*It was so agreed.*

**State responsibility (A/CN.4/453 and Add.1-3,<sup>5</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>6</sup> A/CN.4/L.501)**

[Agenda item 3]

#### FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR

37. The CHAIRMAN recalled that chapter II of the fifth report on the topic of State responsibility had been

introduced at the previous session,<sup>7</sup> and said that the Commission would now consider the legal consequences of "crimes". The relevant documentation included: (a) chapter II of the Special Rapporteur's fifth report (A/CN.4/453 and Add.1-3); (b) the introduction by the Special Rapporteur of chapter II of his fifth report;<sup>8</sup> and (c) chapter II of the sixth report (A/CN.4/461 and Add.1-3).

38. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was somewhat surprised that a number of members had said earlier that they were looking forward to his introduction, as he had already introduced his fifth report the previous year. Actually, the best course would be to refer back to chapter II, section A, of his fifth report and chapter II of his sixth report, as well as to the summary record of the 2315th meeting.<sup>9</sup>

39. Chapter II of the sixth report contained in logical order the issues dealt with in the fifth report, on which it would be desirable for members to comment and to provide him with the guidance needed for his further work on a difficult subject.

40. As could be seen, almost all the paragraphs in chapter II of the sixth report referred back to chapter II of the fifth report. His colleagues no doubt realized that the outline set forth in chapter II of the sixth report only contained the barest essentials. In other words, many details were not mentioned because they had appeared in the appropriate parts of the fifth report. It would be useful if members could, where possible, follow the outline. He very much looked forward to hearing his colleagues' comments.

41. Mr. THIAM said that he had read the Special Rapporteur's sixth report with great interest. He had been struck by a parallel drawn in the report between wrongful acts characterized as crimes under article 19 of part one<sup>10</sup> of the draft and other crimes, for example, crimes against the peace and security of mankind, the subject-matter of the topic for which he was Special Rapporteur. He had the impression that a term had been borrowed from another field and was being employed with a different meaning. The international responsibility of States had but little to do with the criminal responsibility of individuals.

42. The subject of law in criminal proceedings could only be individuals. At the beginning of the discussions of his own topic, the Commission had considered at length whether it should address the criminal responsibility of States, and several members had been in favour of that approach. However, the Commission had concluded that it could not embark on such a course, for the simple reason that individuals could not be treated like States. It was impossible to apply a criminal procedure to one relating to international responsibility.

<sup>7</sup> Chapter II of the fifth report was not discussed at the forty-fifth session of the Commission for lack of time; see *Yearbook . . . 1993*, vol. II (Part Two), document A/48/10, para. 205.

<sup>8</sup> See *Yearbook . . . 1993*, vol. I, 2315th meeting, paras. 1-61.

<sup>9</sup> *Ibid.*

<sup>10</sup> For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>5</sup> *Yearbook . . . 1993*, vol. II (Part One).

<sup>6</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

For example, a State could not be summoned to appear in court and certainly could not be served an arrest warrant. With regard to penalties, it was impossible to impose a prison sentence upon a State.

43. As to the consequences of responsibility, the differences between his own topic and that of the Special Rapporteur were enormous. The responsibility of States was primarily reflected in the reparation which was proportional to the damage caused. In his own topic that was impossible. Although a crime might well cause damage, the main point of criminal proceedings was not to repair that damage, but to decide upon a punishment, something that was very different.

44. If an individual acting as a head of State or Government or simply as a civil servant committed a crime, clearly he was personally and directly responsible for that act, but the responsibility of his State was also involved, and there might be some confusion between the two forms of responsibility. From the conceptual point of view, however, the two ideas were completely different.

45. While he thanked the Special Rapporteur for his enriching discussion of the subject, he did not think that it would ever be possible to mix the two topics.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had no intention of mixing the topic of State responsibility with that of the draft Code of Crimes against the Peace and Security of Mankind or of confusing the criminal responsibility of individuals with the criminal liability of States under article 19,<sup>11</sup> however interrelated the breaches in question could obviously be. He entirely agreed with Mr. Thiam that it was inconceivable to put a State in prison. Indeed, if the Commission was to look for special consequences for crimes, it would need to go beyond the very strict limits of State responsibility for the offences envisaged so far.

47. Mr. THIAM said that he had one simple question: Could a term other than "crime" be found for that type of responsibility?

48. Mr. ROSENSTOCK said he fully agreed with the thrust of Mr. Thiam's question.

*The meeting rose at 4.15 p.m.*

<sup>11</sup> Ibid.

## 2339th MEETING

*Tuesday, 17 May 1994, at 10.10 a.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

*Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues,*

*Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.*

**State responsibility (continued) (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>2</sup> A/CN.4/L.501)**

[Agenda item 3]

### FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. BENNOUNA said that, in chapter II of his sixth report on State responsibility (A/CN.4/461 and Add.1-3), the Special Rapporteur had asked whether the crimes could be defined, and all the following questions would depend upon the reply. For that reason, he suggested that the debate should be organized in two parts: the first would be devoted to the question of defining the crimes set forth in article 19 of part one of the draft<sup>3</sup> and the second to the consequences stemming from the definition agreed. In his view, that approach was important given that the Commission must express an opinion on the fate of article 19.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said he took the view that the members of the Commission should be allowed to decide what questions they raised during their statements. He was well aware that certain members would like to focus first on the question of consequences. It was therefore inappropriate to specify what form the debate must take.

3. Mr. MAHIOU said that Mr. Bennouna's comments were very much to the point, but, noting that article 19 of part one had already been adopted on first reading, he did not think that it was necessary to reply to the question in chapter II, section A of the sixth report of the Special Rapporteur before moving on to the following questions. In his opinion, the Commission might have a better idea of those crimes after the debate on the consequences of internationally wrongful acts characterized as crimes under article 19.

4. Mr. BENNOUNA said that he would not insist on his suggestion, but he did want to formulate a reservation about Mr. Mahiou's comment. In his opinion, the Commission could not wait until the second reading of article 19 to reply to the Special Rapporteur's question on the definition of crimes. It could not work in the abstract, but must clearly state its opinion on that point at the outset.

<sup>1</sup> Yearbook . . . 1993, vol. II (Part One).

<sup>2</sup> Reproduced in Yearbook . . . 1994, vol. II (Part One).

<sup>3</sup> For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see Yearbook . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

5. The CHAIRMAN, speaking as a member of the Commission, said that the basic idea which emerged from the Special Rapporteur's reports on State responsibility was that the drafting of rules on State responsibility for international crimes was a very complex question that was encountering numerous difficulties. The Special Rapporteur had asked two basic questions. The first, which appeared in chapter II of his fifth report (A/CN.4/453 and Add.1-3), was whether it was appropriate to make a clear-cut distinction between "crimes" and "delicts" and the second, which was the subject of chapter II, section A, of the sixth report, was that of the definition of the crimes. In that context, it should be borne in mind that article 19 had been adopted unanimously in 1976<sup>4</sup> and that the distinction drawn between crimes and delicts was already firmly anchored in general international law, as recalled in the commentary to article 19, from which it was also clear that the Commission had termed the adoption of article 19 a "step comparable to that achieved by the explicit recognition of the category of rules of *jus cogens* in the codification of the law of treaties".<sup>5</sup> He saw no reason whatsoever to reconsider what had been completed or to abandon the concept of international crimes of States. In the 18 years that had elapsed since the adoption of the article on first reading, States, to be sure, had committed international crimes, but there had also been considerable progress in the reaction of the international community to those crimes and, in particular, to crimes of aggression. There was also good reason to hope that, with the end of the cold war, the situation in that area would continue to improve. It was clear, however, that it would be impossible for the Commission to draft rapidly rules on the consequences of international crimes because there was no ready-made solution in that regard. First, unlike delicts, crimes against States were not very frequent and established practice thus did not exist and, secondly, it must be borne in mind that the question was very sensitive and affected the principle of State sovereignty.

6. Concerning the question of defining crimes raised in the Special Rapporteur's sixth report, he said that the list of breaches which could constitute international crimes and which appeared in article 19, paragraph 3, were only examples or illustrations and some of the obligations mentioned were obviously no longer topical. That was the case, in particular, of the obligation prohibiting the establishment or maintenance by force of colonial domination or the obligation to safeguard and preserve the human environment, which was confined to prohibiting massive pollution of the atmosphere or of the seas and today appeared to be a bit too restrictive. It would therefore be useful to specify and update those primary obligations. The value of article 19 lay not in the list of breaches of international obligations, but in the actual definition of international crimes. The criterion chosen was basically the danger represented by a breach of an international obligation essential for the protection of the fundamental interests of the international community, as seen in paragraph 2. The purpose of the list that followed was in fact only to facilitate the application of that definition in concrete situations. Once again, the list was

only indicative, and that meant that no analogy could be drawn with general criminal law, which was based on the principle *nullum crimen sine lege*.

7. The second question that then arose, even in the case of crimes recognized by the international community as being international crimes, was who had the right to determine that a crime had been committed by one or more States and thus to define the applicable regime of responsibility. It would be logical for an international body to have that prerogative, and not one or several States, even if they were the direct victims of the crime committed. In his view, that fundamental provision should appear in one form or another in the articles on responsibility, although that did not solve the entire problem. It was only a general principle subject to certain restrictions, such as the inherent right of individual or collective self-defence, in accordance with Article 51 of the Charter of the United Nations. The main obstacle to the application of the principle of the "collective reaction" of States was that currently no international body, including the Security Council, had the express power to settle matters relating to all categories of international crimes and it was not for the Commission to propose to confer certain rights and obligations on United Nations bodies which would allow them to perform their functions in connection with action to combat international crime. For that reason, it was tempting to determine the possible consequences of international crimes and to provide for a special regime of responsibility for the crimes set forth in Chapter VII of the Charter and to apply to other crimes, such as those that did not constitute a threat to the peace or an act of aggression, the existing rules on responsibility for international delicts, without certain conditions and restrictions. Such a solution would be no more than a stopgap measure because it would not answer the basic question already raised, namely, who could determine on behalf of the international community that a crime had been committed if the act in question did not come under Chapter VII of the Charter.

8. Other problems also had to be solved. First, should a distinction be drawn between the rights of the State that was a victim of the crime and the rights of other States that had sustained injury with regard to remedies available and the adoption of countermeasures? It was also difficult to know what the consequences of international crimes would be from the point of view of the obligations of States to which indirect injury had been caused. Lastly, it was worth asking whether it was possible to solve the problem of State responsibility for international crimes by totally disregarding the concept of fault, as the Commission had been able to do when it had established the criteria for the determination of the international responsibility of States for international delicts. There was no quick and easy answer to all those questions and it was therefore difficult to draft detailed provisions on the consequences of international crimes. Hence, the unavoidable conclusion was that, as international relations now stood, such a task could not be completed in the time available to the Commission and given the time-limits that it had set itself for carrying out its programme of work.

<sup>4</sup> *Yearbook* . . . 1976, vol. II (Part Two), pp. 95 *et seq.*

<sup>5</sup> *Ibid.*, p. 122, para. (73) of the commentary.

9. In closing, he reiterated his opinion that it would not be appropriate to reconsider the concepts already embodied in international law and the definition of international crimes in article 19, even though the four categories of breaches mentioned in that article ought to be updated. It would also be wiser, at the current stage of the Commission's work, to stop formulating detailed provisions on the material consequences of international crimes and on the determination of the relevant responsibility. On that point, the Commission should confine itself to noting that there was a close link between the material consequences of crimes and the reaction to those consequences of the international community as a whole, which derived from the definition in article 19. That would be the best solution because it did not reject everything that had been done so far and because it would not delay further the completion of the Commission's work.

10. Mr. ROSENSTOCK said that he endorsed the view expressed in the Special Rapporteur's sixth report that the definition of crimes of States adopted by the Commission in article 19 should receive some attention as a preliminary point in the expected debate. He doubted that there was much point in trying to cure the many defects of the text of article 19. In the end, the Commission would only have found out the hard way that a workable definition had escaped it and that the only acceptable consequences were trivial, harmful to other more realistic aspects of the law and likely to enhance the threat to peace and security or to erode the viability of the concept of *erga omnes* violations in general by focusing on only some of them.

11. He believed that the wisest course would be to take another hard look at article 19, paragraphs 2 to 4, with a view to considering whether the deletion of the notion of crimes by States might not be advisable. In support of that view, he noted that considerable changes had taken place in the world since the 1970s, with the end of the cold war, the reduction of North-South tensions and the elimination of apartheid and colonialism.

12. The starting-point for any reconsideration of article 19 could be an examination of the extent to which it could be said to reflect existing law. Had it been *lex lata* in 1976 and was it *lex lata* in 1994?

13. In his view, article 19 was not *lex lata* because it did not reflect customary law and there were no instruments making it an obligation for States to accept the notion it defined. On what basis had the Commission in 1976 included the notion as if it had been *lex lata*?

14. Leaving aside a few remarks by politicians clearly devoid of *opinio juris*, the Commission had made much of the widespread acceptance at the Vienna Conference on the Law of Treaties in 1969 of *jus cogens* as a ground for asserting the invalidity of a treaty. In his view, there were two fundamental reasons why the *jus cogens* articles of the Vienna Convention on the Law of Treaties did not establish any basis for article 19. First, the fact that a community, national or international, found a contract or treaty concluded *contra bonos mores* or *jus cogens* to be unenforceable and void *ab initio* did not necessarily mean that the act or instrument was viewed as criminal at the national level and hardly established a

basis for creating a notion of crimes of States. Secondly, it should be noted that, at the Vienna Conference on the Law of Treaties, the acceptance of *jus cogens* as a ground for treaty invalidity had been expressly made conditional on acceptance of a definitive role for ICJ in ruling on the validity of such a claim.

15. In the 1970s, the Commission had, moreover, associated itself with *dicta* in the *Barcelona Traction, Light and Power Company, Limited* case,<sup>6</sup> noting the existence of *erga omnes* obligations or, more precisely, refusing to regard the concept as non-existent. It had also sought to draw the same conclusions from the advisory opinion rendered by ICJ on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>7</sup> However, the Convention related only to crimes committed by individuals. The most that could be deduced from the *dicta* of the Court in that advisory opinion was the view that some of the provisions of the Convention had become part of general international law and a hint at the notion of *erga omnes* violations. The fact remained that recognition of *erga omnes* violations did not imply recognition of a new and qualitatively different category of acts *contra legem*. Neither did it imply that the distinction between civil and criminal responsibility had to be ignored.

16. Furthermore, the idea of 'crimes of States' had been explicitly rejected, both in the Sixth Committee and in the written comments by such States as Australia, France, Greece, Sweden, the United Kingdom and the United States.

17. Another argument in support of the view that article 19 was not *lex lata* was the famous statement in the Judgment of the Nürnberg Tribunal that

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>8</sup>

18. It was revealing that, despite the horrors of the deeds perpetrated by the Axis Powers, none of the documents relating to the surrender of Germany and Japan spoke of the criminal responsibility of States.

19. More recently, Additional Protocols I and II to the Geneva Conventions for the protection of war victims of 12 August 1949 elaborated shortly after the fifth report by the Special Rapporteur on State responsibility, Mr. Roberto Ago, on the internationally wrongful act of the State, source of international responsibility,<sup>9</sup> failed to contain any hint of such crimes.

20. The previous Special Rapporteur, Mr. Riphagen, had taken the view that, except in the case of aggression, there was no existing law to suggest the existence of a separate category of State responsibility for crimes.

<sup>6</sup> Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

<sup>7</sup> *I.C.J. Reports 1951*, p. 15.

<sup>8</sup> *Nazi Conspiracy and Aggression, Opinion and Judgment*, United States Government Printing Office (Washington, D.C., 1947), p. 53. Cited in United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7), p. 41.

<sup>9</sup> *Yearbook . . . 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2.

21. If the existence of qualitatively different categories of breaches of international law was not *lex lata*, could it be said to be *de lege ferenda*?

22. He found it difficult to imagine the possibility of creating categories of breaches that constituted differences in kind without damaging the effectiveness of the concept of *erga omnes* violations, unless all *erga omnes* violations were placed in a category of equally more serious violations.

23. Even assuming that the Commission wanted and was able to create such categories, he thought that it would be unwise to maintain the term “crime”. Even a well-informed reader would be likely to assume that what was meant was penal law and that some form of collective punishment or guilt was envisaged by way of consequence.

24. Moreover, the term “crime” suggested the idea of impartial trial and judgement. What the Commission of the 1970s had had in mind in that respect was unclear. Its members had doubtless been aware of the language of Article 36, paragraph 2 (d), of the Statute of ICJ, which referred to “reparation . . . for the breach of an international obligation”. Yet in his fifth report, the Special Rapporteur gave a number of reasons why ICJ was not an answer.

25. If the Commission wanted to draw any distinction, it would therefore seem more straightforward to consider a phrase such as “aggravated or particularly serious delict” and then to set about trying to define it, taking care not to use article 19 as a model. Once an adequate definition had been found, the Commission could proceed to examine the repercussions of the establishment of the new category on parts two and three and decide whether, given those repercussions, the exercise as a whole was justified. In taking a decision, the Commission would have to bear in mind that the regime for aggression was already provided for in the Charter of the United Nations and did not need to be supplemented in the articles and also that, in 1930, the Conference for the Codification of International Law had failed in part because of attempts to include both primary and secondary rules.

26. He, for one, would be surprised if the Commission concluded at the present session that it was useful and prudent to adopt qualitatively different categories of breaches depending on the character thereof. He thought that it would be more likely to conclude that what was involved were acts of increasing degrees of gravity.

27. Mr. BENNOUNA noted that, since everything that could be said on the subject had already been said, what needed to be done now was to establish some order so that the Commission might, either by consensus or by a vote, arrive at a decision that could be adopted at the present session.

28. The question on which the Commission had to take a decision and which determined everything else was that asked by the Special Rapporteur in chapter II of his sixth report: Can the crimes be defined?

29. His own view was that the question should be reworded as follows: “Should a distinction be made in

connection with internationally wrongful acts between crimes and delicts?” It was essential to answer that question before tackling the question of the consequences of crimes, but, until now, the Special Rapporteur and the Commission had considered the consequences of internationally wrongful acts in general and had left aside the question of crimes. If the distinction between crimes and delicts were maintained, it would become necessary not only to consider the effect on other articles, but also to reassess the articles already adopted.

30. Recalling the structure of article 19, he said that its paragraph 1 defined a generic category, that of internationally wrongful acts, while paragraph 2 provided a general definition of crimes and paragraph 3 gave a non-exhaustive list of “crimes”, thus making that concept basically evolutive in nature. The international “delict” was in a subsidiary category and was not itself defined. What was not a “crime” was a “delict”.

31. The situation was thus complex and became even more so in the light of the fact that, at its twenty-eighth session, in 1976, the Commission had refused to identify an obligation whose breach constituted a crime with an obligation established by a peremptory norm.

32. A further element of unnecessary confusion resulted from the Commission’s borrowing from the categories of criminal law and thereby implying, despite all its assertions to the contrary, that it had established the criminal responsibility of States.

33. In that connection, he referred to a study by Ms. Marina Spinedi,<sup>10</sup> in which the author stated that the Commission had simply meant to indicate in article 19 that there were two categories of wrongful acts, one being that of wrongful acts recognized by the international community as the most serious because they affected that community’s essential interests and, in consequence, entailing a special regime of responsibility and that the difference between crimes and delicts related to the forms of responsibility and the subjects who could engage it. So far as the forms of responsibility for crimes were concerned, the Commission had in fact had in mind the sanctions provided for in the Charter of the United Nations and the reprisals adopted by States. According to the author of the study, that was nothing new: it was *lex lata*.

34. Those comments showed that, far from clarifying the state of positive law with a view to its codification, the distinction between crimes and delicts had helped to create confusion and had drawn the Commission into a debate that was a dead end. In order to get out of that situation, the Commission had to avoid two pitfalls.

35. The first pitfall was the result of the theoretical debate about the existence of State criminal responsibility, in which the Special Rapporteur had tried to involve the Commission. Notwithstanding its theoretical interest,

<sup>10</sup> “Obligations *erga omnes*, international crimes and *jus cogens*: A tentative analysis of three related concepts”, *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, J. Weiler, A. Cassese and M. Spinedi, eds. (Berlin-New York, De Gruyter, 1989).

that debate was based on an erroneous assumption because, in 1976, the Commission had not meant to establish State criminal responsibility; and the debate did not help the Commission get ahead in determining the consequences of wrongful acts.

36. He agreed with Mr. Rosenstock that there was no difference of kind, but that there was a question of the degree of State responsibility which justified the use of the expression "continuum" of the wrongful act.

37. After all, if one considered the situation in national criminal law, the same conduct could be characterized as a crime or a delict depending on the circumstances, the motives and whether or not there was wilful intent and, as the Special Rapporteur had rightly pointed out, the Commission had taken no account in the draft of wilful intent and had also not referred to the concept of fault, even though it was inseparable from the concept of crime. Article 19 stressed the degree of gravity of the act which was characterized as a crime, but did not define the threshold of gravity at which a delict became a crime. It also spoke of an "obligation" that was "essential" without defining those terms.

38. If, therefore, the Commission decided to refer to "crimes", it would have to redefine the wrongful act and introduce the concept of fault, which could be more or less serious, grave or aggravated.

39. Secondly, the Commission must avoid the pitfall of allowing itself to become involved in a debate on the interpretation of the Charter of the United Nations and on the powers of the various United Nations organs, and of the Security Council in particular. The Commission was not the proper place for such a debate and was not equipped to enter into it. There was an additional substantive reason in that the Security Council was merely the reflection of power at the world level at any given time. It would therefore be extremely unrealistic for the Commission to embark on the consideration of any revision of the Charter, as some writers recommended, and it might frustrate the whole of the draft on State responsibility.

40. It was necessary to draw a clear distinction, as the Special Rapporteur had done, between what was political and what pertained to the legal realm. The Security Council's prime objective in adopting sanctions was neither to punish crimes nor to determine where responsibility lay; its aim was the maintenance of international peace and security having regard to the balance of power at the time. It made legitimate use of violence at the international level as part of its task of maintaining order.

41. Moreover, the Security Council was very much influenced by its procedure and, in particular, by the right of veto which conferred permanent immunity on at least five States and on a few others. Consequently, it could neither create a court nor effectively recognize responsibility for crime. In both of those cases, however, it was necessary to be realistic and to avoid undue haste and confusion. Of course, he, like Mr. Rosenstock, considered that the articles should not borrow from the provisions of the Charter of the United Nations, but he would none the less be prepared to consider a savings

clause with respect to the provisions of the Charter, as the previous Special Rapporteur, Mr. Riphagen, had tried to do. There could be no question of extending the exceptions, under certain provisions which dealt with the consequences of crimes, to a ban on the use of force, as provided for in the Charter.

42. In the last paragraph of his fifth report, the Special Rapporteur had questioned the distinction between "crimes" and "delicts" by asking if it were true that there existed a certain gradation from "ordinary" violations to "international crimes", especially from the point of view of the regime of responsibility which they entailed, and was it in fact appropriate to make a clear-cut distinction between "crimes" and "delicts"? The Commission should endeavour to answer that question during the current session. To do so, it would first of all have to rid itself of the concept of crimes and delicts because that concept carried with it all the liabilities, the whole legal culture, of the crimes inherited from criminal law. Instead, it should stay within the general framework of the definition of "wrongful act" and provide that there were some acts which, by virtue of their degree of gravity and of the obligations violated—which in fact involved peremptory norms—gave rise to a special and more binding regime of responsibility. It would also be necessary to determine the implications from the standpoint of compensation, countermeasures and *locus standi*.

43. The question was who would determine whether there was a "crime" and it arose as soon as there was a violation of international law, since, in the community of States, there were no compulsory courts. In most cases, each State decided the matter for itself; and, in the event of a dispute between States, there was a body for the settlement of disputes.

44. In the case of serious violations of peremptory norms, the only possible course, in his view, was to follow the path laid down in the Vienna Convention on the Law of Treaties and to provide for the compulsory jurisdiction of the Court. It would then be for the State which considered that there had been a serious violation of an essential obligation to refer the matter to the Court; in the event of a challenge by the other State, the Court would rule on its own competence.

45. There was no other possible way and he would warn against any dream of an institutionalized, harmonious and ideal society, because that would be dangerous.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said that there was some contradiction in saying that the distinction between crimes and delicts was meaningless and that it was simply a matter of gradation and of different degrees of gravity. Distinguishing between degrees of gravity meant making a distinction on the basis of the nature of the infringed rule, the dimension of the breach and its effects, and/or, most importantly, on the basis of fault, which could be, for instance, slight, very slight or serious, or so serious as to amount to wilful intent, namely *dolus*. The concept of fault had been abandoned, wrongly, in his view, but it still had to be taken into account in establishing a distinction between internationally wrongful acts and their consequences.

47. So far as the Security Council's role was concerned, it was not at all a question of amending the Charter of the United Nations, but of dealing appropriately with the topic of State responsibility. As pointed out by Mr. Bowett (2336th meeting), the Commission should at least consider the problem of the lawfulness of the Council's decisions, not in order to determine whether a given decision was justified, but to make a choice of the most appropriate solutions to be envisaged—*de lege lata* or *de lege ferenda*—within the draft on State responsibility. In any event, he was opposed to any provision which, like article 4 of the draft proposed by the preceding Special Rapporteur, Mr. Riphagen,<sup>11</sup> would subordinate the applicability of the articles on State responsibility to the decisions of the Security Council or divest them of any meaning in certain situations which were dependent on the decision of a political body.

48. It was his view that, instead of concentrating on the purely terminological question of whether it was possible to speak of crimes of States, it would be better to agree that a wrongful act could have degrees of gravity and that that gradation, as well as the problem of the reaction of States or international organizations, should be taken into account in any case—whatever the term used—in regulating the consequences of the act. Accordingly, it would be better to leave aside the first question imprudently listed by himself in chapter II of the sixth report and to consider the various problems raised in the remainder of that report. Those problems would not disappear simply by the deletion of article 19.

49. Mr. ROSENSTOCK said that the deletion of article 19 would not make all the problems disappear, but it would eliminate a large number of them if the issue were perceived as one of a continuum and not of two separate categories of acts. That way of seeing matters did not, of course, guarantee that the Commission could make much more progress in its consideration of the topic, but it did have the advantage of avoiding a statement of the obvious, namely, that some violations were more serious than others, and very probably of showing that the general rules governing, for instance, proportionality and the measure of reparations, which already existed on the basis of the degree of gravity of delicts, would be applicable in all cases, including the most serious acts.

50. Mr. CALERO RODRIGUES said that the debate had started with a very important question: how to explain to States the legal consequences of something whose precise nature was unknown. It was essential that the notion of international crimes of States should be clearly defined so that its legal consequences could be defined. At one point, there had been an inclination, both in the Commission and in the General Assembly, to anticipate the second reading of article 19 so that the Commission could confirm, amend or delete it. That had not happened, however, and, as article 19 was still not under consideration, it certainly seemed that the Commission should proceed as though the concept of crimes of States had not given rise to any problem and attempt to clarify it somewhat by examining the possible legal

consequences of such crimes. The main question in that connection—and it also arose with regard to the legal consequences of delicts—was to determine who would decide that there had been a violation of international law, an internationally wrongful act, whether it was a delict or a crime.

51. He had already stressed the need to provide a clear answer to that question when the Commission had considered the problem of countermeasures, with respect to delicts, and he had pointed out that there could be countermeasures only if, first, a State had really committed an internationally wrongful act by which another State had actually been injured. The problem arose even more acutely in the case of the reaction to an international crime, which was distinguishable from a delict by the fact that it was a violation affecting the interests of the international community as a whole. In such a case, and *a fortiori*, it was not for a particular State to determine whether the act constituted a crime within the meaning of article 19 and whether it was entitled to react to that crime. If a well-organized and harmonious international community existed already, the problem would not arise. It could be argued that the problem also did not arise in the case of the crime of aggression, inasmuch as the Security Council was empowered to determine the existence of such a crime. It might even be possible to envisage the extension of the Council's powers with respect to the maintenance of international peace and security to all violations to be covered by article 19, possibly as amended. In the meantime, however, a system should be devised whereby the existence of a crime and the right of States to react to that crime would be determined not by States, but by a body representing the international community. Since the draft being prepared was to become a convention, only the parties to that convention would be bound by it unless there was such a large acceptance by States that it became a part of customary law. Would it not then be possible, for the purposes of such determination, to assimilate the international community to the community of States parties to the convention on State responsibility? He had no decided views on the matter, except that that possibility should be considered.

52. In chapter II, section B, of the fifth report, the Special Rapporteur examined in detail the substantive and instrumental consequences of international crimes of States, as well as the actual concept of international community. He included cessation and reparation among the substantive consequences. Cessation was, for delicts, an obligation independent of any initiative on the part of States and that obligation was even more obvious in the case of crimes. Reparation, in the material sense of the term, was, of course, due to the State which was materially affected, but, in the wider, legal sense of the term, it was due to the international community. The right to reparation was a matter not for States *uti singuli*, but for States acting within the framework of some form of coordination. Such coordination between the States parties to the instrument setting forth the rules on State responsibility would be mandatory in all cases. Furthermore, in the case of delicts, the reparation was subject to three limitations: it must not be excessively onerous, it must not be of a punitive character, and the satisfaction or guarantees of non-repetition must be, as it were,

<sup>11</sup> For the texts of draft articles 1 to 5 and the annex of part three proposed by the previous Special Rapporteur, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 35-36, footnote 86.

optional. In his view, non of those limitations should be allowed in the case of international crimes.

53. With regard to instrumental consequences, it had to be decided which types of countermeasures were admissible and who would have the right to resort to them. With regard to the first point, the use of force in reaction to a crime should be allowed only in the case contemplated by the Charter of the United Nations, self-defence against armed attack. It should not extend to crimes other than aggression. With regard to the second point, there too he was opposed to a right of reaction for States *uti singuli*. There must be some form or other of reaction by an organization of the international community or, more modestly, by the community of States that were parties to the convention. In practice, that involved the basic question of the imposition of penalties, in the traditional sense and not in the current, wider, sense of the term. Penalties must be decided by the "international community" and applied by it or under its control.

54. The issue of permissible penalties gave rise to a number of problems and clearly was more far-reaching than a simple legal reaction to a failure to respect the provisions of a given instrument. In chapter II of the fifth report, a number of possible penalties were listed. It was therefore somewhat incorrect to say that it was not possible to punish a State because a State could not be imprisoned like an individual. The draft articles could now be made to reflect the idea that, in addition to the types of penalties referred to by the Special Rapporteur, criminal penalties could be applied to individuals, as envisaged in the draft Code of Crimes against the Peace and Security of Mankind or the draft statute for an international criminal court. The other difficult problem raised by the application of penalties to States was the desire not to punish a population that was innocent and in no way responsible for the criminal acts of a State. That problem had to be considered more thoroughly because, in practice, it seemed insoluble. The most important thing was not to give States individually the right to react to a crime. The solution to the problem of the legal consequences of international crimes required some type of international organization: ICJ, the General Assembly, the Security Council, or other body created by the United Nations or a special organ set up by the States parties.

55. In such circumstances, it would be a difficult task to complete the drafting of articles on the legal consequences of international crimes before the current term of office of members of the Commission expired. Some members seemed to believe that the exercise itself was impossible, while others were in favour of abandoning the very idea of crimes of States. He had followed the approach proposed by the Special Rapporteur and given his opinion on the legal consequences that could be envisaged, but he recognized that the task was a difficult one. The Commission might be forced to admit that it was incapable of solving the problem at the present time. One solution, not an ideal one, but a pragmatic one, would be not to take up in detail the consideration of the legal consequences of crimes and, in reporting to the General Assembly on the consideration of the draft articles on first reading, point out that provision had not been made for a chapter on legal consequences because, at the outset, there had been doubts about the applicabil-

ity of article 19 as it now stood; that many members of the Commission believed it was inappropriate to undertake a task that might prove extremely difficult and, in the final analysis, of no interest, without a clearer definition of the crimes referred to in article 19; and that the Commission reserved the right to introduce a chapter on the legal consequences of crimes on second reading if article 19 was approved or amended on second reading.

56. Mr. MAHIOU noted that chapter II of the fifth report on State responsibility was distinctive and of particular importance, like the issue it dealt with, namely, the consequences of international crimes of States. It raised a number of delicate and complex questions involving the concepts of the international community, the inter-State system, the powers and functions of United Nations bodies, fault, the criminalization of States and possible criminal responsibility, to cite only some of the most crucial. In order to clarify those concepts, however, it might be necessary to determine the legal consequences.

57. The fact that so many questions arose was in no way surprising: dealing with article 19 of part one of the draft articles meant opening the Pandora's box that the Commission had thought it had closed with the adoption of that article in 1976<sup>12</sup> and the deferral of all its unsuspected or unimaginable implications. It was inevitable that the concept of an international crime, as opposed to an international delict, should come up on the Commission's agenda. And it was clearly in respect of the consequences of such crimes that the debate should be resumed in order to flesh out the problems, pinpoint the concepts and give them meaning and content.

58. In his view, there were two components of the concept of an international crime of State: a conceptual one and an operational or functional one. With regard to the conceptual component, he had no difficulty with the identification of a State crime, the imputation of a crime to a State and the attribution of criminal responsibility to a State. The principle of criminal responsibility of States was neither strange nor revolutionary. Of course, criminal responsibility was primarily individual but, as a result of advances in the law, it could also be collective. There might naturally be some reluctance to reopen the discussion on collective responsibility by dealing with legal persons, particularly States. Yet recognition of the criminal responsibility of a legal person in certain conditions and circumstances was more a step forward for the law than a step backwards. Many legal systems were moving in that direction. In France, for example, the Penal Code which had dated from 1810 and had been amended on 1 March 1994 now recognized the criminal responsibility of legal persons. It was therefore entirely feasible to imagine that a legal person, including the State, could be criminally responsible because genocide and aggression were more than wrongful acts—they were crimes in the moral and legal sense.

59. The identification of international crimes of States did not, however, solve all the problems. That was where the operational and functional component of international crimes came into play. Even if a crime could be

<sup>12</sup> See footnote 2 above.

identified, the important thing was its consequences, both substantial and instrumental. In order fully to understand article 19 of part one of the draft and, if necessary, to amend it, the possible consequences of international crimes of States therefore had to be considered first. Only in the light of such consideration could it be determined whether the concept of international crimes of States was relevant or not and he himself believed that it was. From that point of view, chapter II of the sixth report could only make that very complex task easier.

60. The Special Rapporteur's first question—whether the crimes could be defined—was relevant and went back to article 19 of part one of the draft. Taking that article, with its advantages and weaknesses, as a starting-point in order to determine whether the list and the definition of international crimes it contained were satisfactory, he asked who had the power to determine that a crime had been committed. He said he doubted whether one or more definitive answers could be given. Obviously, if international society was organized and, if there were bodies deemed competent to handle all of the crimes covered by the draft articles and capable of acting in such cases, then the task would be an easy one and would involve simply determining ways and means of carrying it out. Unfortunately, however, that was not the case. The Charter of the United Nations normally gave the Security Council the task of determining that the crime of aggression had been committed, but the problem remained unsolved in the case of other crimes, unless they were included in the category of the maintenance of international peace and security, something which could give rise to dangerous juxtapositions, with the attendant blurring of distinctions, debatable conclusions and discussions about bodies responsible for deciding on the powers and functions of the Council. Recent events had shown that there were ambiguities and gaps in the Charter, even in the case of aggression. It was obviously not up to the Commission to fill those gaps or amend the Charter: there were bodies and procedures for that purpose. However, the Commission could suggest ways of implementing the Charter in cases when a crime referred to in article 19 of part one had been committed, as well as means of mobilizing the powers and functions of each organ of the United Nations—and possibly, subject to further consideration, of other institutions called on to decide on certain crimes. In any event, the Council had a role to play in respect of the crime of aggression and perhaps in respect of other crimes as well, but it was not the only player. In that connection, the problem was to determine how to involve other bodies, such as the General Assembly and ICJ with due respect for the Charter and for the balance of powers it had established. He fully agreed with the comments of the Special Rapporteur in that regard; they showed that the determination of crimes other than the crime of aggression and the definition of their consequences were primarily acts of a judicial nature and that it had to be decided which bodies would be empowered to take part in that process.

61. As to who should be responsible for determining that a crime had been committed, he believed that it would be ominous and dangerous to give a role to any State whatever, including the injured State. The Charter set up a system that was neither perfect nor indisputable, but at present, it was the only one available. The only

exception to that rule related to self-defence—and it was still necessary to define that term, or, rather, the conditions in which it came into play, in order to avoid any possible excesses or abuses in the use—or, rather, the manipulation—of the concept of collective and individual self-defence. There might, however, be a way of getting around the concept of self-defence through substantive, formal and procedural rules to be determined in the light of the resolutions of the United Nations, the Charter and the entire set of customary and conventional rules. Not all aspects of the problem would be clarified by that approach, since self-defence came into play only in the case of aggression. He did not by any means believe that, for other crimes, such as genocide or serious and massive violations of human rights, a State could invoke the right of self-defence if its own population had been the victim. It must be up to the responsible bodies to determine whether a crime had been committed in such cases.

62. With regard to the possible consequences of international crimes, everything argued in favour of using those envisaged for international delicts: cessation of wrongful conduct, reparation in the form of restitution, compensation, satisfaction and assurances and guarantees of non-repetition, but without the reservations permitted in the case of delicts, which were less serious wrongful acts than crimes. In the case of a delict, for example, satisfaction must not be humiliating, but, when a crime was committed, that restriction was not valid because, in committing a crime, a State had already humiliated itself and there was no reason to spare it further humiliation. Perhaps consequences that differed not only in degree, but also in substance should be envisaged for certain crimes. It must be determined, however, that the State had truly committed a crime and not a delict. That was the crux of the problem involved in characterizing a wrongful act, and the first problem that had to be solved.

63. Referring to the question whether the procedural aspects relating to countermeasures, such as notification and use of dispute settlement machinery, should be respected in the case of crimes, he said that it would be premature to give an answer at the present time, when the Commission had not yet considered or adopted the draft articles sent to the Drafting Committee, namely, articles 11 *et seq.* and, in particular, article 12.<sup>13</sup> He also questioned whether the balance which draft article 12 was intended to establish and which he did not find entirely satisfactory had to be respected in the case of a crime. In order to give the Special Rapporteur guidance, the Commission should explore the possibility of adopting an approach to countermeasures that clearly showed the difference between an international delict and an international crime.

64. He reserved the right to continue his statement at a later meeting.

<sup>13</sup> For the texts of draft articles 5 *bis* and 11 to 14 of part two referred to the Drafting Committee, see *Yearbook . . . 1992*, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

**The law of the non-navigational uses of international watercourses (continued)** (A/CN.4/457, sect. E, A/CN.4/462,<sup>14</sup> 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]

SECOND REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)

65. The CHAIRMAN, reporting on the informal consultations he had held on the procedure to be adopted for the draft articles on the law of the non-navigational uses of international watercourses, said that the consultation group recommended that the Commission should invite the Drafting Committee to proceed with the draft articles, without the amendments introduced by the Special Rapporteur on unrelated confined groundwaters, and to submit suggestions in plenary to it on how it should proceed if it decided to deal with unrelated confined groundwaters in the draft articles.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

<sup>14</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

## 2340th MEETING

*Thursday, 19 May 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vilagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (continued)** (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>2</sup> A/CN.4/L.501)

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. HE, commending the Special Rapporteur on the draft articles submitted to the Commission, said that they

<sup>1</sup> *Yearbook* . . . 1993, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

made a significant contribution to the development of the law of State responsibility.

2. He had serious doubts about the advisability of retaining the notion of international crimes of States, as set out in article 19 of part one of the draft.<sup>3</sup> His concern was that any attempt to accept the concept of a State crime in the legal sense would lead to many problems which it would be difficult, if not impossible, to resolve from the standpoint of either criminal law or international law. According to the maxim *societas delinquere non potest*, a State, including its people as a whole, could not be a subject of criminal law; according to criminal law principles, it was questionable whether an administrative organ, as a legal person, could be so regarded. Many positive laws, including those of China, made no provision concerning the guilt of legal persons or for corresponding penalties.

3. A criminal act by a State should be an act specifically prohibited under the relevant laws of the international community. Article 19 of part one of the draft, however, merely laid down in general terms the main principles with respect to certain prohibited acts. Such a provision could not provide the definitive norms to be observed by States nor the objective criteria by which the international community could judge whether or not the delict of a State amounted to an international crime. Since the provision was uncertain and therefore difficult to put into effect, it did not conform to the criminal law principle *nullum crimen sine lege*.

4. If the concept of State crime were accepted, penalties would have to be imposed upon the criminal State. According to established international practice, such penalties could not be more severe than the punitive measures taken by a vanquishing State to restrict the sovereignty of the vanquished State, such as occupying the latter's territory and taking over its property, for instance. Such measures did not have the characteristics of punishment under criminal law. They were more in the nature of a demand made to a party with respect to liability it had incurred under international law, and between equal subjects of international law.

5. A legal organ with compulsory powers to try and punish States would also have to be set up. But to what extent could the international community accept such an organ? 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<sup>4</sup> the proposed international criminal court now under discussion, and the draft Code of Crimes against the Peace and Security of Mankind were all directed at individuals. The only permanent judicial organ for the settlement of disputes in the international community was ICJ, however, its jurisdiction was based on voluntary acceptance by States. It was highly improbable that such acceptance would be forth-

<sup>3</sup> For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>4</sup> Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

coming from a State charged with a crime. There was still no basis, therefore, for establishing an international criminal court with compulsory jurisdiction over States.

6. Accordingly, it was difficult to recognize the concept of crimes of State under both criminal law and international law. In a certain sense, a State could be regarded as the instrument used by certain individuals to commit crimes, for instance, the leaders of a State who made use of its territory and resources to commit international delinquencies for their own criminal purposes. Yet an instrument of crime was not to be regarded as a subject of a crime and a crime committed by individuals using the instrument of the State was in fact a crime of an individual. Furthermore, if the concept of State crime were to be accepted, the position of the State as a subject of international law would be undermined and it would be difficult for a realistically-minded international community to accept such a premise.

7. If, on the other hand, the concept of State crime was not accepted, the consequences of State responsibility could be dealt with calmly and there would be no basic difference in substance. The responsibility of the wrongdoing State, under international, though not criminal, law should differ in content, form and degree, in accordance with the gravity of the delict of the author State.

8. The question was not so much whether crimes could be defined—of course they could, in one way or another—but rather who would be in a position to determine that a crime had been committed. The various possibilities outlined in chapter II of the Special Rapporteur's sixth report (A/CN.4/461 and Add.1-3) were not likely to meet the requirements. Mention had been made of the Security Council's role in determining aggression, for instance, and in resorting to counter-measures. The Security Council, however, was a political organ with powers under Chapter VII of the Charter of the United Nations to determine the existence of, for example, a threat to peace or a breach of peace and to take such measures as the use or non-use of armed force with a view to maintaining and restoring international peace and security. Its competence did not extend to determining the crime of a State in the legal sense. As the Special Rapporteur pointed out in his sixth report, thus far the Council had never characterized a State as an aggressor, let alone determined the commission of a crime of a State within the meaning of article 19 of part one of the draft.<sup>5</sup> It was not the Council's constitutional function, nor did the Council have the technical means, to determine the existence or consequences of any wrongful act, including the other crimes covered by article 19. Its competence in that connection was confined to the purposes set out in Chapter VII of the Charter.

9. In his fifth report (A/CN.4/453 and Add.1-3), the Special Rapporteur had raised the question whether there might have been an evolution in the Security Council's competence, having regard to the organized reaction to such serious international breaches as were reflected in Security Council resolution 687 (1991) of 3 April 1991, requiring Iraq to make reparation for war damage, Council resolution 748 (1992) of 31 March 1992, taking

measures against the Libyan Arab Jamahiriya for failing to extradite the alleged perpetrators of the Lockerbie terrorist act, and Council resolution 808 (1993), on the establishment of an international tribunal. Each of those resolutions dealt with the maintenance of the peace and security of mankind and clearly fell within the competence of the Council. Whether or not there had been an evolution in the competence of the Council, however, was a question of interpretation of the Charter of the United Nations and fell outside the Commission's mandate. In any event, no convincing argument had been adduced to show that, as a result of that practice, the Security Council's competence in the field of State responsibility for so-called "crimes of State" had developed.

10. If the concept of State crime could not be established, the work on international responsibility could be dealt with from the standpoint of State responsibility for international delinquencies, on the one hand, and of the criminal responsibility of individuals for serious crimes, on the other. Progress had been made on the draft Code of Crimes against the Peace and Security of Mankind on the assumption that the Code should be directed only at crimes by individuals, though the individual concerned would have ties with the State. In the circumstances, he would advocate caution: it would be unwise to embark hastily on deliberation of the consequences of State crimes before the whole concept had been reconsidered and further guidance sought from the Sixth Committee.

11. Mr. de SARAM expressed his thanks to the Special Rapporteur for his learned reports, which examined the various issues that would, in his view, need to be considered by the Commission in determining how it might, in part two and possibly also in part three of the draft, give effect to the provisions of article 19 of part one of the draft which had been formulated by the Commission in 1976.<sup>6</sup>

12. It seemed clear, in his view, that there were certain basic understandings within the Commission as to the "crime-delict" distinction made in article 19. There were, of course, various "internationally wrongful acts" (breaches of international obligations) in the field of State responsibility that were attributable to a State. They differed in magnitude, according to the subject-matter of the obligation breached; the significance the international community attached to the obligation; the bilateral or other scope of the obligation; the circumstances in which the breach of obligation occurred. When the wrongful act was of a violent nature, involving injury to person or damage to property, particularly on a scale large enough to bestir the "conscience of humanity", the use of the word "crime" to convey revulsion and condemnation was usual in day-to-day parlance, as well as in political and other non-legal contexts. The use of the word "crime" in that sense was not, of course, what the Commission had had in mind when it had formulated article 19. Nor had it been the intention of the Commission to transplant the concept of "crime" as it was commonly understood in national criminal justice systems to the inter-State level.

<sup>5</sup> See footnote 3 above.

<sup>6</sup> *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 *et seq.*

13. The Commission's purpose had been, as it would appear from article 19, paragraph 2, that a breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole would be treated in the draft articles in a way that was in keeping with the fundamental importance of the international obligation breached and in a way that would be distinguishable from the treatment of breaches of lesser international obligations, for which the Commission, in article 19, employed the term "international delicts".

14. As the Special Rapporteur had rightly observed, a number of questions arose when one considered how the concept of "crime", as expressed in the definition in article 19, paragraph 2, could be implemented in the provisions of part two, and possibly part three of the draft. They might cause some difficulties, given the general terms in which paragraph 2 of the article was couched—difficulties that the Commission had apparently also encountered in 1976, as was apparent both from the non-exhaustive, even illustrative, nature of the four categories of internationally wrongful acts listed in paragraph 3 and from the traces of subjectivity remaining in the language of that paragraph.

15. He was mindful of the note of caution expressed by the Chairman that it might be conducive to a more orderly discussion of matters in the Commission at that stage if, in the present plenary debate, decisions that were reached by the Commission in 1976 were not reopened and if the Commission were to concentrate, rather, on how, having regard to the provisions of article 19 in their present form, one might in part two, and possibly part three, give effect to the "crime-delict" distinction in terms of the appropriate substantive and instrumental consequences. Yet the issues raised by the Special Rapporteur in chapter II, section A, of his sixth report and the observations by members called for brief comment on the appropriateness of the introduction of the concept of "crime" in article 19.

16. First, and as to the principle question that clearly arose, he shared the view that the introduction of the concept of "crime" in article 19, paragraph 2, seemed to make difficult provisions even still more difficult to apply. The concept of "crime" was fraught with national criminal law connotations. The elaborate language of paragraph 2 stemmed in large part from the rather circuitous compromise terminology of the *jus cogens* provisions of article 53 of the Vienna Convention on the Law of Treaties.

17. Secondly, there appeared to be an intrinsic flaw in the notion, expressed in article 19, that a State could be guilty of a crime. Crimes were committed by individuals. There was the *mens rea* requirement, which was essential for a finding that a crime had in fact been committed by the individual accused. That requirement was unlike, and should be distinguished from, the procedure for the "attribution of responsibility"—the legal fiction through which, for purposes of ensuring that there should be adequate compensation for damage caused, a superior was not permitted to escape responsibility for compensation. *Mens rea* was not, naturally or logically,

transferable. It was not possible, naturally or logically, to attribute the *mens rea* of one individual to another, still less from an individual to a legal entity such as a State.

18. Thirdly, it seemed unreasonable, and unjustifiable, to cast the shadow of criminality over an entire people of a State for the acts of the few individuals responsible for the commission of a crime.

19. Thus, considering matters, at least from a purely technical point of view, he did not believe that the introduction of the crime-delict distinction was necessary or appropriate in the articles on State responsibility, the purpose of which was not to punish States but to require them to compensate for damage caused. Moreover, as already pointed out, the introduction of such a distinction might tend to detract from, rather than enhance, the possibility of the widest possible acceptance of the draft articles.

20. The question had been raised earlier by another member as to whether substitution of a more appropriate expression for the term "crime", in article 19, might not possibly remove the difficulties which the introduction of such an expression appeared to cause. He was not altogether certain whether there was any other descriptive term that could successfully be substituted for the term "crime" in article 19 in order to remove the difficulties. It seemed to him that the intention in seeking to make the crime-delict distinction was not simply to convey a difference of degree but one of "species".

21. It seemed to him that there was a related question to be considered, namely, why was it considered necessary to use the term "crime", or any other descriptive term, in order to do what was sought to be done in article 19: to introduce into the articles on State responsibility the concept of *jus cogens* obligations; and then to distinguish a breach of a *jus cogens* obligation from other lesser international wrongful acts? If such was the aim, the use of the term "crime" or any other descriptive term was unnecessary. All that would seem to be required was: (a) to follow closely, and limit oneself to, the language of the *jus cogens* provision in article 53 of the Vienna Convention on the Law of Treaties, without using any additional accompanying descriptive term—and without introducing any illustrative list of examples for which there might not be adequate *lex lata* support; and (b) to indicate what remedies a breach of a *jus cogens* type of obligation would entail, in addition to those required for other wrongful acts.

22. The second principle question that seemed to arise, from the introduction of the concept of crime in article 19, was the question to which chapter II, section B, of the sixth report of the Special Rapporteur referred. The question was whether there were at that time at the inter-State level, or would there be in the foreseeable future, the institutional arrangements necessary for the implementation of the provisions of article 19, paragraphs 2 and 3. He said that viewing matters in that light, a virtually insuperable difficulty presented itself: central to such institutional arrangements would be the requirement that there should be a body responsible for making the very serious, and very difficult, determination as to whether on the facts of a case which could be complex and disputed, a State had in fact committed a

crime. It was a judicial determination, to be made by a judicial body; and neither the Security Council nor the General Assembly—having regard to the authority vested in them under the Charter of the United Nations or to the manner of their proceedings—appeared to be the appropriate bodies. The only existing judicial body that might perhaps be appropriate—ICJ—might not, because of the consensual basis of its competence, have the necessary jurisdiction over a particular case. Thus it seemed to him that it was difficult to be hopeful that the institutional arrangements necessary for giving effect to the provisions of article 19 would be in place, at least for many years to come. If a determination had to be made as to whether a State had committed a crime, it would be important for the determination to be made by a judicial body whose jurisdiction was widely accepted, to which such cases were uniformly referred, and, eventually, which made its determination on the basis of a consistent body of jurisprudence. For those reasons, it would be many years before the necessary institutional arrangements for giving effect to the provisions of article 19 were in place.

23. If, however, provisions of the *jus cogens* type were included in the draft articles without the accompanying conclusion that a breach of a *jus cogens* obligation would constitute a crime, the difficulties in establishing the appropriate determination-making procedures would be considerably reduced.

24. Finally, as to the question of what ought to be the special consequences of an international crime (the question raised in chapter II, section C, of the sixth report of the Special Rapporteur), it seemed to him that as far as the “substantive consequences” were concerned, it might be a relatively easy matter to resolve: cessation, restitution in kind (to the greatest extent materially feasible and, thus, without limitation), trial of the individuals responsible, and non-recognition of the consequences as legal. Where more than one State was injured, there would, of course, have to be the necessary coordination in the submission of claims. Ad hoc procedures for the submission and consideration of claims might also prove necessary.

25. However, problems clearly arose in the area of what the Special Rapporteur termed “instrumental consequences”: the imposition of sanctions under the Charter of the United Nations, and perhaps under other applicable treaties as well, the provisions of the Charter, of course, being paramount; and the difficult question of the entitlement to take countermeasures.

26. Yet, it seemed to him that the necessary distinction to be made, when considering the question of countermeasures in the present context, was not between countermeasures permissible in cases of “crimes” (or other cases of *jus cogens* breach) and cases where there was no “crime” (or other *jus cogens* breach); but, rather, the distinction between, on the one hand, countermeasures that were permissible where there was an applicable multilateral, or even bilateral, treaty regime (the Charter or otherwise) and, on the other, cases where there was no such applicable treaty regime.

27. It should be kept in mind that what was of relevance under an applicable treaty regime was, of course,

not merely the question of permissible countermeasures but also the provisions on the peaceful settlement of disputes.

28. Furthermore, where no treaty regime (the Charter, or other multilateral, or bilateral treaty) applied, regulation or coordination of permissible countermeasures in the event of an obligation breach would surely be necessary—if chaos were not to result from the taking by individual States of countermeasures in an uncoordinated manner.

29. Mr. PAMBOU-TCHIVOUNDA drew attention to the contrast between the brilliant erudition displayed in the Special Rapporteur’s fifth and sixth reports and the relative prudence, not to say modesty, of his proposals. In chapter II of the sixth report, members of the Commission were invited to comment on a number of questions pertaining to the consequences of State crimes, in particular to reflect on how to remedy the harmful consequences arising from the commission by a State of an internationally wrongful act of a criminal nature whose consequences affected the fundamental interests of the international community. The object of the exercise, as he saw it, was to elaborate a legal regime that would be applicable in such cases.

30. Article 19 of part one of the draft, adopted by the Commission in 1976,<sup>7</sup> had divided the victims of internationally wrongful acts into two categories: in the case of an international delict, the victim could be one or more States; in the case of an international crime, the victim was the international community of States as a distinct legal entity. Thus the nature of the victim was the touchstone for determining whether the internationally wrongful act concerned constituted a delict or a crime. In that way, the codification exercise had helped to promote the international community to the status of, as it were, a quasi-public legal authority. The concept of international crimes reflected in that approach had the merit of being dynamic rather than static.

31. With regard to chapter II, section A, of the sixth report, the Special Rapporteur himself was scarcely able to disguise his doubts about the appropriateness of the definition set out in article 19. In his own view, the Commission would find itself in a blind alley if it insisted on maintaining that definition at all costs.

32. So far as the consequences of internationally wrongful acts were concerned, the international community was clearly under an obligation to show active solidarity with any State whose existence as such was threatened by the actions of another State, as well as the related obligation not to recognize the consequences of those actions as legal. To his mind, a threat to a State’s existence constituted a threat to the international community as a whole and called for collective self-defence. Recent developments in that regard showed a welcome trend towards elevating the concept of the international community from the realm of abstraction or myth into that of experience and history. In that connection, the role of non-governmental organizations in loosening the grip of the concept of national sovereignty on matters of

<sup>7</sup> Ibid.

elementary humanity deserved note and commendation. Another sign of the times were the current developments towards a renewal of the United Nations through changes in the permanent membership of the Security Council. A more balanced representation of various regional groups, served by a more equitable distribution of permanent seats, would enhance the Council's credibility in identifying certain international crimes and in authorizing collective punitive or self-defence operations on behalf of the international community.

33. Authorization of punitive action by the Security Council had, however, to be preceded by the identification of the internationally wrongful act as a criminal act. The Commission might well consider recommending a review of the Charter of the United Nations and of the Statute of ICJ in that respect, as well as a number of other institutional innovations that would prove necessary to implement certain ground rules applicable to international crimes of States. Among the points to be considered he would suggest the following: (a) whether the identification of the crime should be based on general international law, and whether the principle of *nullum crimen sine lege* had to be observed; (b) whether State responsibility should be subject to the statute of limitations; (c) whether responsibility had to be limited to the chief perpetrator or could it be extended to possible accomplices, and in either case, whether individuals could be charged as well as States; and (d) whether punitive operations could be undertaken at regional level and, if so, whether it was necessary to devise a decentralized executive mechanism.

34. Mr. VILLAGRÁN KRAMER said the new balance of power following the end of the cold war cast a new light on the Commission's work relating to international crimes and delicts. The fundamental notion of *lex lata* could be used to facilitate analysis of that question, but if the Commission ventured into the area of *lex ferenda*, it would be opening a Pandora's box of options that would be difficult to circumscribe.

35. The latest contributions by the Special Rapporteur to the material on State responsibility were extremely useful in terms of the treatment of the general subject of international crimes and could be used to advance the discussion in academic circles and in the United Nations. Unfortunately, they proposed no new articles on State responsibility in respect of international crimes. They also left open to question what was to be done with article 19 of part one: rejection, amendment or strengthening? He sometimes had the impression that the Special Rapporteur wanted to be free of article 19, and particularly, of *lex lata*, which was too limiting for his taste.

36. The fundamental issue was not what general theory should be applied by the Security Council or other United Nations organs in regard to international crimes. No matter what instrument the Commission produced, the Charter of the United Nations would remain the ultimate regulator of the behaviour of States. Some representatives in the Sixth Committee had spoken of a de facto revision of the Charter. That might be true in political terms: the operations ordered by the Security Council in Lebanon and Kuwait did amount to a new role for that organ—a new interpretation of international

law, an expansion of the sanctions regime. For juridical purposes, however, the Charter could not be regarded as having been revised by such actions.

37. The Special Rapporteur's work on crimes and delicts reflected the remarkable ability of jurists from his country to identify the fine points of legal subject-matter. The need now, however, was to identify criteria rooted in international practice. The Commission did not need to concern itself with defining an international crime. In general terms, the components of an international crime emerged from jurisprudence, the practice of States and the rulings of international tribunals. Specific examples of what constituted an international crime could be found in the work of the Nürnberg and Tokyo Tribunals and of ICJ in the *Barcelona Traction, Light and Power Company, Limited* case.<sup>8</sup>

38. The Commission itself, in adopting article 19 of part one in 1976,<sup>9</sup> had clearly indicated its reasoning on what should be considered crimes in specific circumstances. The recent book by Weiler, Cassese and Spinedi,<sup>10</sup> showed that there was basic agreement among jurists on what a crime was and what a delict was and that the distinction between the two depended on the attribution of international responsibility, not on the criminal effects. ICJ indicated that in making rules on a right or a duty, it was necessary to keep in mind the peremptory norms of law, sometimes called *jus cogens*. It should be kept in mind that a violation of *jus cogens* could be considered an international crime.

39. What the Commission could do now was to incorporate components of the definitions of international crimes—for example, crimes against humanity—in the draft Code of Crimes against the Peace and Security of Mankind or the draft statute for an international criminal court. It must also specify whether there was a distinction to be drawn between international crimes and international delicts. And finally, it must analyse the legal consequences of international crimes in the context of State responsibility.

40. The Special Rapporteur had raised the question of whether the consequences of crimes should be the same as those of delicts, and if not, how they should be handled. It was illuminating in that context to look at the commentary to article 19, drafted in 1976.<sup>11</sup> It showed that the Commission had not intended the article to establish a single, rigid system for responsibility for crimes and delicts: significant variations were to be allowed for within that system. At the current session, the Commission was working on a draft statute for an international criminal court and on the draft Code of Crimes against the Peace and Security of Mankind. In so doing, it was dealing with various categories of crimes, exploring the ramifications of aggression, genocide, apartheid, and so on. If categories were being established in crimi-

<sup>8</sup> Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

<sup>9</sup> See footnote 6 above.

<sup>10</sup> "Obligations *erga omnes*, international crimes and *jus cogens*: A tentative analysis of three related concepts", *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, J. Weiler, A. Cassese and M. Spinedi, eds. (Berlin-New York, De Gruyter, 1989).

<sup>11</sup> See footnote 6 above.

nal matters, why should that not be the case with State responsibility for international crimes? There was nothing in international law to compel the Commission to restrict itself to a single, rigid formula for the consequences of acts incurring State responsibility. It would be entirely appropriate, for example, to pinpoint international effects in terms both of responsibility and of penalties for crimes.

41. The Special Rapporteur's approach to the international responsibility of States had the disadvantage of freezing the discussion. There were no new proposals that might bring the Commission closer to completing its work on parts two or three, and the suggestion had been made that part one should be revised. He greatly feared that the Commission would not be able to complete the draft on State responsibility in the five-year time-frame accorded to it—and it had already been at work for many, many years now. It must really make every effort to push through to completion of its task.

42. The consequences of delicts had already been defined; the thing to do now was to determine responsibility for crimes. In that connection he would point out that responsibility for crimes could vary, depending on the crime. In international law at the present time, there was no difficulty in establishing different and specific levels of responsibility for various crimes. At the same time, the Special Rapporteur's approach to determining a general level of responsibility was a good one: what were the circumstances that increased the responsibility of a wrongdoing State, and what restrictions on reprisals would no longer apply for various crimes? In respect of the circumstances, the Special Rapporteur had gone right to the heart of the matter by positing two that were confirmed by the jurisprudence of the Security Council and the practice of States: non-recognition of rights and failure to cooperate with the Council. Non-application of restrictions on reprisals would be relevant only in cases involving *jus cogens*.

43. It was also important that, in dealing with the consequences of crimes, concerns about responsibility *stricto jure* should be separated from institutional penalties that might be envisaged in the context of *lex lata*. In Articles 39 and 41 of the Charter of the United Nations, very clear guidelines were established for the adoption of measures by the Security Council. The range of situations covered in those articles shed light on the approach the Commission should use regarding penalties.

44. The Special Rapporteur had asked for guidance from the Commission regarding reprisals and the use of force. At the forty-fourth session, the Commission had had a very useful discussion in which it had determined that the use of force could be condoned only as a response to aggression or in exercise of the right to self-defence, and in the very exceptional cases of self-help authorized by the Charter of the United Nations. There were also instruments like the Inter-American Treaty for Reciprocal Assistance that identified cases in which Latin American States could apply sanctions involving the use of force, as long as the Security Council had approved such actions. States could thus respond, either in the context of the United Nations or at the regional

level, in the event of international crimes. Clearly, any reprisals must be carried out not with the use of weapons, but by peaceful means, and must not impinge on existing prohibitions under *jus cogens*. They could be applied unilaterally by States only if they were acting to facilitate the implementation of a Council resolution or a decision of a regional body competent to apply sanctions. The Special Rapporteur was right to say that States must not be unduly generous in considering and adopting collective sanctions: the regime of *lex lata*, which allowed for a certain degree of flexibility, should be applied.

45. The subject of collective sanctions led into a very new and complex area, namely the right of humanitarian intervention, a concept that had attracted criticism and raised controversy. But the records showed that the international community had been constrained to act, in defence of human beings, but did not acknowledge the legitimacy of humanitarian intervention. Unilateral humanitarian action was prohibited, yet collective efforts, though feasible, were rarely mobilized. The case of Rwanda hardly needed to be mentioned in that context. It was not enough to resolve the problem *de lege ferenda*; it was *lex lata* that would legitimize collective humanitarian action taken under the auspices of an institution.

46. As to who could bring responsibility for crimes into play, according to the theory of State responsibility, that could only be done by the affected State, or States in the case of a multilateral treaty. As Eduardo Jiménez de Aréchaga had rightly pointed out, one of the characteristics of an international crime was that all States could act, not only the victim.<sup>12</sup> But act in what framework? The voluminous footnotes provided by the Special Rapporteur illuminated the concept of the organized international community, the institutional structure encompassing the community and the scope of its powers. Nearly all writers on the subject believed that the use of force and the application of specific measures in the event of an international crime was permissible only with the approval of the international community, as represented by the United Nations. Accordingly, the Commission could not depart from the existing structure of the United Nations when dealing with the consequences of crimes.

47. As to the Security Council's competence, a problem existed from the juridical standpoint because there was no control mechanism to determine if and when the Council overstepped or abused its authority. On the other hand, the risk that the Council might adopt a patently illegal decision was minimized, in his view, by the system of checks and balances built into the international community as currently organized, namely, the requirement of action by consensus in the Council. It was true, however, that in the General Assembly, the Group of 77 had on occasion abused the sheer power of its numbers, virtually precipitating a constitutional crisis in the case of the resolution on South Africa in 1975,<sup>13</sup> one which, from a purely political standpoint, had certainly been justified.

<sup>12</sup> "Crimes of State, *Ius Standi*, and Third States", *International Crimes of State . . .*, op. cit., p. 255.

<sup>13</sup> General Assembly resolution 3411 (XXX).

48. The Commission's progress on the topic of State responsibility was such that its drafting work on part two could be completed very soon: a few additional proposals from the Special Rapporteur would suffice. He would like to see a final draft of part two before the end of the present session, and appealed to the Special Rapporteur to engage in elaborating a text which, while it might not satisfy all expectations, at least would achieve the Commission's goal in the current exercise.

49. Mr. PELLET said that he could not imagine that an ordinary breach of a bilateral agreement could be placed on an equal footing with genocide. That simple fact would appear to dispose of the underlying issue raised both by the Special Rapporteur and in the course of the debate. The question was not complicated: was the concept of an internationally wrongful act unambiguous or was it not? Notwithstanding the defence put forward by Mr. Rosenstock (2339th meeting) and Mr. He, the answer could only be an incontestable no. A breach of an air transport agreement, on the one hand, and an act of aggression, on the other, could not and were not part of a single legal regime. He did not rule out that the two internationally wrongful acts might have points in common. In both cases, they incurred the responsibility of the State that had committed the act, and they also shared some of the ensuing legal consequences: an obligation to compensate and, in particular, an obligation of cessation. That the two offences, as different as they might be, were the subject of the same draft articles on State responsibility was therefore justified.

50. But the similarities ended there. To give a hypothetical example, the fact that France, disregarding a bilateral agreement, refused to allow British planes to land at Orly Airport had nothing in common with the holocaust committed by the Nazi State. The systematic extermination of a people had few similarities with the violation, regrettable as it might be, of the basic human rights of an Algerian national detained in a French police station, even if it cost the Algerian his life.

51. The difference between the two categories of internationally wrongful acts was obvious: in one case, which he would provisionally call "crimes", the international community as a whole was concerned. Genocide and aggression were basic infringements of the international public order that enabled States to tolerate each other despite their individuality, their differences and their divergent standpoints. France breached an air agreement and Great Britain could complain, but it was no more than an episode: the fundamental principles upon which international society was based, namely the coexistence of sovereign States, were not threatened in any way. The same would be true if a foreigner were beaten up at a police station in France. On the other hand, if South Africa made apartheid an integral part of its political system, or Yugoslavia (Serbia and Montenegro) carried out "ethnic cleansing" with a view to creating ethnically homogeneous territories, or if Iraq invaded a sovereign State, it was something that shook the very foundations of international society. Fortunately, such cases were rarer, but they gave rise to different and stronger reactions than did simple delicts.

52. With all due respect to the Special Rapporteur and to Mr. Calero Rodrigues (2339th meeting), who had argued along the same lines, he did not agree with the emphasis placed upon the question of who determined that a "crime" had been committed (chapter II, section B, of the sixth report), because such a question did not constitute a prerequisite. As he understood it, the topic of State responsibility had long been divided into three parts: part one, on the origin of State responsibility; part two, on its content, form and degree (where it would be more accurate to say that that concerned the consequences of responsibility); and part three, on the settlement of disputes and the implementation (*mise en oeuvre*) of international responsibility. The question of who determined that a "crime" had been committed fell solely in part three.

53. If the Commission was to base itself on existing law, *lex lata*, the reply would be that it was for each State to assess whether international law had been breached. That might appear to be unfortunate to some people. He too would find it more reassuring if an international body, instead of States, had jurisdiction and determined whether international law had been violated. But that was far removed from the reality of today's society. In saying so, he did not wish to minimize the enormous progress made in the Organization since the beginning. The General Assembly, the Security Council and ICJ were not without influence, especially when it came to matters relating to the use of armed force. That was quite an improvement over the previous situation, when freedom of interpretation, action and reaction had been totally unfettered. In that sense, it might be fair to speak of the organized international community, an expression that the Special Rapporteur had often employed. The General Assembly could take a decision on just about everything, and it made the most of that opportunity. Yet in regard to a reaction to a wrongful act, as in all others, it had no power of decision: it could only recommend. That was not as insignificant as was often thought. The very fact that it made recommendations meant that the Assembly allowed and authorized something that could have a considerable impact in matters pertaining to the issue under consideration. For example, in many resolutions the Assembly had declared that peoples subjected to colonial or foreign domination—a crime under article 19, paragraph 3, of part one of the draft—could use all means to combat such domination. That implied even the use of armed force.

54. The problem was different in the case of the Security Council, which could sanction and punish on the basis of mandatory obligations, but its action was narrowly confined to its main responsibility: the maintenance of international peace and security. That was very important in the case of aggression, which was plainly an example of a "crime". Yet, and there he agreed with the Special Rapporteur in his fifth report, that was a special regime and it would be dangerous to conclude that the Security Council could characterize all crimes, even if the current trend was towards a considerable broadening of the concept of a threat to peace. The trend itself had its own limits and an exaggerated extension of the concept of a threat to peace was probably not very sound. In that regard, Mr. Bennouna (2339th meeting) had probably gone too far in asserting that the Security

Council's recent practice was of no concern to the Commission. It was, but Mr. Bennouna was right inasmuch as that practice did not form the basis for a general regime of international responsibility, even for international crimes. Moreover, even in cases of aggression, States had the power to assess the situation for themselves, because Article 51 of the Charter of the United Nations said that States retained the possibility of a first reaction, that is the inherent right of individual or collective self-defence.

55. As to ICJ for which he had enormous respect, the "State" deadlock was even more obvious. The Court could give an opinion on the existence of all breaches of international law, including the existence of a crime, and it could draw the necessary conclusions. Referral to the Court, however, depended entirely on the willingness of States, and thus the Court was only a very exceptional substitute for the determination by the State itself of a wrong. It was not satisfying, but it was the reality. States remained for the most part the judges of their own cause, which meant that, if they regarded themselves as the victims of an offence, it was for them to decide. If they decided that non-compliance with international law was a crime, it was for them to say so. Safety nets were none the less available in the form of two principles: the prohibition on the use of force in international relations and the obligation to settle international disputes peacefully.

56. So much for *lex lata*. He did not think that it was unreasonable to go further, and Mr. Calero Rodrigues (ibid.) was probably correct in saying that an international body should be given the power of determination. Yet the Commission's task was not to legislate, but to codify. It should say what the law was and should develop it progressively; it should not start a revolution. It must resist the temptation to rewrite all international law. The Commission did not have the power to confer a new jurisdiction upon the United Nations and its organs or to amend the Charter of the United Nations. At most, it could suggest that a legal mechanism might be set up in cases of disagreement as to whether a crime had occurred, for example, as envisaged in the Vienna Convention on the Law of Treaties with regard to *jus cogens*, but it would be wise to contemplate that possibility only as part of an optional protocol. It might also be useful to ask the Sixth Committee whether it was prepared to accept mandatory jurisdiction in connection with such questions.

57. It none the less had to be borne in mind that a determination of whether a crime had been committed could only be made after the fact: no State preparing to commit aggression would wait to see whether ICJ ruled that the planned act was a crime. In any event, that was something relating to part three of the draft. But the hardly realistic nature of any institutional mechanism for determining a crime did not release the Commission from the need to indicate the consequences of the concept defined in part two.

58. He had been surprised earlier to hear that several colleagues were opposed to the very concept of crime. He was surprised for two reasons. First, the difference between "ordinary" offences in international law and much more serious acts was a basic fact in international

life. Secondly, the Commission had provided a definition of crimes in article 19 and it would not be wise to undo that work. Although part one was not gospel, he agreed with the Special Rapporteur that article 19 had been drafted with great care after lengthy discussion and the Commission should therefore consider it carefully before deciding to change it. He concurred with Mr. Mahiou (ibid.) that article 19 should be amended only if the Commission concluded that the definition adopted on first reading did not square with the consequences of the concept of crime as revealed by actual observations. Subjective personal opinion should be discarded. The definition could be changed if, in the end, it was found that it failed to make a clear distinction between crimes and delicts.

59. Unlike Mr. Rosenstock (ibid.) and Mr. He, who regrettably were against both the word "crime" and crime itself, Mr. Bennouna (ibid.) had expressed opposition to the use of the word, arguing that it was wrong to talk of "crimes" of the State, because that would be tantamount to a criminal law concept of responsibility, something that was out of place in international law. Like it or not, the word crime existed; article 19 had given rise to abundant commentaries on it, and it was in common use. Moreover, it had the psychological advantage of stressing the exceptional seriousness of non-compliance, in contrast to delicts, which were ordinary offences. The word also had a tradition; for example, it had been used in the Convention on the Prevention and Punishment of the Crime of Genocide, and the Commission was soon scheduled to examine the draft Code of Crimes against the Peace and Security of Mankind. There were many other examples. Admittedly, the draft Code concerned individuals, not States, but one of the consequences of the very concept of international crime was that it tore through the veil of States and, once a State crime existed, that crime was indissolubly linked to crimes of individuals. The determination of the existence of a State crime was the condition for the incrimination of an individual. However, must it be deduced from the word "crime" that the responsibility of the State committing it was necessarily criminal? He saw no disadvantage in the concept of the criminal responsibility of States. Nazi Germany had been a criminal State, and there was no reason not to say it loud and clear.

60. However, in his opinion the discussion would not lead very far. The international community was not identical with national society, and international law was not the same as national law. The State was not the individual, and State responsibility in international law was neither criminal nor civil; it was, very simply, international, different and specific. International responsibility was a concept unique to international law. The Commission must go beyond domestic law. It should retain the word "crime" and drop the misleading analogies in domestic law. However, if the word "crime" had such a strong emotional connotation, a more neutral replacement should be found, for example "internationally wrongful acts of an exceptional gravity" (*faits internationalement illicites d'une exceptionnelle gravité*).

61. Article 19, paragraph 2, did not deserve the criticism it had attracted. On the other hand, paragraph 3, which contained a list of examples, was questionable as

far as the very principle was concerned. First, it was bad legal technique to give examples in an instrument of codification instead of in the commentary, which was where they belonged. Secondly, the list was subject to the changing views of the times and would quickly become outdated; indeed it already was in part. Thirdly, contrary to the approach established by the Commission for the topic, paragraph 3 was a sudden intrusion of primary norms in a subject devoted to the codification of secondary rules. He was therefore in favour of deleting it, something which could be done on second reading.

62. Alongside the usual breaches of international law, there were others which were fundamentally repugnant to the conscience of the day, and that was precisely what article 19, paragraph 2 stated. A simple delict concerned one State alone, whereas a crime went beyond bilateral relations. It might be said that that was tautological, but it was no more tautological than the concept of *jus cogens*. Nor was it any more extraordinary than the universally accepted definition of custom, a general practice accepted as being law. No one contended that, because international law did not define "general" or "accepted", the concept of custom did not exist. The same was true of crimes. It was vague, but for that very reason it was realistic. The law was full of undefined concepts which altered with the times, with the subject concerned and with the changes in outlook. He had in mind such examples as "good conduct", the principle of proportionality or the concept of "reasonableness". The Commission had not been asked to draft a code of international crimes, but simply to define what it meant by that expression, and article 19, paragraph 2, did so in a sufficiently vague manner as to be able to adapt to the evolution of international society and in a sufficiently precise manner as to permit a distinction to be drawn between the two categories of internationally wrongful act: crime and delict.

63. Mr. de Saram, and perhaps Mr. Pambou-Tchivounda, had been opposed to the use of the word "crime" and had appeared to suggest that crimes should merely be regarded as violations of *jus cogens*. Although it was a tempting approach, he was not sure, for reasons adduced at the time by Mr. Ago,<sup>14</sup> whether it was valid. Whereas all crimes were violations of rules of *jus cogens*, the contrary did not hold. He had in mind, for example, *pacta sunt servanda*, a fundamental norm that he would gladly place in *jus cogens*. But it was also clear that not all violations of *pacta sunt servanda* were "crimes". The definition in article 19 was thus more suitable.

*The meeting rose at 1.05 p.m.*

<sup>14</sup> See, in particular, *Yearbook . . . 1970*, vol. II, p. 177, document A/CN.4/233.

## 2341st MEETING

*Friday, 20 May 1994, at 10.05 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

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

**State responsibility (continued) (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>2</sup> A/CN.4/L.501)**

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. PELLET said that he had little to add to his earlier comments (2340th meeting). He very much doubted whether it was advisable to go into the question of the institution that would be competent to determine whether a crime had been committed; in any event, it could only be a somewhat pointless *de lege ferenda* question. That did not mean the Commission would not have to find a definition of crime. The definition proposed in article 19 of part one of the draft<sup>3</sup> appeared to be satisfactory provided, first, that, if the definition did not seem to be suitable, having regard to the consequences determined by the Commission, there would always be time to change it and, secondly, that, if the word "crime" gave rise to concern, if national law procedures were too entrenched in people's attitudes and if, inevitably, the word "crime" referred to criminal law, that word could simply be replaced by another. It would, however, be quite impossible, in his view, to discard the idea behind article 19 because the differentiation between ordinary internationally wrongful acts and those that were particularly serious for the international community as a whole was, quite simply, a reality that was rooted in positive law.

2. It had often been said that the difference between crimes and delicts was one of kind, not degree; and, since the transition from one category to the other was imperceptible and gradual, there had been talk of gradation. He was among those who favoured "relative normativity", but, in the case of crimes, he did not think that that was the right approach. There were, indeed, crimes, on the one hand, and delicts, on the other. Other terms could be found, but there was a distinction

<sup>1</sup> *Yearbook . . . 1993*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 *et seq.*

between ordinary internationally wrongful acts and particularly grave acts; that was a fact, and article 19 laid down a fairly clear criterion in that connection. Where a wrongful act affected the fundamental interests of the international community, it was a crime; in other cases, it was a delict. A delict was the norm, a crime being quite exceptional. The international community, unlike a nation, was not sufficiently integrated for numerous rules to be considered so essential to it that a breach of them would have to be elevated to a crime. That would come about “perhaps” and it was also why a flexible definition like that contained in article 19 was satisfactory. For the time being, crimes could only be acts that were very rare.

3. He had in the past voiced somewhat forcefully his disagreement with the Special Rapporteur’s approach and had done so in particular with respect to the rules applicable to countermeasures and the inclusion of the concept of fault in international responsibility. A lot of misunderstanding would have been avoided if the Commission had held earlier the discussion it was now having on international crimes. He continued to have many reservations about opening the door too wide to countermeasures in the case of delicts, but equally, it seemed to him that countermeasures were far more justified in the case of crimes. As much as the concepts of fault and punishment should, in his view, be banished from the ordinary law of international responsibility, the concept of fault did not seem to him to be out of place, subject to further discussion, in the case of crimes. Nor did it concern the concept of international crime, rather the consequences of crimes, an issue on which he would comment later on.

4. Mr. EIRIKSSON said that, to start with, he had no conceptual difficulties with the idea of State responsibility for crimes. It was perfectly possible to envisage the equivalent of *mens rea* in the case of acts of States. In any event, one could follow developments in the criminal liability of legal persons under national law which related more directly to the regime of strict liability.

5. As to the use of the term “crime”, while he was somewhat partial to calling forth some of the emotive and psychological elements embodied in that term, he would not allow those more peripheral considerations to stand in the way of a consensus. Indeed, attaching too much importance to how that category of acts was named might be seen as a sign of weakness when it came to substance.

6. He agreed with Mr. Pellet that crimes were different in kind from other wrongful acts and that it was not just a matter of degree. The question was how to define them. He was not entirely satisfied with the existing wording of article 19 and would question in particular the list set forth in paragraph 3. In his view, apart from the case of aggression, none of the sub-categories referred to in the article should be the subject of separate treatment. There was less need for specificity in the draft articles before the Commission than in the draft Code of Crimes against the Peace and Security of Mankind or the draft statute for an international criminal court. Any adjustments to article 19 could be left until the second reading. The object of the exercise in which the Com-

mission was engaged was to complete part two of the draft and, thus, the first reading of the draft articles. He would come to part three later.

7. As for the work still to be done on part two, he could envisage three scenarios. First, the Commission could conclude that the matter was too complicated for the time being and could revert to it on second reading. In that event, the following two situations could arise: either the future members of the Commission would be better able to tackle the problems and to complete the job or they too would abandon the exercise and would revert to part one, deleting article 19 and giving the draft articles the title “State responsibility for all but the most serious unlawful acts”.

8. Secondly, the Commission could decide that the consequences of crimes did not in fact differ from those of other wrongful acts. The question whether article 19 should be retained would then arise. Even in that case, arguments for its retention on ideological or symbolic grounds might be invoked. For instance, Mr. Villagrán Kramer (2340th meeting) had referred to the Civil Code as being for the rich and the Penal Code as being for the poor. He, for his part, was opposed in principle to colouring legal texts in that way. Even if the Commission concluded that there were no differences in the consequences of the various wrongful acts, however, it should not take any decision on article 19 at the current stage.

9. In any event, a third scenario was more likely, namely, that the Commission would identify relevant differences in the consequences of the acts in question, based on an acceptance of article 19. The question of who would determine that a crime had been committed prompted the same answer as in the case of other wrongful acts, except in certain exceptional cases: it was for the injured State itself to decide.

10. With regard to part three, as he had indicated at the forty-fifth session, he was ready to study the Special Rapporteur’s proposals which one member of the Commission had described as “revolutionary”.<sup>4</sup> But he did not think that developing a comprehensive system for the settlement of disputes was essential to the draft under consideration if that would delay the completion of the first reading. That could always be agreed in the final stages of the adoption of the draft articles, for example, at a diplomatic conference.

11. So far as the “acceptability criterion” was concerned, the Commission had tried in many areas to assess the extent to which the results of its work would be acceptable to States. The Commission must combine its forward-looking role with a measure of realism. It must be realistic and pragmatic, but must never forget that it was not laying down an unappealable ruling, like a supreme court. Its work would be examined by the competent bodies of States that would be able to represent their own interests.

12. Referring to the consequences of crimes, the most obvious, being *erga omnes* in character, required separate treatment of the concept of “injured State”. The

<sup>4</sup> Yearbook . . . 1993, vol. I, 2310th meeting.

previous Special Rapporteur had already addressed that point. Furthermore, in his view, some of the safeguards laid down in part two were not applicable to crimes. It would be disloyal to the Drafting Committee if he restated too forcefully his opinion that some of them should not only not be made applicable to "ordinary" wrongful acts, but also that they certainly should not apply to crimes. The applicability to crimes of the defences provided for in part one should also be studied more carefully.

13. The Commission might identify remedies that applied to crimes in addition to those already contained in the draft articles of part two. The Special Rapporteur had already identified a number of them on a preliminary basis, particularly in chapter II of his fifth report (A/CN.4/453 and Add.1-3), where he quoted a writer who sought to distinguish political measures from legal penalties. In that connection, Mr. Pellet had commented (2331st meeting) on the academic nature of the distinction in international law between law and politics.

14. He urged the Special Rapporteur to guide the Commission, as soon as possible, along that third avenue so that it could complete the first reading of the draft articles before the end of the quinquennium.

15. Mr. YAMADA said that he welcomed the initiative taken by the Special Rapporteur in summarizing the main issues to be considered in connection with the consequences of internationally wrongful acts characterized as crimes within the meaning of article 19 of part one of the draft in his sixth report (A/CN.4/461 and Add.1-3) and would encourage other members of the Commission to adopt that approach.

16. First of all, when discussing questions of State responsibility, the real question that had to be faced was the conflict between reality and the ideal. It was necessary to pursue the ideal, but if it was too far from reality, its pursuit might be meaningless. On the other hand, extreme realism would not enhance the progressive development of international law. It was clear that a consensus on the need to deal with the crimes of States had not yet been reached by the Commission. In chapter II, section A, of the sixth report, the Special Rapporteur himself admitted that the question whether the very notion of international crimes of States should be retained was likely to arise. He himself therefore believed that the Commission must proceed in its work with great care in order to find a balance between reality and the ideal and to complete a set of draft articles that would be accepted by a large number of States.

17. Secondly, concerning the introduction of the idea of criminal responsibility in international law, he recalled that a previous Special Rapporteur, Mr. Ago, had affirmed that a survey of the practice of a large number of States revealed that a serious breach of essential international obligations brought about consequences different from those arising from other breaches of international obligations.<sup>5</sup> If that analysis was accepted, it could be said that there was a consensus on the fact that there were certain international rules whose breach entailed

specific legal consequences. The next question was what kind of regime of responsibility could be established in international law, taking fully into account the reality of the international community. In examining that question, the Commission should not stick to considering the analogy of the idea of criminal responsibility in internal law. No new regime of responsibility could function effectively unless it was accompanied by an institutional mechanism, meaning systems and procedures for determining that a crime had been committed, assigning and implementing responsibility and settling disputes.

18. Thirdly, there was no doubt that the question of the introduction in international law of a new regime on responsibility for the crimes of States was very significant from the standpoint of jurisprudence. However, the Commission must provide a clear definition of crimes and limit the scope of the discussion in order to have a useful and fruitful examination of the topic from the standpoint of codification of the law on State responsibility. The rules on State responsibility had been considered to be secondary ones, namely, rules concerning legal consequences brought about by a breach of primary rules, as explained by Mr. Ago.<sup>6</sup> That standpoint had to be maintained in considering the question of crimes of States.

19. As to the definition of crimes of States, it must first be considered whether and how they could be defined within the scope of secondary rules. The Commission had already had occasion to classify international obligations in part one of the draft articles in the context of secondary rules and had also already considered the modalities of breaches and the object of primary obligations in examining the legal consequences arising from breaches of such obligations. The Commission should keep in mind those lines of thinking in seeking to define crimes of States and to establish a new regime of responsibility from the standpoint of secondary rules.

20. Turning to specific comments on questions raised by the Special Rapporteur, he said he agreed with him that the definition had to be tackled first. It was necessary to define carefully the general notion of crimes rather than to try to give a list of crimes. The Special Rapporteur had been right to describe crimes of States, in chapter II of the fifth report, by comparison with breaches of obligations *erga omnes*. In other words, the notion of crime must be the basis justifying a regime of responsibility that differed from the regime applied to the breach of other obligations.

21. Concerning the determination of a crime, it must be made clear whether the word "determination" meant the final determination that a crime had been committed or a procedural requirement that justified certain countermeasures. The Special Rapporteur also used the word "finding" and that needed clarification in comparison with the word "determination". If "determination" meant final determination, then ICJ was the most appropriate body for carrying out such a function. ICJ had certain limits, however, which were inevitable in the current situation of the international community. As to the possible role of United Nations bodies, there was some doubt about the appropriateness of a *de lege*

<sup>5</sup> *Yearbook* . . . 1970, vol. II, p. 177, document A/CN.4/233.

<sup>6</sup> *Ibid.*, para. 11.

*ferenda* approach. Even from the standpoint of *de lege lata*, it was quite doubtful whether a determination of aggression by the Security Council could be considered a legal decision justifying the application of a special regime of responsibility for crimes under the Charter of the United Nations.

22. As to the possible consequences of a finding that a crime had been committed, he believed that questions concerning remedies and conditions to limit the countermeasures applied to such crimes must be considered in the light of the definition of the crimes. If the definition prescribed in article 19 was maintained, the issue would have to be considered by clarifying the concrete meaning of that definition.

23. A new regime of State responsibility could work effectively only if an institutional and procedural mechanism was well established. Otherwise, some countries might misuse the results of the efforts made by the Commission intended to benefit the international community as a whole in order to justify unilateral acts carried out in their interests alone.

24. Mr. KABATSI said there could hardly be a more stimulating subject for scholars than the one under consideration, but, in practical terms, the problems it posed were enormous. The Special Rapporteur appeared to be satisfied that article 19 defined crimes capable of being committed by States as breaches recognized as crimes by the international community. Paragraph 3 of the article gave examples of four categories of extremely serious breaches that offended the conscience of all mankind. But who committed such criminal acts? That question must be answered as a matter of priority. Individuals could commit crimes, including those listed in article 19, but he was not persuaded that the same could be said of States. In speaking of crimes of States, it was impossible to escape the normal definition of crimes and their consequences, as understood in internal law. If the same terms were used, then the meanings must also be as close as possible. He would therefore warn the Commission against using the word "crime" for lack of a better term. Particularly serious breaches of international obligations by States must *ipso facto* entail serious consequences quite different from those that flowed from ordinary breaches, as the Special Rapporteur had tried to show.

25. He entirely agreed with the views expressed by Mr. He and Mr. de Saram (2340th meeting), *inter alia*, to the effect that the attempt to "criminalize" States as provided for in draft article 19 should be abandoned. A State was more than its Government or the handful of persons who at any given moment might be in charge of its affairs. Should the current Government of the Republic of South Africa be burdened with the abhorrent breaches committed during the apartheid regime simply because the country had not yet atoned for such breaches?

26. As far as the definition in article 19 was concerned, he therefore believed that, at present, the idea of a State crime could not be justified from the legal standpoint. Once that was accepted, the questions of who could determine that a crime had been committed and of the possible consequences of such a decision would no longer arise. There were ways of dealing with serious breaches such as those considered crimes under Arti-

cle 51 and other provisions of Chapter VII of the Charter of the United Nations and under the general provisions of the regime of State responsibility. There were also provisions on the criminal responsibility of individuals having committed acts described as crimes in the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. It was in that direction that the Commission should proceed with its work.

27. Mr. YANKOV thanked the Special Rapporteur for his excellent reports on State responsibility, particularly chapter II of the sixth report, which helped a great deal to organize the debate on the subject by identifying the principal issues to be focused on in the discussion of crimes and by analysing various solutions to problems raised by the distinction between State crimes and State delicts. The Special Rapporteur's approach of raising direct questions for the Commission's consideration had proven to be very fruitful.

28. With regard to the definition of a crime and the resulting consequences, a number of elements had to be taken into consideration. In the first place, there was the magnitude of the obligation that had been violated: an assessment must be made of the seriousness of the act or the aggravating circumstances on the basis of the distinction between State crimes and State delicts and especially the substantive and instrumental consequences of crimes as opposed to delicts. Article 19, though not the ideal solution, gave an indication of the three main criteria to be applied in defining a crime. First, there must have been a breach of an international obligation essential for the protection of fundamental interests of the international community; and, secondly, the breach must have been a serious one, the magnitude being assessed according to both quantitative and qualitative criteria, meaning on the basis of the extent of the material or moral damage done and of the threat posed by the wrongful act, either directly or indirectly, to legal and moral values that were essential for the protection of fundamental interests of the international community. Those two factors were extremely important, for they showed that the distinction between crimes and delicts was not merely quantitative, but also qualitative. Account also had to be taken of the concept of intent or *dolus* and of fault on the part of the State responsible. The third criterion was that the breach of the international obligation must be recognized as a crime by the international community as a whole, as stipulated in article 19, paragraph 2. Experience and jurisprudence, of which there was very little in that area, except in respect of aggression, should of course be brought to bear.

29. As indicated in the commentary to article 19,<sup>7</sup> the distinction between crimes and delicts made it necessary to envisage separate regimes of responsibility, for the legal consequences of a crime were naturally more severe than those of a delict. Some substantive consequences could apply both to delicts and to crimes—for example, reparation—but the same was not true of countermeasures. Substantive consequences were thus an important factor in determining the difference between the two types of wrongful acts. The same was true

<sup>7</sup> See footnote 3 above.

of instrumental consequences, particularly of measures involving the using of force, which would not be appropriate in the case of a delict, but would be entirely legitimate for a crime of aggression in view of the natural right of individual or collective self-defence in order to preserve the essential interests of the international community. Article 19 thus had its merits and he thought it should not be rejected outright at the present stage of the Commission's work. He was not wedded to the current wording of the article, but he would be prepared to accept it in a spirit of compromise, even though international law had developed considerably over the years. The line of demarcation between public international law and private international law was very fluid, for example, and new ideas, such as environmental law, that did not fall into any established legal category were constantly emerging.

30. As Mr. Yamada had said, it was not sufficient to define State crimes: a viable institutional framework for applying that legal notion must also be envisaged. The Special Rapporteur's analysis of the powers and functions of the General Assembly, the Security Council and ICJ showed that, at present, the international community was not equipped to deal with the international crimes of States, but that did not mean that the Commission should not make suggestions or proposals for the reform of the current system until an ideal solution had been found.

31. Like many of the speakers that had preceded him, he believed that the Commission must not be put off by the difficulties it faced. Cooperation between the Commission and external experts could be very useful for making progress on the subject. Any such progress that the Commission made on the draft articles would help to strengthen the primacy of the law in international relations, to prevent conflicts and to facilitate the settlement of disputes.

32. Mr. THIAM said that the expression "State crime" was confusing. It did not mean a crime committed by a State because States were not natural persons and thus could not commit crimes. Only individuals could do so, even if they made use of the State apparatus to that end. Hence, States could not be criminally responsible for a crime, even if they were responsible at the international level for the consequences of the crime which they were bound to repair. A term should be employed that was better suited to the reality the Commission was trying to describe. That mistake was probably the result of the fact that international law always sought to borrow terms peculiar to internal law. Thus, although he agreed with the content of article 19, the terms used in it were unfortunate. It had to be revised before the debate on the rest of the subject began. Earlier remarks notwithstanding, article 19 had not been adopted unanimously 18 years previously. He himself had not been present when it had been adopted and he had formulated reservations on it at several seminars. It was not advisable to introduce new and revolutionary ideas that did not have any serious legal foundation.

33. Mr. BOWETT said that Mr. Thiam had raised the fundamental question whether a State, as opposed to individuals in charge of the policy-making of that State, could commit a crime. In his view, it could. Today, a

State could cause such damage to the international community as a whole that a society should not be allowed to shift the responsibility for crimes committed in its name onto mere individuals. He therefore had no moral scruples about accepting the concept of State crime, even if the collective sanctions against the State in question to which that crime might lead could well be prejudicial to all members of that State and not affect only its leaders.

34. The essential question was whether international crimes could be defined and, on that point, he did not think that the elements provided by article 19 in that regard were sufficient. The article contained only a list of various categories of obligation whose breach might give rise to a certain type of criminal responsibility. It did not propose a real definition of crime and the usefulness of the concept of a serious breach was all the more questionable in that it had never been applied in past years, not even against Iraq.

35. Assuming, however, that the concept was clearly defined in other norms of international law, it was still not clear how it was to be implemented, for instance, who would determine that a crime had been committed. There were three possibilities. The first would be for the State that was a direct victim of the wrongful act to determine itself that a crime had occurred. He was not in favour of that solution because of the consequences that might ensue, particularly the punitive measures that might be adopted not only by the victim State, but also by other States. The second possibility would be to let the Security Council decide whether a crime had been committed by virtue of the powers conferred on it under Chapter VII of the Charter of the United Nations. There was no reason for Council not to be able to do so and to decide what sanctions to impose if the alleged act was one of those referred to in Article 39 of the Charter. The third possibility, which might well be considered in the future, would be to create an impartial and independent judicial body, either ad hoc or permanent, with jurisdiction for defining certain acts as crimes. Needless to say, if such a body was created, the draft articles would have to be reviewed.

36. As to the consequences of a finding of international crime, if it were the Security Council that determined that a crime had been committed, it would also have to decide on the sanctions to be imposed on those responsible, within the framework of the powers conferred on it under Chapter VII of the Charter. If, on the other hand, it was a judicial body that determined that a crime had been committed, either it provided for sanctions and those sanctions were in fact imposed or it was unable to decide what sanctions to impose or the planned sanction could not be imposed on the alleged State, in which case it would be for the members of the international community to draw conclusions from that finding of crime in their own relations with the State in question. It might then perhaps be necessary to give thought to identifying in a draft article the various consequences that might stem from such a system for States in general and to make it very clear that *lex ferenda* was involved.

37. Mr. BENNOUNA asked Mr. Bowett for some additional information. As Mr. Bowett had just said that the first possibility, that of the Security Council, was

already *de lege lata* and that the Council could determine that a crime had been committed under Chapter VII of the Charter of the United Nations and could also determine the consequences of crimes in the framework of a resolution, as it had done, for example in the case of the Gulf war by going so far as to establish a system of responsibility through the Compensation Commission, did he really think that that was possible *de lege lata* under the Charter as it existed?

38. Mr. BOWETT said that there was no question that the Security Council had the power to determine that an act of aggression had been committed; assuming that aggression was a crime, it followed that the Council was empowered to determine that a crime had been committed. As to the consequences of that finding, his disagreement with Mr. Bennouna involved whether, in formulating sanctions against the aggressor State, the Council must confine itself to measures that fell short of punitive measures or whether it could go beyond that and take punitive measures appropriate for criminal conduct. Admittedly, to date, the Council had never done so precisely because it had never had the courage to decide that a crime had been committed. It had never even determined that an aggression had occurred. Nevertheless, the Charter of the United Nations allowed the Council to conclude, once it had found that a crime of aggression had been committed, that the collective sanctions embraced punitive measures which were appropriate for a crime. However, that was a possible development for the future that was not yet a practice applied by the Council.

39. Mr. Sreenivasa RAO, referring to Mr. Bowett's assertion as to the possibility of imagining State crimes and, consequently, collective sanctions that might affect society as a whole, said that that theory took little account of other considerations, notably those of a humanitarian nature. In his opinion, even if a crime was committed by the leaders of a State, that was not a justification for the State, including its people, its resources and other areas, to suffer discrimination through the consequences, whether in the form of reparations, sanctions, means of deterrence or punishment. Even within the framework of the Charter of the United Nations, when speaking of sanctions decided by the Security Council, it was essential to take into consideration the economic and other consequences of those sanctions for other States and peoples and to provide for the means of guaranteeing that those consequences did not affect the people disproportionately.

40. The long-term repercussions of that kind of "absolutist" theory were illustrated, according to certain analyses, by the situation at the end of the First World War, which a few years later had led to the Second World War. Such an absolutist point of view was not acceptable in the United Nations, particularly in the General Assembly, where no sanctions could be decided before their repercussions had been considered. The human rights defenders must be heard and no one could claim to be unacquainted with the long-term impact of sanctions on the people of the aggressor State itself. He was thinking in particular of the case of Iraq.

41. Mr. TOMUSCHAT, referring to the question of the gap between the jurisdiction of the Security Council and the scope of article 19, said that the latter related to situations in which the essential interests of the international community were affected, whereas the Security Council's only role was to maintain international peace and security. It might be tempting to broaden the meaning of the expression "international peace and security" to make it coincide with the scope of article 19, but that would be a daring exercise, particularly since article 19 also covered environmental questions.

42. It was therefore impossible to rely solely on the Security Council and, in the circumstances, one had to fall back on the individual action of States, while recognizing that preference must be given to collective action in cases where a crime as defined in article 19 had been committed.

43. He concluded that it might be necessary to institute a two-step regime in which a preference for collective action would be recognized while maintaining the freedom of States to act individually. The Commission was faced with a real dilemma and it had no other way out because it must draft law that could be applied immediately and not rules for the distant future.

44. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had no doubt about the first comment made by Mr. Bowett, that is the possibility that States committed crimes.

45. He was pleased that, apart from a few exceptions, the observations on article 19 were not likely to lead to its deletion.

46. As to Mr. Bowett's remarks, he hoped that he would explain in greater detail the *lex lata* aspect of his proposal, namely, the competence of United Nations organs, particularly that of the Security Council, and the role which, it was to be hoped, he called on it to play with regard to the *de lege ferenda* solution that he proposed—the establishment of a new court.

47. It was only a hypothesis, but it might be possible to envisage that, as soon as the Security Council found that an aggression had been committed, which would promptly be characterized as a crime by the community as a whole and the media, its decision could be challenged under a rule to be inserted in the draft if article 19 were retained, by virtue of which the State characterized as an "aggressor" could refer the matter to a judicial body, perhaps ICJ. The previous Special Rapporteur, Mr. Riphagen, had contemplated a solution of that kind and that was one of the directions that future discussion might take.

48. Mr. ROSENSTOCK said he thought that the debate highlighted the magnitude of the risks entailed by retaining any provision vaguely resembling article 19. For example, was it realistic to characterize a category of acts as a crime when it was obvious that, in today's international society and for some time to come, States would be free to draw their own conclusions about such acts? Concerning the authority of the Security Council, there was quite a difference between empowering it to take the necessary measures to restore and maintain the

*status quo ante* or international peace and security and the idea of punishment as such. The risks existed even if, to bring the terms of article 19 into harmony with those of the Charter of the United Nations with regard to the Council's jurisdiction, article 19 was to be recast to speak of "conduct which, in and of itself, threatens international peace and security".

49. As to the possible reference to the so-called criminal conduct of a given State in the 1930s, he considered it to be totally irrelevant from a legal standpoint. He referred in that context to his earlier statement (2339th meeting) emphasizing that the States involved had not been determined to have been guilty of crimes, the individuals had.

50. The Commission should put aside article 19 and all its baggage and focus on the question of violations of *erga omnes* obligations from the point of view of consequences. That was an infinitely more realistic approach than that of basing a system on the idea that some fine day there might be a court with competence for solving all problems.

51. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wanted to take up Mr. Rosenstock's observation that it was not legally relevant to characterize the conduct of three States in the 1930s and at the beginning of the 1940s which might have set a precedent. From the legal point of view, the Commission did not have to take any decision in that regard, but decisions had been taken at the time and thereafter and constituted precedents and part of *lex lata*. Those three States had been very severely punished in a manner that had affected their territories, their peoples and their armed forces.

52. Distinctions must be made and care must be taken if, in future, sanctions were to be envisaged against States that were responsible for a crime, whether characterized as a crime or as just a very serious breach, and an effort must naturally be made, to the extent possible, to differentiate between the various strata of the people, regions, degree of education and ability to participate. It was important to be cautious and to hit where it was necessary. However, it was also true that there were limits to the non-liability of the people. People had to know what they were doing when they voted, allowed themselves to be deprived of the right to vote or hailed dictators who waged wars of aggression.

53. It would therefore be regrettable for the Commission to provide for the total immunity of the people from the outset. An effort must be made to ensure that sanctions were imposed only where they had to be, but that could not be reduced to numbers of persons. Punishment was part of the game of international politics, international relations and, possibly, international law. There was thus no point in saying that that was not *lex lata*: a *lex lata* to be determined, to be codified and where necessary modified by way of progressive development.

54. Mr. TOMUSCHAT noted that there was a clear division of views in the Commission between members. There were those who advocated a semantic change consisting in the replacement of the word "crime" by a term describing a particularly serious breach of an international obligation, of whom he was one, and those who,

like the Special Rapporteur, believed that the concept of crime indisputably had a penal connotation in the sense that any State which had committed a crime could be punished.

55. In his own view, the essential value of the concept of crime or of a particularly serious breach was that it provided a means of abandoning the traditional framework of bilateralism. Under the rules of State responsibility, the commission of an internationally wrongful act normally established a link between the State having committed that act and the victim State and no third party was entitled to take action in defence of the rights of the victim State. That was especially regrettable in the case of particularly serious breaches, where the international community clearly ought to have the right to intervene in order to defend the rights and interests of the victim State. The value of article 19 was therefore that it expanded the circle of States empowered to react to an internationally wrongful act.

56. On the subject of punishment, however, he disagreed with the Special Rapporteur. The Commission was trying to establish rules designed essentially to govern relations between individual States. It was not establishing a new organization that would punish such claims as might arise from an internationally wrongful act. Moreover, it was completely or mostly disregarding the existence of international institutions capable of intervening to some extent. A punishment could be inflicted only by a court on an individual and could not be ordered against a State unless a specific institution and specific procedural guarantees existed. It was inconceivable to recognize the right of any coalition of States to impose a punishment on another State alleged to have committed a crime. In that connection, he was of the opinion that the striking difference between the treatment given to Iraq and that given to the Axis Powers after the Second World War offered no grounds for the assertion that punishment formed part of existing law. The events of 1945, in particular the expulsion of millions of people from their ancestral lands, could not be a model.

57. If the Commission decided to provide for the possibility of punishing States, it would, at the same time, have to establish institutions and procedures governed by the principle of legality. A punitive sentence could not be pronounced lightly. There was, of course, the Security Council, which, to some extent, could have authority to punish, but that was all.

58. Article 19 was therefore useful because it opened up the "cage" of bilateralism by indicating that, in certain cases of particularly serious breaches, the international community, acting either within the framework of institutions or through individual States, had the right to intervene and that the State which was the victim of the crime could count on the international community's support. Article 19 should therefore not be dropped, but should be understood in that limited sense.

59. Mr. ROSENSTOCK said that, if it was deemed necessary to let the international community out of the "cage" of bilateralism, article 19 or any similar article was neither necessary nor sufficient. It was not necessary because there was no justification for going so far as the

idea of the punitive result inevitably connected with the idea of a crime and it was not sufficient because it failed to settle the issue of the category of *erga omnes* violations as a whole.

60. With regard to the assertion that punishment was *lex lata*, he said that, in 1945, it had been the winners of a war who had imposed conditions by right of conquest which the Charter of the United Nations had mostly ruled out for the future. That was clearly demonstrated by the fact that Article 107 of the Charter made an express reservation for the case of the conditions imposed at the end of the Second World War. Similarly, existing instruments providing, *inter alia*, that territory could not be acquired by force and that the exercise of the right of self-defence could not lead to the acquisition of territory made it clear that there was no *lex lata* authorizing punishment in such circumstances, i.e. in consequence of an aggression.

61. In order to break out of the "cage" of bilateralism, the Commission should focus on the consideration of *erga omnes* violations, possibly within the context of part two of the draft, without resorting to a concept such as that embodied in article 19 of part one.

62. Mr. PELLET said that, from a historical point of view, the intention of 1945 had indeed been to punish States responsible for crimes—criminal States—and that the precedent indisputably contributed to *lex lata*. In 1945, however, there had also been a completely new development, the establishment of the United Nations. Article 107 of the Charter of the United Nations clearly showed that what had happened previously could not have happened if a United Nations had existed. Today, the Organization was the most convincing embodiment of what the Special Rapporteur called the "organized international community" and the normal instrument for responding to certain crimes. However, the jurisdiction of the Security Council was confined to threats to the peace, breaches of the peace and acts of aggression. That jurisdiction could conceivably be expanded, but not indefinitely. At what point did a crime begin to constitute a threat to the peace? Something was unquestionably missing in that area, but could the gap be filled by a kind of inter-State criminal court that could hardly be anything but an abstract rationalization? At a stretch, ICJ could perform that function to the extent that the decision whether or not a crime had been committed was a problem of general international law. In fact, however, the question of countermeasures—the question of what reactions by States to wrongful acts were permissible—was more interesting.

63. He was not absolutely opposed to the idea of dropping the word "crime" if it was really true that, paradoxically, the concept of crime was not extended beyond the limits of the reasonable by the assumption that a crime was completely identical with a breach of an *erga omnes* obligation. He was by no means sure that all *erga omnes* obligations were so essential to the international community that their violation necessarily constituted a crime. As to the question of sparing the people when punishing the State, the Special Rapporteur was right to recall that peoples were not necessarily entirely guiltless. There again, a balance had to be found and the Charter

perhaps provided the beginnings of an answer, since, in Chapter VII, it took great care to avoid hurting the innocent. The prohibition on the use of force was a second safety net in that regard and it should not be eliminated by a right of spontaneous recourse to the use of force in the event of a crime.

64. Mr. Sreenivasa RAO said that the debate on whether the concept of State crime formed part of *lex lata* was essentially academic. Some thought that the concept had no legal foundation and was, moreover, neither necessary nor desirable. Others found that, although "crimes" were constantly referred to in international law and in State practice, their constituent elements were never made clear. Still others rightly stressed the need not to copy the concept or extrapolate it from the concept of crime in internal law. But while there was disagreement about the concept, there could be none about the fact: everyone agreed that serious breaches could be committed by States and which might affect all States, so that it was up to the community of States as a whole to respond to them. Proceeding on the basis of that idea, article 19 gave a general definition of "crimes" but it was too general to be of any practical use in a given case. It nevertheless had the merit of identifying certain forms of conduct which had the basic characteristic of affecting the international community as a whole, although the illustrations given therein required review.

65. In his attempt to pinpoint some of the consequences of such crimes, the Special Rapporteur had focused on the most important among them, aggression, necessarily drawing the debate towards the regime of the Charter of the United Nations, but was that regime really helpful in responding to all situations of serious violations of international law? It was also true that not all breaches of an *erga omnes* obligation were necessarily crimes or necessarily affected everyone. But then how were the consequences of "crimes" to be identified in a strictly legal as well as in a technical manner—the real world being what it was, without any centralized institutions and procedures, which also had to be taken into consideration? In the case of other articles on State responsibility, the consequences were clear and States could accept or refuse the Commission's conclusions, but, in the case of State responsibility for "crimes", the situation was evolving. In the case of delicts, some members felt that, in the absence of appropriate institutions and procedures of the international community, its work would amount essentially to legitimizing existing relationships of force. That fundamental weakness was still more acute in the case of "crimes", especially when views diverged so widely on the very idea that States could commit "crimes".

66. Any elaboration of a regime to govern the consequences of "crimes" should not lead the Commission to reopen the debate on a subject as delicate and vital to the international community as the regime of the Charter of the United Nations, whose application gave rise on several occasions to enormous difficulties for certain countries which were not permanent members of the Security Council. Indiscriminate recourse to the Council was, in reality, an easy solution but which could one day burden the Council itself and the advocates of such recourse. The Charter contained provisions other than those of

Chapter VII which could, within the constraints of their powers, provide a legal basis for the elaboration of the regime of the consequences of "crimes". Articles 10 and 34, for example, gave the General Assembly the authority to come to conclusions and make recommendations, even in the area of dealing with the consequences of "crimes" or serious breaches attributed to States. Even if endowed only with recommendatory powers it was the General Assembly, not the Council, that represented the conscience of the international community. The Council had well-defined, exceptional powers, intended for specific purposes. The articles relating to the Assembly were subject to the doctrine of implied powers and it was doubtful whether that doctrine could be extended with equal facility to the powers of the Council which are essentially of a delegated nature. Moreover, it is a political organ, some of whose members had veto power, which, by their own admission, they would use to defend essentially their own interests rather than as trustees of the interests of the international community as commonly assessed or as could perhaps be assessed. It could therefore not be denied that the Charter regime involved fundamental difficulties so far as the establishment of a legal regime for the consequences of "crimes" was concerned.

67. The distinction between crimes and delicts also raised another problem of logic, namely, the problem that, in the case of a delict, the affected State could react of its own accord, whereas, in the situations covered by article 19, except for purposes of self-defence in the event of armed attack, the victim State had to await the coordinated reaction of the international community. The affected State was therefore in a weaker position quite ironically in the case of violations which were more serious. The punishment must fit the crime, even if it might perhaps be necessary to envisage introducing the principle of proportionality in that area as well. There were thus many questions to which the Commission still had no answer and the subject had certainly not matured to a point where solutions could be found with clarity and consensus.

*The meeting rose at 1 p.m.*

## 2342nd MEETING

*Tuesday, 24 May 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, 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. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**State responsibility (continued) (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>2</sup> A/CN.4/L.501)**

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. Sreenivasa RAO stressed the need not to keep open the way in which the concept of "crime" had been viewed on first reading. Any decision in that regard could be taken on second reading. In matters involving aggression, there was no easy way, outside the context of the Security Council, to deal with the consequences of that crime. As to the Council's role, he was of the same view as Mr. Rosenstock (2341st meeting) and other members that it would be unwise to reopen the debate on the doctrinal differences of opinion of States with regard to the Charter of the United Nations while attempting to establish a regime of consequences for "crimes" as part of State responsibility. The matter was too complex. It was essential to be responsive to the impact of any such consequences on the interests of the international community. The consequences of a "crime" could not be based on a State's unilateral desire "to teach a lesson" or "to punish", over and above the international community's own need to do so. The international community must treat the victim State with a certain consideration in respect of reparations, available remedies and cessation of the crime as part of the consequences of the crime. Obviously, it was important not to minimize the desirability of the international community's coming promptly to the victim's aid and to ensure a return to the situation which existed prior to the commission of the "crime", to the extent possible.

2. As to the State alleged to have committed the "crime", it was unrealistic and even wrong to adopt an approach that drew on the experience prevalent in dealing with crimes in national systems. There were enormous differences, as noted also by others, between national systems and a proposed international criminal system. Even in the context of national systems, the concept of crime had changed enormously over the years. Sociologists currently talked about the causes of crime, and criminologists no longer spoke of retribution, but of reform. At the national level, there were centralized institutions, well accepted codes of criminal law existed and there were uniform standards for investigation, prosecution and punishment. Yet crimes, far from diminishing, were on the rise and were becoming more complex. Why was that so? The Commission must reflect those issues which might be of greater value to the exercise the Commission had undertaken. There was room for a philosophical approach, not purely and simply a clinical one. It was difficult to establish a new concept in an international system and States would be very troubled about the illogical conclusions that might be drawn from it. At the national level, individuals could not take the law into their own hands. The same must hold true at the international level.

<sup>1</sup> *Yearbook . . . 1993*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

3. There was a fundamental flaw in the thinking on the delicate concept of “crimes” in international relations, about which Mr. Pellet (*ibid.*) had rightly sounded a warning. In his very thorough study, the Special Rapporteur had taken a position against unilateral reactions; that was the proper approach for the international community. In the opinion of the Special Rapporteur, an individual State should not even make a unilateral determination about the existence of a crime. Actually, that was consistent with the logic of the concept of “crime”, but in reality the decision was not often taken at the level of the international community. When a State found that it was in a crisis, it had to react.

4. Thus, the Commission was facing a conceptual dilemma. Could it go beyond the provisions of Chapter VII of the Charter of the United Nations and find a solution as far as the consequences of “crimes” were concerned? There appeared to be general agreement that there should be different consequences for different “crimes”. As Mr. Calero Rodrigues had noted (2339th meeting), beyond the context of Chapter VII of the Charter and the Security Council it was the decision of the international community that would help the Commission in determining the consequences and, wherever an international treaty was involved, the decision of the parties to such an instrument could likewise provide guidance.

5. It was essential to examine the question of to what extent the “crimes” of a State, as committed by the State’s leaders or officials, should be attributed to the State and should a condemnation of the State mean condemnation of all nationals of that State? He saw a need for time-limits, flexibility, moderation, proportionality and swift remedies for the victim State, but it was also important to avoid alienating the accused State, which could not simply be excommunicated from the international community. The wrongdoing State and its population would continue to be part of international society. The Special Rapporteur had discussed the question whether conclusions could be reached from recent practice. In his opinion, they could not, and he agreed in that context with the points made by Mr. Rosenstock and Mr. Mahiou (*ibid.*). Every case must be treated on its own merits, hasty conclusions must be avoided.

6. The root causes of crime, namely social systems, indifference to long-standing injustice, inequalities, the impossibility of attaining a decent standard of living and respect for human dignity, were the reasons why an isolated concept of crime would not help in resolving problems facing the international society when it was confronted with grave or serious breaches of international law or “crimes”. Crime was too broad a notion. The maintenance of a minimum public order called for examination of the core issues he had mentioned. Human rights, it was said, was an area in which the international community should react in the event of serious violations. Surely, everyone who believed in democracy could not fail to agree that human rights must be respected. But what did the concept of human rights mean? Essentially, it was a people’s own perception of what was good for it, provided the standards set by a community were promotional in nature. If standards existed, they must be applied uniformly. Different com-

munities must be allowed to have different answers in terms of their customs, beliefs and other personal matters, provided public policy was respected. Any consequences established for internationally wrongful acts characterized as “crimes” must be universally applied, so that States knew what to expect if they acted in a certain fashion. If consequences were selective they would not be convincing or help to promote an optimum world public order. Plainly, universal participation in decision-making was essential to make sure that a system for the consequences of “crimes” was universally acceptable and enforceable.

7. Mr. BENNOUNA, referring first to the question of who determined that a “crime” had been committed, said there was general agreement that it could only be a matter for an international judicial body and that it was impossible to confer the right to make such a determination on a political body, unless the goal was to reinforce the power of a handful of States in the international arena. Nor could it be conferred upon the State itself, except as an interim measure. From that point of view, was the distinction between crime and delict relevant? When an international obligation was breached it was always for an impartial judicial body to determine responsibility, in the absence of any prior agreement. But if there was a judicial control, what would be the jurisdiction for determining the crime? Some members had spoken of an ad hoc body, something he himself opposed. Others had said that ICJ could fulfil that role. Perhaps, but what would its jurisdiction be? That came back to the same problem of an international criminal jurisdiction.

8. Was the jurisdiction to be optional, thus giving criminals the choice of whether or not to appear in court? On the other hand, compulsory jurisdiction would be tantamount to a real revolution in international law, as Mr. Pellet had already pointed out (2341st meeting).

9. As to the Security Council, it did not have the power to determine a crime, and Chapter VII of the Charter of the United Nations only gave the Council powers to adopt measures in connection with its peace-keeping role. The Council was not a judge and did not apply the law, it was a political body and it had political powers. The Charter did not confer upon it the power to decide on the judicial responsibility of a State. When the Council took such a decision, it did so *ultra vires*.

10. Concerning the possible consequences of a finding of crime, and more particularly the remedies available, the Special Rapporteur, focusing on the problem of cessation, had begun by saying, in chapter II of his sixth report (A/CN.4/461 and Add.1-3) that it did not seem that crimes presented any special character in comparison with “ordinary” wrongful acts. Thus, the Special Rapporteur himself did not seem to think that making a distinction between a crime and a delict would have any consequences in that context. The Special Rapporteur had then proceeded to emphasize that the distinction between a crime and a delict would have no effect on restitution in kind in article 7.<sup>3</sup> He agreed that there

<sup>3</sup> For the texts of the draft articles of part two provisionally adopted so far by the Commission, see *Yearbook . . . 1993*, vol. II (Part Two), pp. 53-54.

would be no impact on subparagraph (a) of the article: it was not possible, even in the case of a crime, to impose something that was materially impossible. Again, there was no difference in the case of subparagraph (b): a peremptory norm of international law could not be breached in order to react to another breach of a peremptory norm. Subparagraphs (c) and (d), however, could pose a number of problems. The Special Rapporteur gave the example of South Africa's efforts to wipe out the effects of the apartheid system in his fifth report (A/CN.4/453 and Add.1-3). It was a bad example, however, because no compensation for apartheid was possible. It was not a question of restitution or reparation, but of cessation of the apartheid regime, and that led back to article 6 (Cessation of wrongful conduct).<sup>4</sup>

11. The Special Rapporteur also cited the conflict between Iraq and Kuwait, but that example showed that the crime/delict distinction had no impact, because the Security Council itself had provided for reparations through compensation. As an example in connection with article 7, paragraph (d), the Special Rapporteur had referred to the indemnity paid by the Federal Republic of Germany to Israel, in his fifth report, but he did not see how such indemnity was humiliating for Germany or how it had jeopardized its "political independence" or "economic stability". That example too, was poorly chosen.

12. The Special Rapporteur had also cited the case of the obligations imposed on Iraq by Security Council resolution 687 (1991) of 3 April 1991 relating to the destruction of weapons. That, again, was a bad example, because the destruction of arms fell in the category of guarantees of non-repetition in article 10 *bis*:<sup>5</sup> the obligation to destroy its armaments had been imposed on Iraq to prevent it from engaging in aggressive acts against its neighbours.

13. In another example, the Special Rapporteur had criticized the powers conferred on the Security Council to draw the border between Iraq and Kuwait. But that was not relevant. He had spoken of the territorial amputations of a number of States at the end of the Second World War. Yet under the terms of article 7, subparagraph (b), restitution in kind must not "involve a breach of an obligation arising from a peremptory norm of general international law". If part of a State's territory was amputated, that meant that certain rules had been violated: the right to territorial integrity and, by the transfer of part of the population of one State to another without consulting it, violation of the right of peoples to self-determination. A further example might be added: that of a long-standing embargo which, imposed for political reasons, for example on Iraq, forced sacrifices on the most vulnerable part of the population, the children. If an embargo went on too long, it might well be asked whether it was compatible with basic human rights, and in particular the rights of children. Those issues all showed that the distinction between crime and delict was not relevant in regard to restitution in kind.

14. In article 10 (Satisfaction),<sup>6</sup> paragraph 2 (d) contained a provision to punish officials for serious misconduct or criminal conduct. In that connection, the Special Rapporteur asked whether a ban on demands for satisfaction that would impair the dignity of the State which had committed the internationally wrongful act should apply in the case of crimes. But, surely, there could be no greater infringement of the dignity of the State than that involved in the conviction and punishment of its leaders for a crime. The problem, therefore, had already been resolved, in his view.

15. With regard to assurances and guarantees of non-repetition dealt with in article 10 *bis*, the Special Rapporteur referred, in his fifth report, to guarantees against repetition which strongly affected the area of the domestic jurisdiction of the wrongdoing State. That was not reflected in article 10 *bis* and he would be grateful for the Special Rapporteur's clarification. Once again, he failed to see the relevance of any crime/delict distinction.

16. The Special Rapporteur raised the important question whether non-victim States were entitled to seek remedies on their own initiative or upon a decision of the Security Council. It was a surprising question because the Special Rapporteur had already raised it in regard to delicts—and it was indeed answered in the Commission's report on its forty-third session, which stated:

in respect of article 19 on international crimes and of violations of obligations *erga omnes* (where a multitude of injured States were involved) it had soon been understood that the problem arose also with regard to delicts.<sup>7</sup>

Hence there was no need to ponder the matter further. In the same report, it was also stated that "the question arose not just with regard to countermeasures but also with regard to the substantive consequences" and that "the uniqueness of the position of so-called indirectly injured States was probably only a matter of degree with regard to both reparation and countermeasures". In other words, the situation of such States should be determined *in concreto* or on a case-by-case basis. His own view was that the same applied to crimes. Were it otherwise, one might have to contemplate a situation in which some 180 States all sought a remedy against one criminal State: that was clearly absurd. It had been suggested that the General Assembly or Security Council could seek a remedy on behalf of all States, but the Charter of the United Nations did not provide for such a remedy. A remedy did, however, exist within the context of the European Union as exemplified by a recent case in which Greece had decided to impose an embargo on Macedonia and the European Commission had decided to seek a remedy before the international court. It was regrettable that that kind of situation was not covered by the Charter. It was not the function of the Commission, however, to revise the Charter and in any event it would not be desirable for experts to do so, as they might not have all the necessary elements. The possibility of the Assembly or the Council seeking an advisory opinion could perhaps be envisaged, but in that case it would no longer be a question of a judicial remedy.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> *Yearbook . . . 1991*, vol. II (Part Two), para. 319.

17. The Commission was also asked to reflect on the *faculté* of resort to countermeasures. His answer to the first question raised—whether all States became “injured States” for the purposes of article 11<sup>8</sup>—was in the negative. As to the second question—whether the restrictions imposed under article 12<sup>9</sup> would apply to crimes—it seemed, having regard to article 12, paragraphs 2 (b) and 2 (c), that self-defence could be treated as an interim measure of protection in that it was designed to protect rights and to provide a defence pending a decision by the Security Council. Consequently, there too, the crime/delict distinction was not relevant.

18. The third point concerned the principle of proportionality, which was dealt with in article 13<sup>10</sup> and should, in his view, apply to crimes. In the case of the occupation of Kuwait by Iraq, for example, the mandate of the international force had ceased when Kuwait had been liberated. There had been no question of occupying Iraq, though some might have wished to do so. Instead, the rule of proportionality had applied. In that case too, therefore, he saw no distinction between crimes and delicts.

19. With regard to the fourth point concerning prohibited countermeasures, which was dealt with in article 14,<sup>11</sup> the use of force should not be permitted even for crimes, apart from cases of self-defence. No further pretexts for using force should be added to those already invoked in the past. The main thing was to abide by all the provisions of the Charter of the United Nations without exception. Article 14 provided essentially that the rights of other States should be respected, and that applied equally to delicts and to crimes. Again, no distinction could be drawn between the two.

20. The Special Rapporteur’s next question concerned conditions under which all States, and not only the actual victim, might in the case of a crime, be allowed to seek remedies or to resort to countermeasures. That question had been answered in connection with the problem of a plurality of injured States—a problem that arose in the case of both crimes and delicts.

21. Another question was the possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness. With regard to consent, dealt with in article 29 of part one of the draft,<sup>12</sup> it was not possible to agree to a breach of a peremptory norm of international law and, indeed, paragraph 2 of that article so provided. Accordingly, in the case of consent the problem had already been settled. He did not see how *force majeure*, which was covered by article 31,<sup>13</sup> could apply to crimes, since a crime involved a premeditated act. Consequently where there was *force majeure*, there could be no crime. Paragraph 2 (a) of article 33 (State of necessity)<sup>14</sup> likewise made an exception in the case of a peremptory norm of general international law.

<sup>8</sup> *Yearbook* . . . 1992, vol. II (Part Two), p. 25, footnote 56.

<sup>9</sup> *Ibid.*, p. 27, footnote 61.

<sup>10</sup> *Ibid.*, p. 30, footnote 67.

<sup>11</sup> *Ibid.*, p. 31, footnote 69.

<sup>12</sup> For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

Once again, therefore, the problem was already settled and he saw no point in the crime/delict distinction.

22. The Special Rapporteur’s next point related to the general obligation not to recognize the consequences of a crime, in which connection he referred in particular to the obligation not to recognize as legal any territorial acquisition resulting from the use of force. That, however, was another way of saying that it was the rule prohibiting the use of force against territorial integrity and against the rights of peoples which applied. In fact, that meant a return to the primary rule. The main problem seemed to be that the Commission was becoming involved with primary rules. If one followed the Special Rapporteur’s reasoning, it seemed as though the use of force in all international relations was going to be regulated. That would be entering the realm of primary rules of law and departing from that of State responsibility.

23. The general obligation not to aid the “criminal” State and to render aid to the victim—the fifth question raised in the Special Rapporteur’s report—likewise involved a matter of primary law. The general obligation not to aid the criminal State was a matter of complicity. It was a general rule of law that anyone who helped another to violate the law participated in that violation himself. On the other hand, there was no obligation, in his view, either *de lege lata* or *de lege ferenda*, to render aid to the victim of a crime.

24. It was a case of much ado about nothing. That remark was not addressed to the Special Rapporteur, however, and he did not believe that the Special Rapporteur endorsed the observations that he placed before the Commission. Rather, he simply wished to point out the difficulties. As for his own modest analysis, it was addressed to the question of a distinction in the case of crimes and their possible consequences—consequences that should not be dealt with in the context of State responsibility.

25. He also wished to correct a misunderstanding. He had not meant to suggest that the concept of crime did not exist in international law: it did and there was, for example, the International Convention on the Suppression and Punishment of the Crime of Apartheid, which spoke of crime. Whether or not that concept should be dealt with in connection with State responsibility was another matter. In that connection, he would refer members to an article by François Rigaux on State crime,<sup>15</sup> according to which three requirements would have to be met if article 19 of part one<sup>16</sup> was to be effective. The first requirement was legality. The acts characterized as crimes and the penalties for those acts would first have to be incorporated in a norm of positive law in keeping with the principle *nullum crimen sine lege*. In the case with which the Commission was concerned, there was no such prior law. In any event, it was not in that context but rather at the primary norm level that the notion of crime should be dealt with. To that end, the Commission

<sup>15</sup> “Le crime d’État. Réflexions sur l’article 19 du projet d’articles sur la responsabilité des États”, in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (Milan, Giuffrè), vol. III (1987), pp. 301-325, at p. 318, para. 19.

<sup>16</sup> See footnote 12 above.

should propose to the General Assembly that a topic of State crimes should be created and assigned to another special rapporteur. The topic could then be studied at the same time as the topic of State responsibility and, in that way, it should be possible to determine whether the law governing State crime could be codified.

26. The second requirement mentioned by Rigaux was the application of the penalty by an impartial judge, something which, in his opinion, posed enormous difficulties in international law. The third requirement was that the penalty should be in keeping with the gravity of the crime and the personality of the criminal, or in the case in point, with the actual nature of the State. As those three requirements were not met in the present instance, it was not possible for it to proceed further with the matter. The most prudent course would be not to try to decide the question during the current quinquennium but rather to review article 19 of part one on second reading and perhaps propose that it should form a topic for the codification of international law.

27. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Bennouna's interesting statement was indicative of the kind of debate he wanted from the Commission. He trusted, however, that members would understand the questions he had raised, notwithstanding the somewhat imprecise wording used in some of his reports, due in part to his imperfect English and in part, sometimes, to the translations into the other languages. For example, Mr. Bennouna had mentioned the expression *autorité interne*, used presumably in the French version of the report: that was simply a poor translation of the expression "domestic jurisdiction".

28. He had raised the question of the rule of proportionality to make it clear that, in the case of crime, the application of that rule would operate to the detriment of the criminal State. Failure to apply the rule could mean that the State responsible for a crime was not treated as severely as it should be.

29. He was grateful, in a sense, to Mr. Bennouna for suggesting that the Commission should ask the General Assembly whether there should be a separate topic and special rapporteur. From the very outset, the subject of crimes and article 19 had caused him considerable difficulty, though he had endeavoured to pay his debt to the Commission in that respect. He had of course felt duty bound, in his report, to express all his doubts and perplexities with regard to the matter, rather than favour unconditionally the implementation of article 19. At all events, he retained an open mind on the matter and was ready to do his best to submit constructive proposals provided that the Commission showed that it so wished.

30. From the remarks made by several speakers—including perhaps Mr. Bennouna—regarding the relevance of the circumstances precluding wrongfulness, which were referred to under the heading "Possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness" in chapter II, section C, of his sixth report, he realized that it was indispensable to correct the false impression created by the unfortunate drafting of that portion of the report. His intention had been to draw attention to the obvious distinction suggested in chapter II, section B, of

his fifth report, where, in discussing the admissibility of the use of force in response to an international crime, he had distinguished between the lawfulness of such a reaction by injured States in response to a crime, on the one hand, and the lawfulness of resort to force by States in the face of a "state of necessity" or "distress", on the other. While circumstances such as "necessity" or "distress" possibly precluded wrongfulness of resort to force, unlike self-defence, they did not authorize a direct reaction against the State perpetrating the crime. In other words, "necessity" and "distress", *de lege lata* or *de lege ferenda*, fell beyond the scope of the specific regime governing reactions to internationally wrongful acts or to international crimes of States in particular. His faulty drafting had failed to make that distinction clear in chapter II, section C, of his sixth report: as presently formulated, it appeared to address the different issue of whether an international crime could be justified, to any extent, by the presence of circumstances precluding wrongfulness, such as necessity, distress, consent or *force majeure*. He apologized for the confusion he had created and hoped that the attention of readers of his sixth report in its final printed form would be drawn to the clarification he had given.

31. Mr. CRAWFORD said that, as the Special Rapporteur had clearly demonstrated in his reports, the Commission faced considerable difficulties with regard to article 19 of part one of the draft.<sup>17</sup>

32. As far as definitions were concerned, the existing wording of article 19 was rather unsatisfactory, not so much in its recognition of a category of State crimes as in its attempt to spell out those crimes. Paragraph 3 of the article, in particular, was defective in a number of ways. First of all, it did not actually say what it appeared to say. It appeared to say that the matters listed and examples given actually constituted State crimes. It was, however, prefaced by the phrase "Subject to paragraph 2, and on the basis of the rules of international law in force". Accordingly, the test provided for in paragraph 2 still had to be applied and the rules of international law in force still had to be determined. The second difficulty was that paragraph 3 contained a non-exhaustive list which none the less set out a number of categories. Presumably, the intention was to lay down the most important categories, but it was very difficult to do so until the question of State crimes had been thoroughly explored. Rather unusually, the draft gave examples whereas one would have thought that the function was not to illustrate by example but rather to specify the intent.

33. Again, the draft also seemed to encroach on the line between primary and secondary rules of responsibility. Unlike the Special Rapporteur, he favoured the distinction between primary and secondary rules, which he regarded as essential to maintain the integrity of the draft and to limit it to the matters with which the Commission should deal. If paragraph 3 was anything more than indicative and exemplary, then it overstepped the line; and, if it was merely indicative and exemplary, it was unnecessary. He therefore favoured relegating it to the commentary.

<sup>17</sup> Ibid.

34. The rest of the definition stated, in effect, that an act was an international crime if it was universally recognized as such. There was a time-honoured precedent for a definition of that character, one whose truth could not be denied. The question, however, was whether there was such a thing as a category of international crimes. The Special Rapporteur affirmed that there was, though he affirmed very little else about the law relating to State crimes, primarily on the doctrinal ground that States were factual, collective entities rather than *personnes morales* of national law and, as such, were just as capable of committing crimes as anyone else. He was not sure that one had to be committed to the Special Rapporteur's view of the State in order to accept that States might commit crimes. There had been examples where States had been regarded as committing acts that were criminal in character. None the less, there was an important distinction between crimes that could be committed at the international level by whomsoever—individuals, corporations or States—and crimes that could be committed only by a State.

35. There were only a few examples of crimes that could be committed exclusively by a State: for example, aggression, which was widely acknowledged to be a crime, and intervention, which did not, in his view, have the characteristics of an international crime, though it was an internationally wrongful act. As a matter of general international law, it might well be that it was only the crime of aggression that could be committed exclusively by a State. By reason of the powers and responsibilities of the Security Council under Chapter VII of the Charter of the United Nations, aggression was in a special category, however.

36. There were also a number of crimes—terrorism and genocide, for example—that could be committed by State officials, and under normal rules of imputability they could be considered State crimes. But some of them, genocide for example, were committed typically against the population of the official's own country, not against other States. That raised the organizational difficulty of how to impute to the State—the organized manifestation of a human community—a crime of which that community was the primary victim. A classic illustration was to be seen in the Cambodian genocide.

37. On the question of whether there were any consequences specific to State crimes, as opposed to consequences that all internationally wrongful acts shared, it was possible to distinguish seven categories. Referring to the fifth report, he noted that, in respect of cessation of a breach of international law, there was no distinction between international crimes and internationally wrongful acts. As to reparation, there might be differences in degree of gravity, but a category of State crimes was not needed in order to reflect those differences.

38. The third category was punitive damages, which must be accepted as being distinct, in respect of State crimes, from the punitive damages sometimes envisaged for internationally wrongful acts: it would be an aberration to say that State crimes existed but there were no punitive damages for them. Yet the implementation of such a regime would pose significant problems, espe-

cially when the principal victim of the State crime was the population.

39. The fourth category of consequences was the use of force in reaction to a State crime. Although various forms of forceful reaction might be appropriate, it was the Charter of the United Nations, and not the category of the crime, that would ultimately justify or invalidate such a reaction. The interpretation of the Charter provisions on the use of force was controversial, particularly with regard to humanitarian intervention, but where it had been determined that such intervention was permissible, the category of the crime involved had not been used as the defining element. The Commission should resist the temptation to amend the Charter, leaving that task to the bodies specifically empowered to look into that issue.

40. Regarding non-forcible countermeasures, the fifth category, the Special Rapporteur had rightly pointed out that they might be exacerbated, compared with those applicable to delictual responsibility, but was vague on exactly what such measures might entail. In the fifth report, it was suggested that the prosecution of individuals might be a form of aggravated countermeasure, but that was wholly inadmissible on the grounds of due process. The guilt or innocence of an individual was distinct from that of the State and had to be judged independently. The impact on third States of sanctions or other measures taken in response to crimes might well be greater than in cases of delictual responsibility, but the relevant provision was concerned with rights, not with indirect consequences, so there was no need for specific regulation on that point. There was, finally, the general category of other punitive measures, which could not be excluded from the regime, any more than punitive damages could be. However, very little progress had been made in elaborating what they might be.

41. The sixth category was that of an obligation incumbent on other States to react to a State crime. The international community could no doubt impose such an obligation. On the other hand, it was difficult to find State practice, or provisions in contemporary international law, in support of the thesis that there was an affirmative obligation on States to respond to State crimes.

42. The seventh, and most disputable category was that of an obligation of non-recognition. The problem was that any such obligation in international law was not limited exclusively to State crimes. The normal illustration of the obligation related to the acquisition of territory, but in State practice the conduct in question need not be classed as a State crime. A further problem with non-recognition and the associated duty of non-assistance was that most crimes were concerned not with questions of legal validity, but with questions of fact. Most criminal conduct was criminal by reason of its consequences in fact, and there was no point in not recognizing facts.

43. In short, there were a number of consequences that could be attached to State crimes: punitive damages, the aggravation of certain countermeasures, the obligation to react and the possible indirect obligation of non-recognition. Yet he saw a number of reasons why the

articles on State responsibility were not the place to elaborate the consequences that might flow from State crimes. First, such an effort would inevitably involve the elaboration of primary rules of responsibility, which was inconsistent with the foundation on which the draft had been built so far. Secondly, a satisfactory regime for crimes could not be devised without substantial measures of implementation to accompany it. It had been said that States would not be deterred from committing crimes by the threat of punishment. However that might be, they certainly would not be deterred by the threat of a crime being labelled as a crime. That was, roughly, what the draft articles as now worded did. Thirdly, most of the consequences that might derive from State crimes were closely bound up with the functioning of the Charter of the United Nations. Most examples given by the Special Rapporteur were drawn from Security Council resolutions, but the Charter regime operated independently from that of the draft articles, and the Commission could hardly amend it. The fourth reason why the Commission should not seek to elaborate a full-scale regime of State responsibility for international crimes was that it would be a distraction from the very important task of developing a satisfactory regime dealing with general issues of State responsibility. State crimes were, fortunately, a minor—though often tragic—aspect of the general regime.

44. What conclusions, then, should be drawn about the draft articles in their current form? Internationally wrongful acts, as a category, covered any conduct that constituted a State crime: hence, all the consequences attaching to internationally wrongful acts applied to State crimes as well. The question was what additional consequences should derive from State crimes, and where should such consequences be elaborated. He was inclined to think that article 19 of part one,<sup>18</sup> with the amendments he had suggested earlier, should be retained in order to reflect the category of State crimes that existed in international law, in a limited number of cases. There should also be a clause, probably in part two, saying that the draft articles applied to cases constituting crimes as defined in article 19 with such modifications as might be required, but that those articles were without prejudice to the further consequences that could flow from a state crime, in accordance either with the Charter of the United Nations or with general international law. Care should be taken to ensure that the rules in part two were adapted to deal with State crimes in their manifestation as internationally wrongful acts, but nothing more than this was required.

45. The question remained as to whether the Commission should take up a new and separate topic of "State crimes". Given its current workload, the Commission should not actively seek such an assignment, although it could no doubt flag the issue in reporting to the General Assembly on its work on State responsibility.

46. Mr. AL-BAHARNA said the major issue now facing the Commission was whether the draft articles on State responsibility should deal with the consequences of crimes of States. An answer to that question depended, first, on whether the Commission's mandate warranted

the consideration of matters relating to the criminal, as distinct from the civil, responsibility of States; and secondly, on whether the Commission should continue to discuss criminal responsibility of States when the topic of crimes by States had been ruled out in connection with the draft Code of Crimes against the Peace and Security of Mankind. In regard to the first question, he believed that the Commission's mandate did not preclude criminal responsibility from being discussed in the context of State responsibility. On the second question, his preference would be to adopt the same approach as for the draft Code of Crimes against the Peace and Security of Mankind, although he had nothing against exploring the consequences of State crimes as part of the development of the norms of State responsibility.

47. Paragraph 299 of the Commission's report on its forty-fifth session<sup>19</sup> reflected a number of issues raised by the Special Rapporteur. As to whether United Nations organs were empowered to determine the existence, attribution and consequences of the wrongful acts contemplated in article 19 of part one,<sup>20</sup> his own opinion was that, notwithstanding its principles and purposes, the United Nations was not a supra State endowed, on a higher plane, with powers comparable to those of a State at the national level. The United Nations could not be expected to exercise the full panoply of powers of a nation State: it could not, for example, impose sanctions for breaches of the law. Admittedly, in certain circumstances the Security Council could impose obligations on Member States that might affect their conduct: such had been the case with regard to Iraq. But that example, which was a special case, could not be used as the basis for the general conclusion that the United Nations could prescribe consequences for the international crimes enumerated in article 19. It should also be borne in mind that enforcement action under Chapter VII of the Charter of the United Nations was specifically geared to the objectives of Article 39, namely, of maintaining or restoring international peace and security. It certainly could not be said that Chapter VII operated as a sanctions mechanism in international relations. There were only four instances in which the United Nations had determined that there had been a breach of the peace within the meaning of Article 39: under the Security Council decisions relating to the Korean war, the Falklands Islands, the Iran-Iraq conflict and the Iraqi invasion of Kuwait. Mandatory sanctions under Chapter VII had been adopted in only two instances: against Rhodesia in 1966 and against Iraq in 1990.

48. The Special Rapporteur's second question was whether the existing powers of United Nations organs should be legally adapted to the tasks that would have to be performed by the United Nations under article 19 of part one of the draft on State responsibility. In the present political and economic climate of the international community, it was doubtful whether that could be achieved. Any attempt at adaptation of the United Nations system would involve an examination of the primary rules of international law, especially the nature and scope of the use of force, self-defence and collective

<sup>18</sup> Ibid.

<sup>19</sup> Yearbook . . . 1993, vol. II (Part Two), document A/48/10.

<sup>20</sup> See footnote 12 above.

self-defence, enforcement measures, and so on. Such an inquiry might be open to objection on the grounds that the Commission was going beyond its mandate.

49. The third question was to what extent the powers of United Nations organs affected the rights and obligations of States to react to internationally wrongful acts. It was conceivable that, in certain situations, a State's actions might coincide with international measures proposed by the Security Council under Chapter VII of the Charter of the United Nations. Colonel Green, Counsel to the Chairman of the Joint Chiefs of Staff of the United Nations, had said that the use of force against Iraq had been pursuant to a Council authorization and in exercise of the right of collective self-defence. A truer explanation was probably that, in the Gulf war, the Security Council had seized the opportunity to give the coalition a legal seal of approval for the projected use of force against Iraq. The coincidence of enforcement measures and collective self-defence could plausibly be interpreted to say that the actions of the United Nations necessarily affected the obligations of States in respect of international crimes of States. But that coincidence might be more fortuitous than the result of a conviction that the United Nations represented the organized community of nations.

50. There might yet be situations—first, in relation to acts or threats of aggression, and secondly, in relation to genocide and apartheid—for which the Commission must articulate norms dealing with the consequences. It might therefore consider including in the draft provisions on the responsibility of States arising from acts of aggression, genocide and apartheid.

51. With regard to the issues raised in chapter II of the Special Rapporteur's sixth report, the first question was whether the list of crimes in article 19 was the most satisfactory one. He agreed with the Special Rapporteur that the definition set out in article 19 was somewhat circular. Moreover, the crimes listed in paragraph 3 (b) and paragraph 3 (d), dealing respectively with colonial domination and massive pollution of the atmosphere or of the sea, were outdated in one case, and controversial in the other. The Commission should tread carefully in enumerating State crimes, and must remain satisfied with prescribing the consequences of crimes agreed by the entire international community.

52. It was only logical that the victim State should have the right to decide that a crime had been committed. In his view, the State's decision was not provisional, but it did entail a risk of its own. Under Article 39 of the Charter of the United Nations, the Security Council had the power to decide the issue of aggression, but its competence was confined to the restoration or maintenance of international peace and security. Further investigation of that point was required, and he would reserve his position. The crimes of genocide and apartheid gave rise to somewhat different considerations, but the Council could be presumed to have the competence to determine that they had been committed in cases where, for example, they entailed a breach of the peace within the meaning of Article 39 of the Charter.

53. The answer to the question of whether any State other than the victim State was entitled to seek remedies

or resort to countermeasures was in the negative. Such a possibility was likely to give rise to abuses. The legal position would, of course, be different if there were a Security Council decision specifying the legal consequences arising out of acts of aggression, genocide or apartheid. Under Article 25 of the Charter, a decision of that kind would be binding on all Member States.

54. The general obligation of non-recognition of the consequences of crimes of aggression arose from a normative decision by the Security Council. The position was the same with regard to the general obligation not to aid one criminal State and to render assistance to the victim State.

55. In conclusion, he would suggest that the draft be confined for the present to the formulation of norms concerning the consequences of aggression, genocide and apartheid. Care should be taken not to engage in a definition of the primary rules of international law relating to those crimes or to overstep the Commission's mandate.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said that reference had been made more than once in the debate thus far to the concept of an "organized international community" as something either espoused by him or as having been put forward by him in one of his reports. True, he had often had occasion to mention that concept in his reports by referring to what most international lawyers indicated by the term. He wished to place on record, however, that from the earliest days of his study of international law he had thought and written that there was no such thing as an organized international community, far less a properly or decently organized one. That was the view he continued to hold today, nothing having occurred in the meanwhile to change his mind. To complete the picture, he would add that he was far from sure whether an international legal community, whether organized or not, existed at all; indeed, at the risk of blaspheming, he would confess to daily doubts as to the existence of a system of international law in any sense comparable, however imperfect, to the legal systems of interrelated societies. A statement much to the same effect by a former high official in the United States Administration had recently appeared in the press, showing that the view was not only held by theoreticians such as himself but was shared by men who had been substantially involved in the practice of international relations.

57. Mr. FOMBA said that, far from being a purely intellectual construct, the concept of an international State crime had both a political and a legal foundation. The political foundation was self-evident inasmuch as the contemporary history of international life was, unfortunately, full of examples of criminal acts directly or indirectly imputable to the State. The legal foundation was provided by *lex lata*, as embodied in particular in the Convention on the Prevention and Punishment of the Crime of Genocide, which used the term "crime" in the title and in articles I, IV and IX, and also in the International Convention on the Suppression and Punishment of the Crime of Apartheid, which also used the term in the title and in articles I, III and X.

58. With regard to the doctrinal debate on the concept of the State as a legal entity capable of being held responsible for its actions, he remarked that the distinction between individual and legal entities was not always clear-cut, and referred in that connection to the concepts of *faute personnelle* and *faute de service* in French administrative law and also to relevant passages of the judgment of ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*.<sup>21</sup>

59. In an article on the international community and genocide published in 1991, Judge Antonio Cassese discussed the *lex lata* relating to the crime of genocide and went on to examine the international community's reaction in various cases where genocide had actually occurred. Of particular interest in that connection was the history of the savage massacre of the Balubas perpetrated during the Congo crisis in 1960. On that occasion, the then Secretary-General had initially stated that the acts involved bore the characteristics of the crime of genocide. After contentions that he wanted United Nations troops to intervene, he had been compelled to tone down the terms of the accusation, saying that the perpetrators no longer formed part of the Congolese army and were acting as individuals. The Security Council had ignored his words and nothing had been done. At the current time, 34 years later, it might well be asked whether the "organized international community" possessed ways and means of achieving greater credibility in its role as the guarantor of international public order.

60. The late twentieth century's most serious case of genocide was currently taking place in Rwanda. What was the international community doing about the situation, and what ought it to be doing? The Security Council, in its resolution 918 (1994) of 17 May 1994, was concerned that the situation in Rwanda constituted a humanitarian crisis of enormous proportions, expressed alarm at continuing reports of systematic, widespread and flagrant violations of international humanitarian law in Rwanda, recalled that the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constituted a crime punishable under international law, and was concerned that the continuation of the situation in Rwanda constituted a threat to peace and security in the region. The Council demanded that all parties to the conflict immediately cease hostilities, agree to a cease-fire and bring an end to the mindless violence and carnage engulfing Rwanda. It decided to expand the mandate of the United Nations Assistance Mission for Rwanda and recognized that the Mission might be required to take action in self-defence, and, in that context, authorized an expansion of the Mission's force level up to 5,500 troops. It did not, however, authorize the use of force by United Nations troops with a view to disarming the parties to the conflict. While invoking Chapter VII of the Charter of the United Nations, the Council did not seem inclined to apply it with full rigour. The question of the prosecution and punishment of the presumed perpetrators of acts of genocide was not directly or openly touched upon, and, notwithstanding the request addressed to the Secretary-General to present a report as soon as possible on the

investigation of serious violations of international humanitarian law committed in Rwanda during the conflict, it was to be feared that the 1960 scenario of silence and vacillation would be re-enacted. Nor was it by any means certain that much significant case-law would be forthcoming from 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.<sup>22</sup> All those unanswered questions should inspire the Commission in its search for ways and means of proclaiming the *lex lata*, clarifying it and, possibly, proposing new rules.

61. Mr. AL-KHASAWNEH said that the distinction drawn by the Commission in 1976 between ordinary wrongful acts—delicts—and a special class of serious wrongful acts that breached the fundamental interests of the international community—international crimes—was not the only solution to the problem of differentiating between regimes of responsibility. It was possible, for example, to argue in favour of a continuum within a single regime of responsibility extending from minor breaches at one end of the spectrum to exceptionally serious breaches at the other end, a continuum marked by an essentially quantitative difference. No system of classification was perfect, and the debate between the proponents of the continuum theory and those who wished the draft to include a distinct category for exceptionally serious wrongful acts was likely to be never-ending, since quantitative differences could, beyond a certain threshold, turn into qualitative ones. In his opinion, the distinction drawn in article 19 of part one,<sup>23</sup> while not sacrosanct, was none the less valid and useful for the purposes of ascertaining the consequences of a wide range of wrongful acts covered by the draft articles.

62. It would be idle to pretend that the use of the term "crime" had not contributed to the controversy surrounding article 19. Without pressing for the term to be maintained at any price, he would point out that its use might have a deterrent effect on the conduct of States. Besides, it had been decided to speak of crimes, rather than offences, in the draft Code of Crimes against the Peace and Security of Mankind currently under preparation in the Commission. He was, of course, not oblivious of the fact that the point at issue in that topic was the criminal responsibility of individuals, not States, but it was also true that conduct which would be labelled criminal under that topic corresponded closely, *ratione materiae*, to breaches of obligations in the present draft which had been termed international crimes. Therefore, if only for the sake of uniformity of terminology, the Commission should not replace the term "international crimes" by the more serpentine and, it might be added, more obscure term "exceptionally serious wrongful acts".

63. Beyond that relatively minor point, he had some difficulty with the definition of crimes contained in paragraph 2 and the non-exhaustive list contained in paragraph 3 of article 19. Paragraph 2 required the breach to be recognized as a crime by the international commu-

<sup>21</sup> Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

<sup>22</sup> See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

<sup>23</sup> See footnote 12 above.

nity. Yet criminal law was steeped in subjectivity; the reprobation aroused in the public conscience by the commission of an act, no matter how heinous, was never uniform, even in a national society sharing the same values. In a culturally heterogeneous international society the element of subjectivity was even more marked. The question might well be asked, if only from a moral point of view, why a "small aggression" which caused relatively minor destruction of property and the death of few innocent people should entail additional consequences in terms of authorized armed countermeasures when such countermeasures would presumably not be allowed in the case of wide-scale genocide. A similar point could be made in connection with the choice of crimes included in the list in paragraph 3, as Mr. Ago pointed out in an article he wrote,<sup>24</sup> and to which reference was made in the Special Rapporteur's fifth report. He was not suggesting that paragraph 3 (d) be dropped but simply pointing out the unavoidable subjectivity inherent in including in the list acts on the basis of moral revulsion felt by the Commission at the time of codification.

64. His answer to the question whether the list was still satisfactory 18 years after the adoption of article 19 on first reading was generally in the affirmative. Some drafting changes should perhaps be made in paragraph 3 (b), relating to the establishment or maintenance by force of colonial domination, so as to bring the text into line with the realities of modern international relations, especially after the end of classical colonialism and the belated decolonization of the Soviet Empire. Attempts at expanding the list of crimes should, in his opinion, be resisted, if only in the interests of quality control.

65. In the case of a crime such as aggression, the determination should not be left to the victim State, the maxim *nemo iudex in sua causa* being applicable in the case of aggression as in that of other crimes. The determination could be made by the Security Council, although it was true that the Council had never as yet characterized a State as an aggressor. He was not unaware of the difficulties and dangers of leaving such a determination to a political body, which was prone to act neither consistently nor impartially, and for that reason he thought that the Council's determination should take the form of a presumption rather than a definitive determination. However, there was no way round the need for an ultimate judicial determination as to whether a crime had been committed. If that was so with regard to the crime of aggression, it would be even more important to ensure that the hypotheses of the kind described in paragraph 3, subparagraphs (b) to (d) of article 19 were met, at least *de lege ferenda*, by judicial means.

66. As to the substantive and instrumental consequences of international crimes, cessation presented no special problems. With regard to *restitutio*, the limitation of excessive onerousness should not, in his opinion, be derogated from in the case of crimes. Unlike punitive damages, which could be disguised as guarantees of non-repetition, the limitation of excessive onerousness could

be measured with reasonable accuracy and should be maintained in order to spare the inhabitants of the criminal State excessive suffering.

67. Regarding the question whether the prohibition of punitive measures might be derogated from in the case of crimes, in the third report,<sup>25</sup> as a matter of *lex lata*, there could be no doubt that punitive measures had traditionally played a part in the responsibility relationship. It was argued that such measures were a thing of the past and had no place in a modern codification of State responsibility. The truth was, however, that the tendency in recent years had been not to abandon punitive measures but to disguise them as *restitutio* or guarantees against repetition. In that connection, he pointed to certain aspects of the obligations imposed on Iraq in Security Council resolution 687 (1991) of 3 April 1991. If the Commission's intention was to ensure that innocent people were, as far as possible, to be spared the consequences of measures amounting to collective punishments, it should recognize that, in the hard political realities of today, that was not achieved by pretending measures such as those imposed on Iraq carried no punitive implications. Rather, the aim was achieved by careful regulation of punitive damages, first, through a judicial review of decisions taken by international bodies, and second, through objective criteria relating to proportionality and non-derogation from the excessive onerousness requirement. Consideration should also be given to the guarantees proposed by the Special Rapporteur in respect of countermeasures, for example the effect on third parties and the protection of the human person, as well as to Mr. Bennouna's suggestion concerning an express prohibition of punitive consequences even in the case of crimes threatening the territorial integrity of States.

68. At a time when severe measures were taken on the basis of the "organic reaction" of the world community against a State committing a crime, and when it was claimed that a reaction of that kind lay outside the responsibility regime, the Commission should ask itself whether it ought to accept the unfettered exercise of power to conceal a severe punitive intent in the regime of the maintenance of international peace and security.

69. With regard to the *faculté* of resort to countermeasures in the sixth report, procedurally there was no reason why the preliminary requirements of prior notification and resort to peaceful settlement of disputes should be abandoned. In the fifth report, the Special Rapporteur referred to the case of Iraq, when no less than 15 States had adopted economic measures on their own a few days after the invasion of Kuwait before any attempt had been made to resolve the question by means of dispute settlement mechanisms. It was at least possible that, had there been no hasty condemnations and economic countermeasures designed to escalate the dispute, a peaceful but principled solution to the conflict might have been found.

70. In the sixth report, the Special Rapporteur asked whether proportionality, as provided in draft article 13,

<sup>24</sup> "Remarks on some classes of crimes by States", *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, J. Weiler, A. Cassese and M. Spinedi, eds. (Berlin-New York, De Gruyter, 1989).

<sup>25</sup> *Yearbook . . . 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1

applied to crimes. The answer, of course, was that it did, and it was gratifying to hear the Special Rapporteur's confirmation of that point.

71. As to the general obligation not to recognize the consequences of a crime mentioned in the sixth report, in his view, the duty not to recognize was a consequence not only of crimes but also of delicts. Furthermore, the obligation should not be confined exclusively to acquisitions of territory resulting from wars of aggression. Acquisition of territory resulting from a war waged in exercise of self-defence, although not a crime, was still a wrongful act to which the duty of non-recognition should apply. An authoritative statement not only by the Security Council but also by the General Assembly might trigger the recognition of the duty not to recognize in such a case. Again, such a statement by the Council or the Assembly would be absolutely necessary in order to trigger the general obligation not to aid the criminal State and to render aid to the victim. He agreed with Mr. Crawford that the passive duty of non-recognition was confined to certain classes of wrongful acts when the validity of the measure taken was at issue; but the duty of non-assistance to the offending State, which also covered delicts as well as crimes, was not confined to acts where validity was at issue.

*The meeting rose at 1.20 p.m.*

## 2343rd MEETING

*Thursday, 26 May 1994, at 10.10 a.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

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

**State responsibility (continued) (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>2</sup> A/CN.4/L.501)**

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. MIKULKA said that, in adopting article 19 of part one of the draft articles on State responsibility,<sup>3</sup> the

<sup>1</sup> *Yearbook* . . . 1993, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>3</sup> For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

Commission was engaged in both the codification and the progressive development of international law. Those two elements were present in the distinction drawn by the Commission between crimes and delicts on the grounds that the content of State responsibility was not identical in the two cases. The debate should not be reopened now on article 19 *per se*; instead, the consequences of the two categories of internationally wrongful acts should be investigated so that, during the second reading of part one, the Commission would have the necessary information to determine the validity of the distinction established at the outset. The study of the consequences of crimes must maintain the balance between codification and progressive development and not be limited to an analysis of positive law—the existence or absence in State practice of a specific regime of responsibility for crimes—but must consider the relevant literature and the possibilities for the development of practice that it offered. The use of the term “crime” in article 19 had given rise to an unnecessary debate, since there was no analogy between the meaning of the term as used in the draft articles and as used in internal law. The use of the term in no way prejudged the question of the content of responsibility for an international crime. “Crime” as defined in article 19, paragraph 2, meant only a “breach by a State of an international obligation . . . essential for the protection of fundamental interests of the international community”. Crimes were accordingly particularly serious breaches of preemptory norms of international law and were thus always violations of *jus cogens*, even though the opposite was not always true. To look into the consequences of international crimes thus meant considering the consequences of violations of *jus cogens*. Since the obligations of States under *jus cogens* were obligations *erga omnes*, there could be no derogation by agreement *inter partes* from the secondary rules governing State responsibility for crimes.

2. Could State crimes be defined? In the case of aggression or genocide, that was virtually a foregone conclusion, in that the international community as a whole viewed them as jeopardizing its fundamental interests and characterized them as crimes. However, there was absolutely no consensus on whether serious breaches of an international obligation relating to the protection and preservation of the environment would constitute crimes. Article 19 did not contain a real definition of international crimes; it gave only their general characteristics. The draft articles were intended to set out secondary rules and the definition of specific crimes would have to be dealt with in other instruments. The identification of the consequences of crimes was all the more difficult owing to the lack of agreement on which internationally wrongful acts should be characterized as crimes, but that did not mean that the task was impossible. The list given in article 19, which was not exhaustive because it referred to a changing reality, gave enough of a basis for analysis.

3. Who was to determine that a crime had been committed? Some members of the Commission believed that question to be of essential importance. On the grounds that the international community was not yet sufficiently organized and that there was no mechanism with compulsory jurisdiction to determine that a crime had been

committed, they questioned the idea that there could be a specific regime for State responsibility for crimes and even the category of crime. However, that argument could equally well be applied to a finding that a delict had been committed. Should it therefore be concluded that delicts did not exist? Except in the case of aggression, there was no doubt that such a gap existed, but it did not justify the Commission's reluctance to define the consequences of crimes.

4. What were the possible consequences of a finding that a crime had been committed? That should be the focus of the debate. In terms of the cessation of wrongful conduct, there was no difference between delict and crime, but the same was not true for reparation *lato sensu*. Because a crime was harmful to the international community as a whole, it was a breach of a peremptory norm of international law and its consequences could not be recognized, restitution in kind took on particular importance and could not be subjected to the restrictions contained in article 7, subparagraphs (c) and (d), of part two.<sup>4</sup> A direct victim of a crime must not have to choose, as in the case of a delict, between restitution in kind or compensation, unless the first option was materially impossible or entailed a breach of *jus cogens*. Satisfaction must encompass the criminal prosecution of individuals who had taken part in the preparation or commission of the crime, but, contrary to the provisions of article 10, paragraph 2,<sup>5</sup> prosecution in such cases must be possible without the consent of the State that had committed the international crime.

5. In the case of the so-called instrumental consequences of State crimes, priority should be given to the collective response of the international community, with countermeasures coming into play only in the absence of such a response. Thus, unlike several other members of the Commission, he held the view that there were two separate regimes for responsibility, depending on whether crimes or delicts were involved, and that it was possible and desirable for the Commission to establish the regime of responsibility for State crimes in the context of the topic under consideration.

6. Mr. GÜNEY said that the limited options for the progressive development of the law on State crimes within the meaning of article 19 of part one<sup>6</sup> had forced the Special Rapporteur to adopt a pragmatic approach focusing on the problems that needed to be analysed in detail. In view of the distinction which had been made at the outset between delicts and crimes and which required a special regime for crimes and because of the difficulties and controversies involved in defining the concept of crime, the Special Rapporteur was using that term for acts which the international community as a whole considered to be serious breaches of obligations essential for the protection of its fundamental interests. The concepts of criminal responsibility of States and of fault established a link between crimes and their consequences and the response of the organized international community.

<sup>4</sup> For the texts of the draft articles of part two provisionally adopted so far by the Commission, see *Yearbook . . . 1993*, vol. II (Part Two), pp. 53-54.

<sup>5</sup> *Ibid.*

<sup>6</sup> See footnote 3 above.

In general terms, the ideas of international crimes and responsibility for such crimes did not give rise to conceptual problems as long as precise criteria and objectives were set for the evaluation of the damage sustained by the injured State and of the magnitude of the responsibility of the wrongdoing State. The idea of crime already existed in international law for conduct such as aggression or apartheid, although aggression alone could be committed by a State, while all the other crimes could be committed by individuals. A crime was a serious breach of an obligation *erga omnes* to which the injured State was entitled to react. For an international crime, the right of reaction was collective in nature. In the case of aggression, for example, the Security Council stepped in to make a finding that a crime had been committed, even if it was more a presumption than a finding. International practice was currently moving towards adoption of sanctions to be applied by international organizations. The Commission should refrain from entering into a debate on the competence of the Security Council or the concept of self-defence; the objective should be to find ways of preventing States from evading the consequences of crimes committed by their agents. As it now stood, article 19 was only descriptive in nature.

7. With regard to the link between dispute settlement and State responsibility, the Commission must take account of the reluctance of States to submit to binding third-party settlement procedures. The principle of free choice of methods must be central to any future mechanism. States increasingly tended to reserve the right to specify whether or not they agreed to be bound by dispute settlement provisions and to insist on the option of withdrawing from or modifying such provisions. It would therefore be better to try to strike a balance between what was feasible and what was desirable and to leave the task of deciding on appropriate machinery to a future diplomatic conference. Perhaps dispute settlement machinery could be made applicable only to certain parts of the draft articles, as had been the case of the Vienna Convention on the Law of Treaties.

8. Mr. TOMUSCHAT said the Commission absolutely had to try to complete its consideration on first reading of the entire set of draft articles on State responsibility in 1996. The Special Rapporteur's stimulating and thought-provoking sixth report (A/CN.4/461 and Add.1-3) was a good basis for doing so. The Special Rapporteur asked whether the crimes could be defined. The answer was indisputably yes, but it was not necessary to create an itemized list of offences, because the principle *nullum crimen sine lege* did not apply. He could envisage a fairly simple definition of an international crime: a particularly serious breach of an international obligation whose impact went beyond the bilateral relationship between the wrongdoing State and the injured State and affected the international community as a whole. There was thus no need to create a new topic for the Commission. A formula must be found which would, like the phrase defining the jurisdiction of the Security Council, leave enough room for adjustment to future developments. The technique used in article 19 of part one,<sup>7</sup> consisting of a general clause with a non-exhaustive list of examples, was of some interest, even though the word-

<sup>7</sup> *Ibid.*

ing of the general clause might warrant a fresh look. In any event, article 19 simply reflected a fact of life, namely, that most breaches could be dealt with in the bilateral relationship between the two States directly concerned, while others were of such gravity that the international community must intervene.

9. The objective was therefore not to establish the criminal responsibility of the State, but to codify the classical rules of State responsibility as they applied in a legal framework made up of sovereign States. Of course, alongside that traditional configuration of coordination between entities that were legally equal, a new and more progressive constitution of the international community had evolved, but, since the "Ago era", the Commission's mandate under the heading of State responsibility had been understood as aimed at codifying the traditional law of the traditional society of States, while taking account of such new elements as had emerged since 1945. The Commission had rightly refrained from undertaking the task of paramount political importance of defining a new layer of worldwide institutions responsible for issues of State responsibility. Within that framework, it was obvious that every State made its own determination as to whether a delict or a crime had been committed. From the legal standpoint, that held true for aggression as well, in the sense that every State had the right of self-defence independently of a finding by the Security Council to that effect, as it did for collective self-defence. The basic features of the present-day international community could not be ignored, especially as the power of individual States to make such findings was always open to challenge by the aggrieved party. That power would seem odd or unacceptable only if the notion of crime was filled with criminal characteristics. As long as the definition of crime was confined to a finding that a particularly serious wrongful act had been committed, there was nothing strange about States having the ability to evaluate the legal position as they viewed it.

10. The main consequence of the commission of a crime was that the international community had a role to play and it would be preferable that that community should act through the collective institutions it had established. As there was no such institution with competence in all instances where the vital interests of the international community were affected, he was very much in favour of a broad interpretation of the powers of the Security Council under Chapter VII of the Charter of the United Nations, but even the rather loose formula "international peace and security" had certain limits. As a substitute for truly collective action, authorization should therefore be given to third States not directly affected to take measures for the defence of community interests. In addition to the right to make representations, which they already enjoyed, they should be given the right to take countermeasures, since the prohibition of the use of force served as a safeguard against a penalty's being out of all proportion to the crime. In the case of genocide, for example, there would be no harm in 140 States adopting countermeasures. The draft articles must, however, emphasize that the first remedy should be a collective one and that third States had a standing that was essentially one of *defensores legis*. It was only the State directly affected that must be entitled to adopt all appro-

priate measures for its defence, but always within the limits of Article 51 of the Charter.

11. For the Special Rapporteur, the consequences sustained by the defeated Powers at the end of the Second World War were part of positive international law and it was thus legitimate to punish aggressor States. For his part, he had already warned against the temptation of introducing the idea of the punishment of States without careful consideration. The punishment of those guilty presupposed the existence of an authority duly vested with the power to sanction in accordance with a well-established procedure. Yet there was no such institution at the international or the regional level. The Security Council had essentially been entrusted with police functions and its jurisdiction might at most have a preventive character, but under no circumstances that of a court of law. The international community had not seen fit to create an institution empowered to judge State conduct and impose punitive sanctions.

12. What about the measures taken against the Axis Powers after the Second World War? Could they serve as a model for the draft under consideration? He had serious doubts in that regard. Was it really possible to subscribe to the proposition that a coalition of victorious Powers might unilaterally, at their political discretion, annex parts of the territory of an aggressor State, expelling the population living there? It was patently clear that all the horrors and atrocities committed by a criminal regime could not serve as a justification for subjecting the population living under such a regime to similar treatment—to do so would ignore the basic principles of humanitarian law and human rights. He was not at all against the idea of imposing sanctions against a State whose leadership had led its people into crime, war and tragedy, but then a carefully conceived procedure must be established and, in particular, the rights of the people concerned must be respected. A pronouncement of collective guilt was to some extent inevitable, but on no account should innocent people be made to suffer. Thus, he could only caution against attempts to open the door to arbitrary action that disregarded due process of law. Indeed, the best way to punish was first and foremost to punish the leaders responsible and to insist on reparation, and nothing but reparation. As the case of Iraq had shown, that was most difficult to achieve. In all probability, Iraq would never be able to provide compensation for all the damage that it had caused. Putting an end to a conflict required a great deal of statesmanship. If retribution and revenge were the sole objectives, tension would only be perpetuated. From the seventeenth to the nineteenth century in Europe, the art of achieving comprehensive peace settlements had been highly developed. Inevitably, two things must be reconciled: just reparation and satisfaction for the victim, but also reconciliation with a view to building a durable foundation for a peaceful future.

13. Lastly, he wondered whether the Commission would undermine the powers of the Security Council if it did not recognize that the commission of a crime entailed particularly harsh consequences. In fact, the Council did not have the power to invent new laws: it was bound to apply the law within the limits of its mandate and the rules under consideration would not affect its functioning in any manner whatsoever. As he had

already pointed out, the Council had primarily a police function. In order to restore the peace or put an end to an act of aggression, it could even set the conditions that an aggressor State must meet to make good the harm it had caused. That derived from the specific mandate of the Council under Chapter VII of the Charter. The Council's powers were in no way conditioned by the rules on State responsibility.

14. It would be wrong for the Commission to engage in a debate on the scope of the powers of the General Assembly and the Security Council. Likewise, it should refrain from redefining the scope of self-defence under Article 51 of the Charter. It was not called on to invent new instances of the legitimate use of armed force. The parameters were quite clear and should be left as they stood: it was the Council that might order the use of armed force under Article 42 of the Charter and Article 51 provided for the right of self-defence. That was all. The task of the international community was to strengthen its possibilities of action with a view to counteracting serious human rights violations, such as genocide. However, it could not be left to individual States to use military means to combat and stop atrocities from being committed.

15. Drawing attention to another possible consequence of the commission of one particular category of international crime, namely, serious human rights violations, he said that a person who committed such crimes might lose immunity not only for the purpose of criminal prosecution, but also with regard to a civil action to obtain compensation.

16. Although he agreed that article 19 of part one of the draft was useful, he was open to a change of terminology, since the ambiguity of the word "crime", which inevitably implied a criminal flavour, was rather infelicitous.

17. In closing, he thanked the Special Rapporteur for his brilliant report, which had stimulated a rich debate.

18. Mr. MAHIU said that he would first expound on the reaction of States other than the victim State in the event of aggression. The States not directly concerned could be divided into two categories, depending on the type of legal relations they had with the victim State. First, there were the States that were linked to the victim State through a defence agreement, a military alliance treaty usually providing that any attack on one party was regarded as an attack on the other. The question then arose whether, although not directly and concretely affected by the aggression, they were nevertheless injured legally and, consequently, whether they could not resort to countermeasures, including armed force. That was the whole problem of collective self-defence, the conditions of form and substance and the instrumental circumstances in which they could be invoked under the Charter of the United Nations. Clearly, it was impossible to steer clear of the debate simply in order to avoid the dangers of excessively invoking collective self-defence, which might serve as an excuse to sidestep the control of the international community or to violate the rules of *jus cogens*. The other States, being those that had no legal ties with the victim State, did not, of course, have the right to invoke self-defence and use armed

force in order to come to the aid of the victim. The use of armed force in that case must be part of the collective mechanisms currently provided for in the Charter and must therefore take place under the authority of the competent United Nations bodies, in particular, the Security Council, which alone could request other States, if necessary, to use force in circumstances that it defined.

19. In the case of crimes other than aggression, it was more difficult to determine which States could react and the conditions under which they could do so and the manner of intervention. In actual fact, solutions could be only case by case. With genocide, for example, it was necessary to distinguish between at least two situations. First, there was that of a State which attacked its own population, stirring the conscience of other States, but not directly injuring any of them. Was it logical to conclude that those States must consider that they were not concerned and must simply leave the matter to collective mechanisms or, on the contrary, that each of them was entitled to demand that the killing should stop and, in the event of a refusal, to take countermeasures to be determined, with the exception of armed force? He felt that, in such a case, several reactions were possible, for instance, decreeing an embargo on the supply of weapons to the State responsible for the crime of genocide, it being understood that such reactions must take place under the authority and control of collective mechanisms, in the current state of affairs, under the auspices of the United Nations and the Security Council. It could then very well be asked whether the international community could go farther and use armed force for a humanitarian intervention. The Commission must give thought to that problem and define when it could arise and how to respond to it.

20. The second case was that of a State which committed genocide not only against its own population, but also against the population of one or more other States, which were thus directly injured and could not help but react. What forms could the reaction of those States take or what could the States rightfully demand? Could they contemplate humanitarian intervention such as the use of armed force? The Commission must reflect on that question; otherwise, it would leave it to States themselves to ask such questions and perhaps to reply to them as they saw fit and thus allow them full freedom to invoke that concept, which was still vague, and to determine subjectively the conditions under which they could do so.

21. As to the consequences of international crimes compared to those of international delicts, he wondered whether the limits, admissible in certain cases, to the substantive and instrumental consequences of delicts should be ruled out for crimes, whether crimes should have the same instrumental consequences as delicts and, lastly, whether it would not be advisable to recognize that crimes incurred special consequences. First, in the case of international delicts, the Commission had for example provided that the wrongdoing State should not be subjected to excessive obligations or humiliation. Were those restrictions justified in the case of an international crime? The question was a sensitive one, but it must be asked. There was probably no universal response, but a separate one for each crime. Secondly, he thought that, generally speaking, given the desire for

equity and justice, the injured State should be able to react more easily in the case of a crime than in the case of a delict, the aim being to discourage any escalation. It was for the Special Rapporteur to explore the conditions in which that reaction might take place. In any event, the principle of proportionality, one of the most important in international law, must prevail for crimes and delicts alike, regardless of the circumstances. Lastly, contrary to what had been envisaged for delicts, punitive sanctions could be taken against a State that committed an international crime such as aggression, for example a prohibition on the manufacture of certain weapons, the dismantling of certain weapons factories or the obligation to pay punitive damages. Could those measures, which were understandable and even justified in the case of aggression, be applied in the case of other crimes? He simply raised the question, to which he hoped that the Special Rapporteur would have a reply.

22. With regard to the consequences of a given sanction, a serious difficulty remained that had been raised by the Special Rapporteur in his fifth report (A/CN.4/453 and Add.1-3), in which he asked whether it could be assumed in any circumstances that a people could be totally exempt from guilt—and liability—for an act of aggression conducted by the obviously despotic regime of a dictator enthusiastically applauded prior to, during and after the act. That question was at the heart of the most sensitive and complex problem of the consequences that might attach to the crimes. The temptation was great to reply that, obviously, if the people had applauded the crime committed, it must suffer the consequences at the same time as the persons who were punished individually pursuant to the draft Code of Crimes against the Peace and Security of Mankind. It was, however, no secret that despotic regimes had ways to arouse and, indeed, manipulate the enthusiasm of their peoples, which, with a despotic power at home and the possibility of sanctions being imposed from abroad, were caught between the devil and the deep blue sea. Even a democratic country was not immune to such a misfortune and that was even more serious because, if a country freely allowed an aggression to be committed, its people was then more responsible than in a case in which it was governed despotically. The fact was that those who suffered first from sanctions in a number of cases were often innocent people, including women and children. To react or not to react was a tragic dilemma. It was perhaps not possible, when imposing sanctions for a crime, to spare the population, which was usually not to blame. The Commission could not afford not to discuss that issue. It must analyse all the implications of the sanctions that might be imposed on a wrongdoing State and determine how far it was possible to go. He was interested in hearing the Special Rapporteur's viewpoint on that serious and difficult problem.

23. Mr. THIAM, referring to the prohibition on the manufacture of certain weapons or the dismantling of weapons factories mentioned as possible sanctions by Mr. Mahiou, said that he wondered whether such sanctions fell within the scope of State responsibility. Until now, sanctions imposed on States had been political sanctions taken by victors. No international court had assumed responsibility for ordering political measures. Was it conceivable that an international court called on to apply the

law of State responsibility would do so? Political sanctions were the responsibility of political organs.

24. Mr. MAHIU pointed out that he had not specified which organs would take the sanctions. The fact was that, in the event of aggression, the Security Council, a political organ, was empowered to take political measures. In the case of other crimes, the problem was still unsolved.

25. The difficulty with the current debate was that, because of the link with article 19 of part one of the draft, it touched not only on primary rules, but also on secondary rules.

26. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had understood Mr. Mahiou to have spoken only of the dismantling of weapons factories and the prohibition on the manufacture of certain weapons, not of territorial changes or population transfers. Such sanctions would not affect the people of the State against which they were directed, but would constitute a form of punishment whose effect would be to prevent that State from committing another act of aggression.

27. It was possible to imagine a punitive measure against a State which in no way harmed the population of that State and, indeed, even protected it. For example, it was possible to envisage imposing international control on a State where disturbances were taking place, even if that meant encroaching on its sovereignty. He saw no difficulty in agreeing to such a measure, which could be taken either by the victor States acting in self-defence or by judges or a court such as ICJ. There might be some situations which, at a particular time, called for a restriction of the absolute sovereignty normally enjoyed by every State precisely as a means of defending other States and the international community, as well as the population of the State concerned. Disarmament and control were, in his view, entirely consistent with full respect for the interests of populations.

28. He agreed in principle with the distinction Mr. Thiam had drawn between the position of a State, especially a victor State, and that of a judge, who did not have the same powers. This did not imply, however, that no role whatsoever should be envisaged, *de lege ferenda*, for the judge in the determination of the existence, attribution and consequences of a crime, including, for example, a crime of aggression.

29. Mr. KUSUMA-ATMADJA said that the concept of State crime did not exist in *lex lata*. It was true that there had been many new developments since 1945 and article 19 of part one of the draft articles<sup>8</sup> reflected that new situation. That did not mean that the article was entirely satisfactory. In the first place, the understandable and acceptable distinction it established between crimes and delicts gave rise to a problem, if only with regard to the distinction between different categories of internationally wrongful acts depending on their gravity. The problem was perhaps only one of terminology that could be solved later.

<sup>8</sup> Ibid.

30. With regard to the question of the definition of crimes, it was obvious that certain criminal acts such as aggression, apartheid, genocide and the maintenance by force of colonial domination could be committed only by States. He was therefore prepared to agree that such acts should be considered State crimes, while being aware of the problems that doing so might create and the consequences it might have, for example, in connection with succession of States or collective guilt. He had more serious reservations about the fourth category of breaches referred to in article 19, paragraph 3 (d). It was difficult to believe that massive pollution of the atmosphere or of the seas could occur without any measure being taken, if only at the regional level, before mankind as a whole was affected. Taking account of such a situation was not very realistic. Furthermore, defining pollution of the atmosphere or of the seas as a crime was somewhat premature, considering that acts of transboundary pollution were only just beginning to be regarded as internationally wrongful acts. It should not be forgotten that treaties existed in that regard, such as the ASEAN Agreement on the Conservation of Nature and Natural Resources which had been concluded by the countries of ASEAN in 1985,<sup>9</sup> and whose articles 19 and 20 dealt precisely with that question. Defining a wrongful act as a crime would hardly encourage the States parties to such treaties to abide by them.

31. As to the consequences, they were clear in the case of aggression and mechanisms for responding to aggression existed on the basis of the provisions of Chapter VII of the Charter of the United Nations. The question was, rather, whether States not directly victims of aggression could exercise a right of collective self-defence. In his view, the answer was yes. It was particularly important not to place too many restrictions on that right, since aggression at the present time could assume many different forms. To prevent the neighbouring States of a State that was the victim of aggression from helping that State would be unrealistic and inconsistent with the current situation.

32. He was also prepared to agree to recourse to countermeasures if they were properly regulated so as to avoid any abuses. Thus, in the case of transboundary pollution, considered to be an internationally wrongful act, if the relevant treaty provided only for consultations and a dispute settlement procedure which might well be ineffective, it should be possible to apply countermeasures. Generally speaking, flexibility was called for in that field, especially if wrongful acts were not classified in two categories, that of crimes and that of mere delicts. If that distinction was made, however, the consequences attaching to each category of wrongful acts would have to be specified. There again, everything depended on the point of view the Commission decided to adopt, *de lege lata* or *de lege ferenda*. The Commission was engaged not only in the codification of international law, but also in its progressive development.

33. Mr. IDRIS said that, for a variety of reasons, he associated himself with the arguments put forward against the more philosophical than legal concept of State crime defined in article 19 of part one of the draft.

First of all, as it now stood and bearing in mind its history, article 19 also appeared to cover the question of the succession of States in respect of international crimes. That meant that a State would continue to suffer the legal consequences of an international crime committed earlier even if the political, social or human circumstances in which that international crime had been committed had ceased to exist. Secondly, when an international crime was committed, the criminal responsibility of certain individuals was also involved. Thus, in actual fact, there were two crimes—a crime of the State and a crime of individuals and the draft should take that fact into account. Thirdly, it should not be overlooked that a crime of the State would give rise to sanctions that would affect the population of that State without distinction, including those members of society who had, individually or collectively, been opposed to the crime, not to mention innocent people. Fourthly, the idea that a State was responsible for an international crime was far too simplistic and totally failed to take account of the many different relationships that existed within a particular State or between States in general. Fifthly, there were at present no legal means or mechanisms that would make it realistically possible to apply article 19. Existing political organs such as the General Assembly and the Security Council were not empowered to punish crimes corresponding to the definition in article 19 and ICJ could act only with the consent of States. Like Mr. Thiam (2338th meeting) and Mr. Rosenstock (2339th meeting), he therefore considered that crimes were committed not by States as such, but by individuals who used the apparatus of the State for that purpose. He did not believe that using a term other than “crime” would help to find a lasting solution to the problem. He was not in favour of Mr. Bennouna’s suggestion (2342nd meeting) that the General Assembly should be asked whether the question of State crimes ought not to be dealt with separately; the General Assembly was certainly not better equipped than the Commission to answer that question. Lastly, he endorsed most of the comments made by Mr. Tomuschat.

34. Mr. PELLET recalled having said (2340th meeting) that the distinction between two categories of wrongful acts under international law was self-evident, whether the two categories were called crimes and delicts or whether different terminology was found; that the crimes were *prima facie* correctly defined in article 19, paragraph 2; and that he believed that the difference between crimes and delicts was one of kind rather than simply one of degree, as some members had suggested. Those were, however, only convictions—intuitions unconfirmed by any proof. In order for those intuitions to be confirmed, the distinction had to have concrete effects *de lege lata* or, in other words, a different regime had to apply to crimes, on the one hand, and to delicts, on the other. With that in mind, he would try to answer the questions asked by the Special Rapporteur in chapter III of his sixth report.

35. First of all, he disagreed with the heading of section C: “What are the possible consequences of a finding of crime?” In his view, the question of a finding was an entirely separate problem that would best be dealt with in part three of the draft, since the existence of a crime was in fact entirely independent from its determi-

<sup>9</sup> Adopted at Kuala Lumpur on 9 July 1985.

nation. It would certainly be better if the existence of a crime was determined by an impartial organ, but no such organ existed in modern-day international society. Much had been said about the Security Council in that connection, but he did not think that bringing charges formed part of the Council's functions. It was not for the Council to determine whether a particular action was or was not a crime. Under the Charter of the United Nations, it could, of course, determine the existence of at least one crime, aggression, but it was not required to define it as a crime. As far as the other crimes were concerned, its jurisdiction could, at best, only be derived. Moreover, the Council's *faculté* of reaction was limited to restoring international peace and security and it was only to that end that it could apply what were known as "sanctions". However, contrary to what had been said, the power to sanction derived not from the finding that a crime had been committed, but from the actual text of Chapter VII of the Charter. Its foundation was to be found in the Council's primary responsibility in the field of the maintenance of international peace and security and it could be exercised only after the Council had made the determinations referred to in Article 39. Moreover, even in the event of aggression, the Council's power to find that aggression had occurred left intact the parallel and even previous rights of the victim State, as Article 51 demonstrated.

36. There were two resulting consequences. On the one hand, the Charter regime should be set aside for the topic under consideration. The Charter established a special mechanism which could come into operation in the case of a reaction to a wrongful act, but that was not the Charter's main purpose and he suggested that the Special Rapporteur might include a provision stating, for example that these draft articles shall be without prejudice to any powers that may be vested in the United Nations or certain regional bodies in the event of a threat to the peace, a breach of the peace or an act of aggression. On the other hand, such setting aside in no way meant that the Commission did not have to consider the consequences of a crime in the context of inter-State society, which Professor René-Jean Dupuy had called the "relational society" and which was the fundamental reality of the present time. In that respect, the Special Rapporteur's fifth report and the summary of it contained in the sixth report were valuable guides, despite some gaps.

37. First, it seemed obvious to him that a crime was, above all, an internationally wrongful act. Consequently, the obligations already agreed on with regard to all internationally wrongful acts applied to crimes, particularly, the obligation of cessation of the wrongful conduct, the obligation of reparation and, where applicable, the obligation to give assurances or guarantees of non-repetition. If the special regime for crimes existed—and he believed that it did—it was not opposed to that of simple delicts, but added to it. The very essence of the definition of a crime contained in article 19 was that a crime constituted a breach of an international obligation essential for the protection of fundamental interests of the international community. There were two fundamental consequences of that definition: on the one hand, the concept of the injured State did not disappear, but was watered down;

and, on the other, the seriousness of the breach called for more energetic and more radical reactions.

38. It might well be that one or more States would be more injured than others, that they might be the direct victims of a crime. In every case, however, in addition to such direct injury, there was an injury to the fundamental interests of the international community, which was therefore entitled to react. Thus, in the case of the crime of genocide, all States could react even if they were not directly affected. By way of proof, he referred to the famous judgment of ICJ in the *Barcelona Traction, Light and Power Company, Limited* case,<sup>10</sup> in which the Court spoke of the essential distinction between the obligations of a State towards the international community as a whole and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former were the concern of all States. In view of the importance of the rights involved, all States could be held to have a legal interest in their protection. The obligations in that category were obligations *erga omnes*. The Court did not, it was true, speak of crimes. In 1970, the term "international crime" had not yet been adopted by the Commission, which would begin to use it only in 1976. However, the Court did not refer only to *erga omnes* obligations, but also stressed the importance of the rights involved. The point at issue was thus not the breach of just any rules *erga omnes*, but of particularly serious breaches of certain rules of *jus cogens*. The examples which the Court gave in the *Barcelona Traction* case were aggression, genocide, and the infringement of the basic rights of the human person. Those were not "ordinary delicts", as would be, for example, the infringement of the right of transit passage through an international strait, although that, too, placed an *erga omnes* obligation on the coastal State. There was therefore a difference between a breach of an *erga omnes* obligation and a crime.

39. Admittedly, it could be argued that that would establish only the existence of a purely procedural right before the Court. But, in the first place, that was not altogether an insignificant matter. For instance, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* brought before the Court by Bosnia and Herzegovina on 20 March 1993,<sup>11</sup> the *actio popularis* principle could be of very real and significant importance, on the one hand, because any State could join Bosnia and Herzegovina and its legal interest would be established and, on the other, because Bosnia and Herzegovina could charge the defendant, Yugoslavia (Serbia and Montenegro), with violations committed not only against Bosnian nationals and on the territory of Bosnia and Herzegovina, but also with any act of genocide committed against non-Bosnians and on Yugoslav territory itself or elsewhere. That element was very characteristic of the special legal regime applicable to crimes.

40. Secondly, that element was not, in his view, the only consequence of the commission of a crime. It was quite clear from the Special Rapporteur's very detailed

<sup>10</sup> Judgment of 5 February 1970, *I.C.J. Reports* 1970, p. 3.

<sup>11</sup> *Provisional Measures, Order of 8 April 1993, I.C.J. Reports* 1993, p. 3.

fifth report that that kind of internationally wrongful act had special implications for international law and for the international community. First of all, the *faculté* of resort to countermeasures was considerably enlarged. In the case of delicts, it was acknowledged that certain principles had to be observed, such as the principle of proportionality whereby only the State which had suffered damage directly could react, if it were able to do so and subject to strict conditions, and perhaps, the principle of the exhaustion of prior remedies. The position was different in the case of crimes. In the case of genocide, for instance, not only could all States react; they could also not be asked to wait until the State suspected of genocide had agreed to abide by the decision of an impartial third party.

41. As to the means used, they must be such as to put an end to the crime. That, however, involved a very serious problem which was considered by the Special Rapporteur in his fifth report in connection with the subjective-institutional aspects of the problem of reaction, namely, the use of force. In that connection, it was his firm belief that the principle of the prohibition of the use of force, even in the context of an individual or collective reaction to a crime, represented a boundary that must not be crossed, at any rate, in inter-State relations, in the context of the "relational society".

42. In more general terms, it appeared to be out of the question that the individual reactions of States to a crime could result in violations of the rules of *jus cogens*, in other words, of norms the international community as a whole accepted and recognized as peremptory. Recognition of the concept of crime therefore did not necessarily involve recognition of an absolute and unlimited right of riposte or of *lex talionis*, a fact that would perhaps reassure certain members of the Commission. There was little precedent, but reference could none the less be made by way of example to Viet Nam's intervention against the Khmer Rouge, the consequences of which had never been legally recognized by the international community because, in order to put a stop to the crimes of the Khmer Rouge, Viet Nam had in turn violated a peremptory rule of general international law, namely, the rule prohibiting any use of force in the absence of a decision by the Security Council.

43. In addition to those main elements of the special legal regime applicable to crime, there were others, including the obligation not to recognize the consequences of a crime and not to give aid to the perpetrator, as well as the obligation to render assistance to the victim and the non-application to crimes of circumstances precluding wrongfulness.

44. Among the other problems which arose was that connected with the obligation of the State which committed a crime to compensate for the damage it had caused. So far as delicts were concerned, he had considerable reservations about the concepts of fault and punishment in the field of international responsibility, but he did not rule out the possibility of aggravated or punitive damages in the case of crimes. There was judicial practice to that effect which the Special Rapporteur had referred to earlier, and which pointed to certain trends that supported the award of aggravated or punitive damages to a State directly injured by a crime.

45. Unless he was mistaken, there was a lacuna in the fifth report. In the title to section C, the Special Rapporteur raised the question whether international criminal liability was that of States, of individuals or of both. The ensuing discussion, however, actually dealt with a different matter, namely, whether the responsibility of the State could be criminal and with the very delicate problem of collective responsibility; the question asked in the title of section C, however, remained unanswered. That problem had in fact been broached by Mr. Thiam, who wondered whether, in the final analysis, what was termed "international crime of the State" was not in fact the crime of natural persons. It was an important question because, if the answer was in the affirmative, it was a matter that would be covered solely by the Code of Crimes against the Peace and Security of Mankind. It was, however, his firm belief that the reply was not in the affirmative and that there was a logical and consistent category of internationally wrongful acts, which was based on a clear if not precise criterion, that gave rise to special legal consequences, and such acts were indeed violations of international law attributable to the State itself. It was hard to conceive of such acts unless they came within the framework of the State and had the support of the machinery of the State. If, as Mr. Thiam had said, it was individuals who made use of the State, then they were individuals who were indissociable from the State, like Hitler, as Chancellor of the Reich, and Saddam Hussein, as President of Iraq. What they did was binding on the State itself. If that argument were rejected, then, to be a true follower of Scelle, the reasoning would have to be followed through to its conclusion so that there would be no interest in the legal superstructure, the sole concern being the underlying social structure. That, however, was tantamount to disregarding the unquestionable legal reality which the State represented, and it was in any event outside the competence of the members of the Commission.

46. On the other hand, one of the consequences of the concept of international crime of the State, in his view, was that it lifted the veil of the State. In the case of delicts, of "ordinary" internationally wrongful acts, the organs of the State bound the State and the State alone; in the case of crime, their own individual responsibility was also incurred and they could not shelter behind the immunities which their duties conferred on them. That was another element in the special legal regime applicable to international crimes.

47. Lastly, he would make an appeal to members of the Commission. The debate, which had started well with chapter II of the fifth report, had been rich and useful, but some members of the Commission had stopped short at the word "crime", because of an internal law and criminal law approach, and had rejected the very concept of particularly serious internationally wrongful acts, though it seemed perfectly obvious. That would be tantamount to throwing out the baby—a baby who, admittedly, had been born 18 years earlier, but who was still no more than a puny adolescent—with the bath water. Certainly, not everything was clear, but care should be taken not to "throw out" the highly valuable and indispensable concept of "crime". It was a matter of *lex lata* and it was for the Commission to determine its implications, with moderation, from the standpoint

either of *lex lata* or of the codification or progressive development of the law.

48. Mr. THIAM said that he did not deny the existence of international crimes, but he did reject the notion that the proposition he put forward was based on a purely internal law approach. If one faced facts, it could not be denied that the crimes of the Second World War and earlier wars had been committed by individuals holding responsibility who had committed them by making use of the machinery of the State. That did not mean the State was not responsible, but its responsibility was subsidiary. An individual who held a post of responsibility in a State and who committed a crime was criminally responsible, but the State incurred international responsibility deriving therefrom. Also, the draft Code of Crimes against the Peace and Security of Mankind, which was before the Commission,<sup>12</sup> contained an article 5 which provided that prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of any responsibility under international law for an act or omission attributable to it.

49. He only regretted that a term had been used in article 19 of part one of the draft articles which created confusion and which, at the time when the "baby" had been born, had not been generally accepted because there had been some talk even then of a "little loved child", precisely because the term with which it had been submitted had been unsuitable. So long as the Commission used the word "crime", it would not be doing article 19 any service. He noted in that regard that Mr. de Saram had proposed (2340th meeting) that the word "crime" should be replaced by a reference to a wrongful act of a violent nature. In any event, an expression which would command unanimous support would certainly have to be found.

50. Mr. RAZAFINDRALAMBO said that he would confine his comments to a few problems raised in the report which, in his view, were of particular importance.

51. The Special Rapporteur's fifth report was based on a complete inventory of the problems involved in the proposal for a special regime of responsibility for crimes, as noted by the Commission, by the Sixth Committee and by doctrine. His study was supported by numerous examples which had been drawn from the Security Council's recent practice and demonstrated its key role in the settlement of major international conflicts during the previous decade. With the ever-increasing number of serious violations of international law, the idea of responsibility for "crime" was coming more and more to the fore and, in his view, the introduction of a "special regime" of responsibility for crime was a task the Commission should knuckle down to as a matter of priority, in accordance with its mandate, as regularly renewed by the General Assembly since 1976.

52. The question whether the crimes could be defined was tendentious in that it could call into question the very basis of article 19. Nobody could seriously imagine that there could be just one single category of offences when there were several kinds of primary obligation, which were unequal in importance and whose violation

constituted an internationally wrongful act. In particular, the obligations imposed on States under Article 2, paragraphs 3 and 4, of the Charter of the United Nations were so important that their violation justified the remedies and measures laid down in Chapter VII. Such violations could, of course, be characterized as particularly serious internationally wrongful acts or as very serious international delicts and the explanation could be given that the difference between them and violations of ordinary obligations was only one of degree, not one of kind. In his view, there was no particular reason not to characterize them as "international crimes", keeping the term "delicts" for all other internationally wrongful acts that did not have the same character of seriousness. There could therefore be no talk of the Commission exceeding its mandate when it considered that the time had come to determine the consequences of international crimes.

53. As to the criticisms of the definition contained in article 19, paragraph 2, the words [international] "community as a whole" were simply borrowed from the wording used in article 53 of the Vienna Convention on the Law of Treaties to define *jus cogens*. Furthermore, the subjective criterion, which derived from the fact that the violation of the obligation was "recognized" as a crime, was no more open to question than the criterion of recognition by "civilized nations" of the general principles, as referred to in article 38 of the Statute of ICJ.

54. Unlike the Special Rapporteur, he did not believe that article 19, paragraph 2, was worded in circular terms, as it was clear that the crimes recognized by the international community as a whole were, *inter alia*, the crimes set forth in paragraphs 3 (a) to 3 (d). In the circumstances, the violation by the State of an obligation of the kind covered by paragraph 2 in no way implied recognition of any criminal responsibility. That did not mean, however, as the Special Rapporteur had pointed out, that the State might not incur responsibility, *de lege ferenda*, if not *de lege lata*, which differed from civil liability under internal law. Even in the so-called liberal countries, the maxim *societas delinquere non potest* had fewer and fewer supporters, particularly in view of economic and financial crime such as money laundering. In such a case, the most serious criminal conduct of States called for an appropriate policy of sanctions, the nature of which, albeit punitive, could not be afflictive, as in the case of individuals guilty of crimes.

55. In view of those new areas of crime, the list in article 19, which in any case was only indicative, should be completed by a reference in particular to drug-traffic-related crimes.

56. As to which organ should determine whether a crime had been committed, in his view, the role of the Security Council should be decisive in the case not only of aggression, but of other crimes as well in so far as it could act within the framework of Chapter VII of the Charter. Otherwise, there would be an unacceptable gap in the law. In the case of remedies, the Council would also have a central role to play in connection with measures that could undermine the independence, sovereignty or territorial integrity of the State which committed the crime and, in particular, of armed action. It also seemed as though the prohibitions laid down in article 14 could not be lifted in the case of crime without the intervention of the Council.

<sup>12</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

57. So far as the possible exclusion of crimes from the scope of the provisions on the circumstances precluding wrongfulness was concerned, it would be difficult, having regard to the definition contained in article 19, paragraph 2, and to the *erga omnes* nature of the crime, to preclude wrongfulness on account of the consent of the injured State; and that was what article 29, paragraph 2, seemed to indicate. Similarly, a state of necessity was not grounds for precluding wrongfulness in the case of the violation of a *jus cogens* obligation. Apart from those two cases, however, it did not seem that the circumstances precluding wrongfulness could be removed a priori.

58. His position with regard to the general obligation not to recognize the consequences of a crime and not to render assistance to a "criminal" State was consistent with the reasoning which lay behind his proposition that the Security Council should have exclusive responsibility for the decisions incumbent on the international community and, more particularly, on injured States *uti singuli*. The obligation to render assistance to the victim was a matter solely for the sovereign will of each State.

*The meeting rose at 1.10 p.m.*

## 2344th MEETING

*Friday, 27 May 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, 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. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

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

[Agenda item 4]

### TWELFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Commission to embark on the second reading of the draft Code of

\* Resumed from the 2334th meeting.

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>3</sup> *Ibid.*

Crimes against the Peace and Security of Mankind. The text of the draft articles, including the commentaries, was to be found in an informal paper which was available in all languages.

2. Mr. THIAM (Special Rapporteur), introducing his twelfth report (A/CN.4/460), said that corrections were required in the text. In the French version, the commas before and after the word *déjà*, in the last sentence of paragraph 4, were to be deleted. In paragraph 21, the words "the second sentence of" should be inserted before "draft article 2". In paragraph 64, the words "rule *non bis in idem*" were to be replaced by "rule set forth in article 6". In subheading 2, directly following paragraph 99, the word *assistance* should be replaced by *existence*, a correction that applied only to the French text. Lastly, in subparagraph (c) of paragraph 159 of the French version, the second sentence should form a separate new paragraph 160, the following three paragraphs being renumbered accordingly.

3. The twelfth report was the shortest thus far presented on the topic. The concepts it dealt with had already been discussed at considerable length both in the Commission and in the Sixth Committee, and he had therefore decided to take the course of simply reproducing the text of each draft article as adopted on first reading, without reverting to the discussion on it, except in those cases where no clear view had emerged in the Commission.

4. As indicated in paragraph 1, the report focused on the general part of the draft, namely, chapter I (Definition and Characterization), and chapter II (General Principles). Members who had participated in the elaboration of the draft from the outset would recall the debate on whether the consideration of general principles could logically precede that of the crimes actually to be referred to in the Code. Now that the Commission knew more or less clearly what crimes were involved, it was in a position to embark on the identification of the general principles applicable to those crimes. The chapter dealing with the crimes would form the subject of the next report, which would present a far shorter list of crimes than envisaged earlier. In the light of discussions in the Commission and of observations by Governments, he had decided to limit the number of crimes to those whose inclusion in the Code had not given rise to objections from any quarter. Thus, threat of aggression, intervention, and so on, although characterized as crimes by virtue of resolutions of the General Assembly and the Security Council, could not be so characterized from the point of view of criminal law and he had therefore concluded that it would be wisest to omit them.

5. The layout of the twelfth report was explained in the introduction to the report.

6. Mr. IDRIS, after commending the Special Rapporteur for his excellent report, said that a preliminary issue was article 2, which he continued to think not only confusing but also devoid of any legal value.

7. Mr. THIAM (Special Rapporteur) drew attention to those paragraphs of the report setting out his point of view on article 2, and also to his earlier corrections to

paragraph 21. It should be noted that he had no objection to deleting the second sentence of the article.

8. Mr. AL-BAHARNA said he noted the view expressed by the Special Rapporteur in the report that the Bulgarian Government's compromise formula for article 1 (Definition) might be adopted subject to drafting improvements. While generally in agreement with the idea of combining a conceptual definition with an enumerative one, he thought the Commission should try to formulate the article as clearly as possible. The draft article, as proposed by the Bulgarian Government, struck him as somewhat circular in character, and he would therefore suggest that it should be reformulated to read:

"1. For the purposes of this Code, a crime against the peace and security of mankind is any act which constitutes a gross violation of or threat to the international peace and security of mankind.

"2. In particular, the crimes set out in this Code constitute crimes against the peace and security of mankind."

9. He said the correction to paragraph 21 made by the Special Rapporteur was gratifying. Article 2 (Characterization) as a whole was too important to be deleted, for it embodied an important aspect of the draft Code, namely, the autonomy of international criminal law *vis-à-vis* internal law. In order to meet the United Kingdom's criticism, the article could be modified to read:

"The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that the act or omission in question is not a crime under internal law does not exonerate the accused."

However, if the second part of the article was considered merely a corollary of the first, he would have no objection to it being deleted.

10. With regard to paragraph 3 of article 3 (Responsibility and punishment), he agreed with the Special Rapporteur that it would be an impossible and pointless exercise to specify the crimes to which the concept of attempt might apply. While supporting the idea underlying the paragraph, he suggested that it be amended to read:

"3. An individual who attempts to commit one of the crimes set out in this Code is responsible therefor and is liable to punishment."

"Attempt" in this paragraph means any act or omission towards the commission of a crime set out in this Code which, if not interrupted or frustrated, would have resulted in the commission of the crime.

11. Article 4 (Motives) had been a bone of contention between several States. The Government of the United Kingdom had, in his opinion, rightly pointed out that that provision would be more appropriately located as part of article 14 (Defences and extenuating circumstances), where it might simply be stated that motive did not constitute a defence. He agreed with the Special Rapporteur's proposal to delete article 4, but would like to see its legal significance reflected in article 14. Article 5 (Responsibility of States) had elicited no unfavour-

able comments and he therefore saw no reason to change the text.

12. Article 6 (Obligation to try or extradite) was an important provision and he shared the Uruguayan Government's view that it should be linked with international criminal jurisdiction. Article 63 of the draft statute for an international criminal court<sup>4</sup> set out the procedures governing the surrender of an accused person to the court established under the statute. *Ex hypothesi*, article 63 was limited to the court, whereas article 6 of the draft Code would be of general applicability. The two provisions must be harmonized, which could be done by making paragraphs 1 and 2 of article 6 of the draft Code subject to article 63 of the draft statute and by deleting paragraph 3. With regard to the priority to be assigned to the principle of territoriality and the complicity of the territorial State in the commission of the crime, he had reservations about including them in the text adopted on first reading, but was open to persuasion.

13. He did not share the Special Rapporteur's view that article 7 (Non-applicability of statutory limitations) should be deleted. That would be going against the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. As the Convention was confined to "war crimes" and "crimes against humanity", article 7 might also be so restricted, but it should not be left out completely. In the absence of a provision of that kind, States would apply different norms with regard to statutory limitations, something which might ultimately weaken the international system. Article 8 (Judicial guarantees) had, as the Special Rapporteur had noted, "garnered a broad consensus". Although it was acceptable, the Commission should none the less harmonize it with article 44 (Rights of the accused) of the draft statute,<sup>5</sup> as both dealt with the same subject-matter. There was a slight divergence between the texts as to "public hearing": whereas the draft Code envisaged a public trial, the draft statute allowed for a trial *in absentia*. That inconsistency must be avoided.

14. States had sharply criticized article 9 (*Non bis in idem*). The United Kingdom, for example, had found the article to be *prima facie* in conflict with the provisions of the International Covenant on Civil and Political Rights. The Special Rapporteur had felt compelled to re-examine it under two different assumptions: first, where an international criminal court existed and, secondly, where there was no such court. As the Commission was currently drafting a statute for such a court, it was appropriate to take the first assumption and to proceed accordingly. In that context, the new text of article 9 proposed by the Special Rapporteur became highly relevant. He supported it and, indeed, found it to be similar to the text of article 45 (Double jeopardy (*non bis in idem*)) in the draft statute for an international criminal court.<sup>6</sup>

15. One Government had objected to paragraph 2 of article 10 (Non-retroactivity) but he agreed with the Special Rapporteur that the paragraph could justifiably

<sup>4</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 129.

<sup>5</sup> *Ibid.*, pp. 119-120.

<sup>6</sup> *Ibid.*, pp. 120-121.

be kept, because it reflected article 11 of the Universal Declaration of Human Rights.<sup>7</sup>

16. Article 11 (Order of a Government or a superior) had been criticized, *inter alia*, on the ground that the meaning of the expression “in the circumstances at the time” was not clear. In explanation, the Special Rapporteur stated that the article was based on principle IV of the Principles of International Law recognized in the Charter of the Tribunal and in the Judgment of the Tribunal.<sup>8</sup> However, in view of the criticism caused by replacing the clause “provided a moral choice was in fact possible to him” by “if, in the circumstances at the time”, the Commission should revert to the clause contained in principle IV. Article 11 would then read:

“The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of moral responsibility under international law, provided a moral choice was in fact possible to him.”

17. Article 12 (Responsibility of the superior) was sound, notwithstanding the reservations of one State that it conflicted with article 3. The article should therefore be retained in its present form. Similarly, he endorsed the text of article 13 (Official position and responsibility), which was squarely based on principle III of the Nürnberg Principles.

18. Article 14 (Defences and extenuating circumstances) had aroused considerable criticism from Governments. It had been challenged on the ground that it had cobbled together two different concepts and that it was too vague. Finding the criticism well taken, the Special Rapporteur had proposed a new text for article 14, on defences, and a new article 15, on extenuating circumstances. The new formulation proposed for article 14, “there is no crime when the acts committed were motivated by self-defence, coercion or state of necessity” was unsatisfactory both in form and in content. Granted that they were possible defences, but they should be dealt with individually in greater detail. The elements mentioned by the Special Rapporteur in his comments could usefully be embodied in the text of the article itself. In their absence, the criticism of vagueness levelled against the original article 14 remained. The Commission should be more specific about self-defence, coercion and necessity. Otherwise, the defences would not be of much practical value to the accused. The Commission should also consider whether it was tenable to include the defences of “insanity”, “error” and “consent”.

19. The text of new article 15, “When passing applicable sentences, extenuating circumstances may be taken into account by the court hearing the case”, should be harmonized with article 54 of the draft statute for an international criminal court (Aggravating or mitigating factors).<sup>9</sup> Unlike the Special Rapporteur, he held that the

new article 15 should deal both with extenuating and aggravating circumstances. Moreover, he agreed with the Government of Belarus that the question of extenuating circumstances could be considered in conjunction with that of penalties.

20. Mr. TOMUSCHAT congratulated the Special Rapporteur on an excellent and succinct report and said that the title of the draft brought to mind Chapter VII of the Charter of the United Nations. The draft Code had originally drawn on the Nürnberg Tribunal as a model, but its scope had been enlarged since then, as seen, for example, by article 21 (Systematic or mass violations of human rights). He therefore wondered whether it might not be better to produce another title to reflect the fact that the scope of the draft was now much broader than in the beginning. Perhaps the Drafting Committee could examine the question.

21. He agreed with the Special Rapporteur that the words “under international law” contained in square brackets in article 1, should be deleted, because it was not certain that all crimes enumerated in the draft Code were really crimes under positive international law. It was important to be cautious in that regard. He had doubts, however, about whether it would be possible to find a common denominator for all of the crimes. The risk was that penal prosecution might be based directly on that general wording, which would be at variance with the principle of *nullum crimen sine lege*. He therefore thought the Commission should not strive for a general wording to cover all of the crimes in the draft Code.

22. With regard to article 2, the second sentence could indeed be deleted. Norway and the United Kingdom were nevertheless right in some sense perhaps, for the crimes that the Commission had chosen were punishable in the internal law of all civilized States and, as such, were not completely independent of internal law. The point was that characterization was independent of the characterization in the internal law of any given State. He suggested bringing the language of the first sentence of article 2 into line with the link that existed between the draft Code and the criminal codes of all civilized States.

23. He endorsed paragraph 1 of article 3, but disagreed with the Special Rapporteur about paragraph 2. In part two of the draft Code, great care was taken in determining which persons were responsible for a crime. For example, the purpose of the wording adopted in paragraph 1 of article 15 (Aggression) was to restrict the category of persons punishable for the crime of aggression. If the wording were very vague, it would enormously expand the category of persons who could be punished under the draft Code. For the crime of aggression, every soldier would be punishable, and that would not square with the principles of the law of war. He could also refer to the example of article III (a) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, which governed participation. This far-reaching provision could not be supplemented by a further provision on participation. Accordingly, paragraph 2 of article 3 should be recast to take into account each of the crimes enumerated in part two of the draft Code.

<sup>7</sup> General Assembly resolution 217 A (III).

<sup>8</sup> Hereinafter referred to as the “Nürnberg Principles”. *Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), para. 45.

<sup>9</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 125.

24. Article 4 could be deleted, because it was unnecessary, and he was in favour of retaining article 5, for it said something that needed to be said.

25. The terms of article 6 were rather spare in substance and were inconsistent with the wording found elsewhere in model texts. For example, article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents stipulated that, if the State party did not extradite the alleged offender, it must submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Article 6 of the draft Code, on the other hand, merely spoke of trying or extraditing the person concerned. The formulation of article 6 must be brought into line with the wording in other texts. Mr. Al-Baharna had already drawn attention to the need to harmonize article 6 with article 63 of the draft statute for an international criminal court. In his view, an additional paragraph should be drafted, giving priority to requests for extradition from an international criminal court. It would also be noted that the French version of article 6, paragraph 1, as it appeared in the report of the Special Rapporteur, had neglected to state that the individual concerned was alleged to have committed a crime.

26. He had no definite position on article 7, although he considered that it should be re-examined. He wondered, however, whether the non-applicability of statutory limitations should apply for all time. Was there any point in bringing to justice the perpetrator of a crime against the peace and security of mankind 30 or 40 years after the crime had been committed? All kinds of difficulties could arise after such an interval. A compromise solution might be to add a clause to provide that time would cease to run for so long as there were factual grounds for not initiating criminal proceedings. In countries where criminals were in power, for instance, it was simply not realistic to bring proceedings while they were in power, a period, therefore, during which time should cease to run.

27. He agreed with article 8, which reproduced article 14, paragraph 3, of the International Covenant on Civil and Political Rights more or less word for word. He also agreed with the new text of article 9 proposed by the Special Rapporteur, one which was modelled on the provisions of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia,<sup>10</sup> and with the deletion of paragraph 4 of the original version. He did not, however, concur with the observations of the Government of the United Kingdom. On the basis of a close study, it had been concluded that, under existing positive law, the *non bis in idem* principle applied only within a given legal system. In other words, there were certain limits to the prohibition imposed by that principle so that proceedings taken in another State, on the same facts, were not precluded. That understanding of the position had, in fact, been endorsed by some international bodies.

28. He could not agree with the Special Rapporteur that article 10 was based on article 15, paragraph 2, of the International Covenant on Civil and Political Rights, which referred to "general principles of law recognized by the community of nations". Article 10, paragraph 2, however, referred to "international law or domestic law applicable in conformity with international law". If he remembered rightly, a conscious decision had been taken to give expression to the conviction that the world had entered the era of written law and hence there was no need to rely on unwritten principles. The phrase used in article 10, paragraph 2, had also been used to underline the importance of the principle of the rule of law. It should, therefore, be retained.

29. The Commission might wish to consider whether the word "possible", in article 11, should be qualified, perhaps by the word "really" or the word "morally". In German, the word *zumutbar* conveyed the idea but, unfortunately, it was untranslatable. Essentially, its connotation was that there existed a threshold concerning the sacrifices that could be reasonably expected of a person.

30. Article 12 should be re-examined, in his view, as it imposed a very heavy responsibility on the superior. The Commission should also consider the sources of the article. Article 13, on the other hand, commanded his full support. The Special Rapporteur had proposed a new text for article 14. Again, it seemed that the article should be split into two, as two different concepts were involved. An act done in self-defence was not illegal, whereas, in the case of coercion and state of necessity, fault was removed but not wrongfulness. He agreed entirely that the defence of error should have a place in the draft; it was unlikely, however, to be frequently invoked in the Code of Crimes against the Peace and Security of Mankind.

31. The high calibre of the Special Rapporteur's report should enable the Commission to conclude its work on the topic at the present session.

32. Mr. PELLET, speaking on a point of procedure, said that, notwithstanding the very interesting statements made by Mr. Al-Baharna and Mr. Tomuschat, he would propose that the Commission should examine the draft, article by article, after members had made any general observations. That would make for a livelier and more coherent debate.

33. Mr. THIAM (Special Rapporteur) said that he would have no objection to such a procedure.

34. Mr. BENNOUNA, supporting Mr. Pellet's proposal, said he would point out that the Commission was dealing with two interlinked topics: the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. Some of the provisions of the statute dealt with subjects covered by the draft Code. In the circumstances, he was concerned to ensure that the Commission would not envisage referring the draft Code to the General Assembly when the first reading of the draft statute had perhaps not even been completed. Some coordination of the work of the Commission was therefore necessary.

<sup>10</sup> Document S/25704, annex.

35. Following a further exchange of views in which Mr. CALERO RODRIGUES, Mr. GÜNEY, Mr. ROSENSTOCK, Mr. Sreenivasa RAO, Mr. VILLAGRÁN KRAMER and Mr. YANKOV took part, the CHAIRMAN said he would suggest, in the light of comments made, that members should first have the opportunity to make their general statements, after which the draft Code would be considered article by article, having regard to the fact that the subject-matter of some of the articles was under consideration in the Working Group on a draft statute for an international criminal court. He would then convene a meeting of the Bureau to decide how to coordinate further work on the two subjects.

*It was so agreed.*

*The meeting rose at 11.30 a.m.*

## 2345th MEETING

*Tuesday, 31 May 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, 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. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

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

[Agenda item 4]

### TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN said that, as agreed, the consideration of the topic would be broken down into two parts, beginning with a general discussion that would take only one meeting and followed by an examination of the individual articles, certain of which dealt with questions also treated in the Working Group on a draft statute for an international criminal court. In order to avoid excessively fragmenting the second part of the debate, which would last for several meetings, he pro-

posed taking up five clusters of articles successively, namely, articles 1 to 4 first, followed by articles 5 to 7, articles 8 to 10, articles 11 to 13, and, lastly, articles 14 and 15.

2. If he heard no objection, he would take it that the Commission agreed to proceed in that manner.

*It was so agreed.*

3. Mr. PELLET said that he wanted to make three brief comments in the framework of the general discussion.

4. The first concerned the title itself of the Code of Crimes against the Peace and Security of Mankind, which was entirely deceptive. The title was appropriate for certain crimes, such as aggression, but was much more debatable for others, such as genocide or crimes against humanity, that did not come under the peace and security of mankind unless the concept was given a very broad meaning, which would play into the hands of ideologies with an emphasis on security. A review was therefore necessary because it was the Commission's last chance to remedy that great weakness in the text.

5. His second comment concerned the problem raised by the relationship between the Code and the statute for the international criminal court, which affected less the drafting of the Code, that was perfectly viable with or without the court, than it did the establishment of the statute for the court, for which it was still uncertain whether it would have jurisdiction for applying the Code. He cautioned the members of the Commission against the temptation of rigidly linking the two exercises and even more so against making the adoption of one of the instruments contingent on the adoption of the other. Such an approach might well prove to be totally sterile.

6. Inevitably, however, there were provisions and problems common to the two drafts, as Mr. Bennouna had already pointed out (2344th meeting). In particular, he acknowledged that, apart perhaps from articles 1 and 5, all the articles of part one of the Code were related to the statute of the court. That did not prevent the Commission from considering the draft Code on second reading because nothing justified the Commission's giving priority to the statute of the court over the Code, but such consideration should take place in the light of the draft statute. Above all, it was very important, with regard to each of the articles of the draft Code, for the Chairman or the members of the Working Group on a draft statute for an international criminal court to provide information on the corresponding progress made so that the discussions could be mutually enriching and incompatibility avoided. By the same token, it was essential for the Working Group to take the draft Code fully into account for the drafting of the statute and, assuming that the draft Code was adopted on second reading prior to the completion of the draft statute, the Working Group must use the wording of the Code. It therefore had to demonstrate consistency and intellectual discipline and not go back on its decisions, whether in the framework of the Code or in that of the statute.

7. His third comment related to part two of the draft Code, on crimes, and concerned the intention expressed

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

by the Special Rapporteur in the introduction to his twelfth report (A/CN.4/460) to limit the list of such crimes to those that could not be challenged. He welcomed that intention because, apart from aggression, genocide, crimes against humanity, serious violations of the humanitarian law of war and, probably, apartheid, the maintaining of colonial domination by force and, indeed, the systematic and massive use of torture, he did not believe that it was necessary to keep the long litany of crimes currently enumerated in the draft. That change, which the Special Rapporteur had promised, would have a direct impact on part one of the draft, inasmuch as the title of certain provisions must necessarily be very different, depending on whether the Code covered virtually all violations of international law or whether it would be limited to acts which the Special Rapporteur had defined earlier as "crimes of crimes", those that constituted either a breach of the peace or a violation of the very notion of humanity.

8. In respect of the non-applicability of statutory limitations, for example, covered in article 7 of the draft, many Governments had expressed reservations and concern. In its observation on behalf of the Nordic countries, the Norwegian Government had correctly noticed that non-applicability of statutory limitations might be acceptable in regard to the most serious crimes, but was considerably more doubtful in those cases where conflicting national penal laws prescribe statutory limitation after a certain period of time.

9. Generally speaking, he had noted that Governments were rather bewildered, as could be seen in some of their observations on the rather numerous provisions of part one, in particular non-retroactivity, responsibility of the superior and the pretext of an order of a superior. In his view, that was due to the fact that the offences which were characterized in part two as crimes against international peace and security had never been considered as such in the past and, if the Commission confined itself to the idea that the Code was really the Code of offences that outraged the conscience of all of mankind, it might quite easily find formulations to win unanimous approval for part one of the draft. It would therefore be necessary to take account, during the discussion, article by article or by cluster of articles, of the intention expressed by the Special Rapporteur in the introduction to the twelfth report.

10. Mr. BENNOUNA said that there were two essential questions, that of the title of the Code of Crimes against the Peace and Security of Mankind and that of the relationship between the draft Code and other drafts.

11. The title did not fit the content of the Code as it stood. The concept of peace and security was too closely linked to the action of the Security Council or to political questions for the Commission to retain it in the title, which would therefore have to be recast, perhaps by drawing on part two and simply using the existing headings.

12. Concerning the relationship between the draft Code and other drafts, he said that there was perhaps a link between the draft Code, which dealt with crimes committed by individuals, and the draft articles on State responsibility, in particular, article 19 on crimes commit-

ted by States.<sup>4</sup> At the beginning of the discussion on the draft Code, the Commission had planned to cover the whole of those two categories of crimes; subsequently, it had rather wisely decided to focus solely on crimes committed by individuals, leaving aside, but not completely excluding, the question of crimes committed by States. But the facts of life being what they were, the problem of the relationship between the two categories of crimes was bound to arise again. If, on the basis of Mr. Pellet's suggestion, the Commission reduced the list of crimes to "crimes of crimes", it would see that many of those crimes could not be committed without State complicity or involvement. That was especially clear for certain crimes, such as aggression or genocide, which could not be committed by an individual without the State apparatus and were often the work of high-level officials in that apparatus.

13. The State was none the less bound to be implicated even in the context of a criminal trial, if only by the agent being tried, who would attempt to exonerate himself by hiding behind the State he had represented. The Commission would therefore have to consider that link at some point.

14. Secondly, there was a link between the Code of Crimes and the statute for an international criminal court. Unlike Mr. Pellet, he did not think the two were separable. Practically all articles in the Code were involved and, if the Commission ignored that fact, it would discover that it could not take a decision on certain articles on second reading without having completed its consideration of the draft statute. The most obvious example was that of the article relating to the *non bis in idem* principle, but many others could also be cited.

15. Moreover, if the Commission persisted in analysing the draft Code while allowing the work on the draft statute to proceed separately, it would find that the articles of part two of the draft Code were also involved. Different approaches to the question of crime had been adopted in connection with the Code and the court. In delimiting the jurisdiction of the court, the draft statute referred to certain clearly designated international conventions, whereas, in the context of the Code, crimes were defined without any reference to the relevant conventions. Those two very different approaches would have to be coordinated at some point.

16. Putting off the problem would merely make it more complicated. The only way to tackle it would have been to prepare a report incorporating both approaches in a single consistent whole. Any hesitations there might have been on that score at one time were no longer justified, as the Commission was now engaged in drafting a statute for an international criminal court and it was thus no longer a mere hypothesis. The basic premise on which the Commission had built the Code, namely, the concept of universal jurisdiction, had evolved and the time had perhaps come to base the Code on the existence of an international criminal court and to reshape the entire edifice. What was involved was not simply a question of legal technique, it was a whole philosophy. Depending on whether the Commission established an

<sup>4</sup> *Yearbook* . . . 1980, vol. II (Part Two), p. 32.

international criminal court having exclusive or concurrent jurisdiction, the approach would be entirely different and would entail very different consequences at the technical level.

17. He therefore formally submitted a specific proposal that the entire set of articles of the draft Code of Crimes against the Peace and Security of Mankind should be referred to the Working Group on a draft statute for an international criminal court and that the Working Group should be instructed to consider the articles of the draft Code on second reading together with the draft statute and to submit an integrated draft for consideration in plenary.

18. Such a method would offer the advantage of consistency and was the only one likely to yield concrete results.

19. Mr. HE said that the ultimate object of drafting a code of crimes against the peace and security of mankind was that it should be brought into effect through an appropriate mechanism. The Code had to be a workable and effective legal instrument to combat attacks on international peace and security. A number of important issues would have to be resolved for that purpose.

20. Thus, the interrelationship between the draft Code, the proposed international criminal court and national courts should be clarified from the outset, since it would have important repercussions on the content and application of the draft Code. If the Code was to be implemented by the proposed international criminal court, it would have to stipulate specific penalties for each crime according to the principle *nulla poena sine lege*. On the other hand, if the Code was to be implemented by national courts or by both national courts and the international criminal court, the provisions on penalties could be left to be decided by national law in the former case or to be dealt with by reference to national law in the latter.

21. Given the seriousness of the crimes included in the draft Code and the basic objective of establishing an international criminal court to deal with serious international criminal acts, it was essential that the crimes listed in the Code should be placed under the jurisdiction *ratione materiae* of the future international criminal court. At the same time, the Code should have effect *erga omnes*, as it would certainly also be implemented by the national courts. Failing that, what would be the point of elaborating such a Code? The Code would thus provide positive rules of law both to the international criminal court and to national courts. As to the relationship between the international criminal court and national courts, it should be borne in mind that the establishment of the international criminal court would probably be based on free acceptance by States and that the statute and function of the court would be in parallel to those of national courts under the existing system of universal jurisdiction. In the circumstances, the provisions of the Code in that regard should retain a certain flexibility so that the Code could be implemented both by the international criminal court and by national courts.

22. As to the scope of the draft Code, it should, in accordance with its title, encompass the most serious

crimes against the peace and security of mankind. States were generally reluctant to waive or surrender their criminal jurisdiction and it was only in connection with the most serious international crimes in respect of which the criminal jurisdiction of a single State was practically of no avail that States might be willing to accept the establishment of an international criminal court. For that reason, the draft Code should be closely linked to the proposed international criminal court. Such close linkage required that the elaboration of the two drafts should move forward at more or less the same pace. However, the emphasis thus placed upon the role and function of the international criminal court should not prejudice the jurisdiction of national courts, since both were on an equal footing and their functions were complementary.

23. Mr. ARANGIO-RUIZ said that two general problems were not really covered by any of the articles under consideration. The first involved the relationship between international law and internal law. Article 2 affirmed the primacy of the former over the latter, and that was clearly essential if the Code was to be properly implemented, but it was not adequate. It would be preferable if the convention through which the Code eventually came into force imposed on all participating States the obligation to incorporate the Code in their respective legal systems. States would be free to do that by simple *renvoi* to the convention or by enactment of internal legislation; but they all should be unambiguously bound to graft the entire contents of the Code into their respective systems of criminal law and criminal procedure. In particular, it should be made clear in the convention that any participating State whose legal system was not brought into line as soon as the convention came into force would be in breach of the convention *vis-à-vis* all other participating States. In that way, the primacy of the provisions of the Code over internal law would be automatically ensured in respect of all participating States. Article 2 could then perhaps be shortened. The Special Rapporteur and the Drafting Committee would undoubtedly find the necessary drafting solutions, the essential point being that the necessary provisions should be inserted in the draft at the present stage without waiting for an eventual diplomatic conference.

24. His second point related to the settlement of disputes. Since the likelihood of disputes between participating States over the implementation of the convention embodying the Code was considerable, a suitable arbitration clause should be included specifying the settlement procedure or procedures to which States should have recourse in the event of failure to settle by negotiation a dispute over the compliance by any State with its obligations under the convention. The Commission should not pass on the problem to the international criminal court which might be set up for the purpose of implementing the Code. One thing would be the competence of an international criminal court to implement the Code *vis-à-vis* individuals. Another would be the settlement of disputes between States parties over the fulfilment of their obligations relating to the implementation of the Code.

25. Mr. BENNOUNA said that he wondered whether, in addition to the problem of the relationship between the Code and internal law, there was not a problem of

the relationship between the Code, on the one hand, and international conventions, especially the Charter of the United Nations, on the other.

26. Mr. VILLAGRÁN KRAMER congratulated the Special Rapporteur on his report, which explained concepts such as the link between the Code and the international criminal court. It was now clear that the Code was to be an instrument which the court would apply.

27. In his view, the present title of the topic restricted the range of international crimes as they were defined now and might be in future and which were not necessarily crimes against the peace and security of mankind. He therefore proposed a simpler and more general title: "Code of international crimes". That wording would have the advantage of indicating from the start that an international or national court would have to refer to the Code—the product of a regulatory exercise *de lege lata* and *de lege ferenda*—as well as to the international treaties in force in order to be able to characterize a crime as an international crime.

28. He entirely agreed with the choice of jurisdiction *in personam* for the Code. It was to be applicable to individuals only and there was to be no question of the criminal responsibility or "criminalization" of States.

29. With regard to legal guarantees, he suggested that the Special Rapporteur might consider leaving a State the choice between handing the presumed perpetrator of the crime over to the international criminal court or to another State with which it had concluded an extradition treaty. Since the rule exempting international crimes from statutory limitations was too rigid, he also proposed that the question of statutory limitations should, if possible, be governed by the law of the country in which the crime had been committed. With regard to the *non bis in idem* (*res judicata*) rule, he noted that the common law concept of double jeopardy, or protection against being tried twice for the same offence, did not have the same scope as that offered by the concept of *res judicata* in some Latin American legal systems, where *res judicata* was fully applicable when the individual concerned had already been found guilty, but not absolute when he had been acquitted.

30. He thought that, if it had time, the Drafting Committee might begin the consideration of the articles of the draft Code at the current session. In any event, the Commission should first conclude the work on the international criminal court before going on to the draft Code.

31. Mr. CALERO RODRIGUES said he fully agreed with the members of the Commission who thought that the title of the draft under consideration might not be an exact reflection of the content of the future instrument. In the 1950s, under the influence of the Nürnberg Judgment, there had been talk of political crimes or, in other words, crimes connected with the activity of the State. Specifically, the Commission had worked on the basis of a very useful three-way split: crimes against peace, war crimes and crimes against humanity. The trichotomy could, however, not be reproduced without change in the title of the Code. The best course might perhaps be to wait and see what crimes would be included in the Code before deciding whether or not the title should be retained.

32. When adopting the draft Code on first reading, the Commission had been aware of its preliminary nature, a fact which the Special Rapporteur seemed not to have taken into account. His report took a somewhat "bureaucratic" approach, leaving aside general problems which were precisely those the Commission was in process of discussing. It would have been far more useful to focus not on part one of the draft, but on part two relating to the definition of crimes, thus contributing to the work of the Working Group on a draft statute for an international criminal court. Moreover, the draft had not been really updated, as shown by the case of article 6, concerning which it was stated that it would have to be reviewed if an international criminal court were established, but for which no revised text was suggested, although the court was in the process of being set up.

33. As several members of the Commission had pointed out, the work of the Drafting Committee on the draft Code of Crimes against the Peace and Security of Mankind and the work of the Working Group on a draft statute for an international criminal court must be much more closely coordinated. Many articles in the statute could be incorporated in the Code in full and vice versa. As it was not known whether the Code would be applied solely by the international criminal court or by national courts as well and since the statute as it stood would not apply only to the Code, some parallel provisions would inevitably be included in both instruments. Such provisions must therefore be absolutely identical in both cases. As to the best way of ensuring such coordination in practice, perhaps all that was needed for the time being was a recommendation to the effect that, when the Working Group on a draft statute for an international criminal court came to examine the provisions which corresponded to those in the draft Code, it should take the latter into consideration without prejudice to any action that might be taken at the Commission's next session.

34. Mr. THIAM (Special Rapporteur) said he would point out that his proposed new wording for article 6 bore no relation to the earlier wording, the difference being, precisely, that the existence of an international criminal court was taken into account. The old wording relied on a system of universal jurisdiction, whereas the new wording restated article 10 of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.<sup>5</sup> So far as the relationship between the Code and the statute for the international criminal court was concerned, all the provisions relating to judicial guarantees under the statute were taken from the Code, which had the benefit of antecedence. It was now for the Commission to decide what action should be taken in respect of both texts.

35. Mr. MIKULKA said he wondered whether the comments and observations of Governments on the draft Code as adopted on first reading,<sup>6</sup> given their relatively small number, were really representative of the whole

<sup>5</sup> Document S/25704, annex.

<sup>6</sup> *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/448 and Add.1.

range of Government views and, in particular, whether they reflected the prevailing trend of opinion on the problem at issue. At all events, since the adoption on first reading of the draft Code, the Commission had made exceptional progress on the draft statute for an international criminal court, so that fresh light was thrown on many problems concerning the Code. The two issues were autonomous, but they were also, undeniably, interlinked; that meant the Commission must improve the coordination of its action in both cases, but without going so far as to arrange for their joint consideration, since the composition of the Working Group and of the Drafting Committee would perhaps make it possible to dispense with such a rigid structure. The Special Rapporteur's twelfth report dealt with part one of the draft, but the main problems arose with respect to part two. The Special Rapporteur's intention to limit the number of crimes solely to those offences whose character as a crime against the peace and security of mankind was difficult to challenge should therefore be welcomed. There was no procedural obstacle to the examination of part one on second reading, provided that two questions remained open until the Commission considered part two on second reading: the questions of the non-applicability of statutory limitations (art. 7) and of definition (art. 1). The latter was linked to the question of the title, on which subject he endorsed, in particular, the comments made by Mr. Tomuschat (2344th meeting), Mr. Pellet and Mr. Calero Rodrigues.

36. Mr. CRAWFORD said that he agreed with Mr. Pellet's three points, namely, that the title of the draft was rather unfortunate; that the Commission should ensure that the provisions of the Code of Crimes against the Peace and Security of Mankind and of the statute of the international criminal court were consistent; and that the list of crimes should be limited to those of the gravest magnitude. With respect to the first point, in his view, the word "code" was not the one that posed the least problems in the title. In principle, that word should be followed by a generic expression to which, precisely, the Code was supposed to give content. Since there could not be a code of some crimes, the Commission would perhaps have to retain the existing expression, if it could not find something better.

37. As to the relationship between the international criminal court and the Code, it was, of course, essential that the Commission should adopt exactly the same wording in both instruments for the provisions on the indispensable judicial guarantees in order to ensure minimum standards of protection of the individual. The Code enjoyed a certain degree of priority in that connection and the Working Group on a draft statute for an international criminal court had endeavoured to follow the relevant provisions of the Code as closely as possible. The fact that there were articles common to both instruments, however, simply meant that there were minimum standards to be maintained in both cases, but not that there were necessarily other kinds of links. It was, of course, anticipated that the Code would provide one of the bases for the jurisdiction *ratione materiae* of the court, but the Commission had always maintained the principle that the court should not be linked exclusively to the Code. It was States that would ratify and implement both instruments, which meant that the Commission must draft

instruments that were acceptable to them and must provide for the case, which, regrettably, was possible, of many States not ratifying the Code.

38. Moreover, there was a large number of crimes of genuine international concern which were contained in treaties that provided for their own apparatus, but which would not have a place in the Code. The purpose of the statute for an international criminal court was to establish a new mechanism that would assist in the implementation of some of those treaties at the international level. In the case of the Code, too, the Commission's endeavour was one of creation, not just of consolidation or codification, in that it was establishing new definitions of crimes where there had been only international customary law, the most important example being crimes against humanity. The two undertakings were distinct in that the statute created a new mechanism to assist in the implementation of existing provisions, whereas the Code created new provisions. Without actually creating any new structure to ensure concordance between the articles common to the Code and the statute, the Commission might wish to call on the Working Group at the current session to ensure that the articles it drafted reflected fully any changes proposed to the draft Code and that any variations from the Code should be fully debated, clearly understood and taken into account by the Drafting Committee when it came to drafting the articles of the Code.

39. Mr. ROSENSTOCK said that he found it somewhat difficult to comment on part one, the general part of the draft, without having a sense of the crimes that would actually be included in the Code of Crimes against the Peace and Security of Mankind. The Special Rapporteur intended to introduce substantive changes in part two, which should, in his own view, contain a narrower, or more contemporary, list than the one suggested by Mr. Pellet. He also found it difficult to comment on the question of the title, since it too depended on the crimes that would be included in the Code. It would therefore be advisable to await the consideration of part two before asking the Drafting Committee to begin work on the articles in part one. As to the relationship between the work on the Code and the work on the statute for an international criminal court, he endorsed Mr. Crawford's position and in particular his rejection of the joint consideration of the two questions by the Working Group.

40. Mr. Sreenivasa RAO expressed his thanks to the Special Rapporteur for leading the Commission to the consideration on second reading of an important, difficult and controversial subject, which had been the subject of many vicissitudes.

41. The elaboration of the draft Code was not the drafting of just any legal instrument: the Code was seen essentially as a symbol—a symbol of the aspirations of a large majority of the international community to prosecute, with a view to deter certain offences which were committed wantonly, wilfully and arbitrarily and which it regarded as crimes.

42. It had to be recognized that the Code could not be as comprehensive as the Commission would have liked; but, at all events, it should be framed around certain

common denominators and should be based on a consensus.

43. With regard to the crimes to be included in the draft Code, he noted that the Commission was not in the process of codifying customary international law and in that case he was willing to accept a limited number of generally and widely recognized crimes. Article 1 of the draft Code should therefore be re-examined from that point of view to emphasize that crimes not included in the Code were not rejected as such under international law. As to motives, the principle was that they would not be taken into account during prosecution. Motives were linked, indirectly or directly, to defences. But what was the position with respect to self-defence in the case of aggression? In his view, the deliberate use of certain weapons regarded as causing widespread and long-term harm should be considered as a crime against humanity which would not benefit from extenuating circumstances.

44. The establishment of an international criminal court and the drafting of the Code of Crimes against the Peace and Security of Mankind were closely linked and, if the work in that connection was to be successful, it should legitimately, logically and morally proceed in step, on a consensual basis. The future international criminal court should not be brought into being at the expense of national courts: the main thing was that justice should be done, that the accused should be tried and that the guilty party should be punished.

45. Mr. KABATSI thanked the Special Rapporteur for his wisely structured report, which would facilitate and ensure progress in the debate in the Commission. The Special Rapporteur's choice to focus at the current session on part one of the draft Code of Crimes against the Peace and Security of Mankind, namely, on the part dealing with definition, characterization and general principles, before discussing the list of crimes, was a useful one. It would not, however, be possible for the Commission to conclude its consideration of certain articles in the draft Code which also had a bearing on jurisdiction before it had taken a decision on the corresponding articles of the draft statute for an international criminal court. Generally speaking, the articles that related both to the draft Code and the draft statute were those dealing with procedural matters, especially those dealing with due process and fair trial. It would be desirable for those articles to be dealt with in such a way that there would be no conflict between the Code and the statute and no serious practical problem would arise. The Working Group on a draft statute for an international criminal court, of which the Special Rapporteur was a member, would no doubt make sure that was so. Many articles in the draft Code were, however, independent of the provisions of the draft statute and could be considered without delay.

46. In general, the Special Rapporteur had dealt carefully with the issue of general acceptance by States of the draft Code and had made useful proposals. It was also very wise, in his view, to limit the list of crimes to those whose characterization as a crime against the peace and security of mankind was hard to challenge.

47. The Code was intended to focus exclusively on crimes committed by individuals and thus did not provide for the direct or implied criminality of States. Vicarious civil liability for criminal acts committed by individuals acting directly or indirectly on behalf of the State could be envisaged, but that was in any case unnecessary because the concept came under a separate legal regime that would be better dealt with separately.

48. He welcomed the emphasis in the draft Code on the role of State agents because they, more than anyone else, were likely to be the perpetrators of crimes against the peace and security of mankind. State officials were not to be allowed to hide behind the façade of an excuse, whether orders from superiors or their official position. The Special Rapporteur's proposals were therefore very useful and should be maintained.

49. Lastly, he endorsed the principles relating to due process and guarantees of a fair trial. A stable world involved not only the punishment and suppression of crimes against the peace and security of mankind, but also the provision of legal guarantees to the accused.

50. Mr. PAMBOU-TCHIVOUNDA said that he was not sure whether the draft Code of Crimes against the Peace and Security of Mankind could actually be adopted on second reading by the end of the current session. He feared that it would, rather, give rise to an endless and wide-ranging debate. He himself had a number of comments to make on the twelfth report of the Special Rapporteur.

51. First, the Special Rapporteur announced that chapter II was intended to give a broad picture of the relevant general principles, but it actually dealt more with general issues, from the definition of a crime, through defences, to extenuating circumstances. It was surprising that no mention was made of penalties, since the crimes did have to be punished. It might therefore be useful to supplement that chapter and complete the picture.

52. Secondly, he was uncomfortable not with the Commission's approach to the topic, but with its working methods. The very title of the report could be misleading, since it referred to a draft Code. However, the word "code" did not cover the whole set of general rules to be taken into consideration. He would have preferred the report to provide information at the outset on the crimes to be covered so that the Commission might have a clear idea of what those crimes were.

53. Thirdly, he stressed that there was what could be called almost an organic link between the draft Code and the draft statute for an international criminal court. He had already drawn the Commission's attention to that point during the consideration of the draft statute in plenary and he even wondered whether the comments on the twelfth report concerning the draft Code were not ultimately intended for the Working Group responsible for drafting the statute. He therefore endorsed the appeals by other speakers that coordination should be ensured between the work on the draft Code and the work on the draft statute in view of the close interrelationship between the two topics.

54. He had some reservations about the cluster of provisions which in his view, lay at the heart of the matter, namely, draft articles 11 to 13. He greatly feared that they showed both how much and how little progress had been achieved. After all, how could one determine the responsibility of a president or of a minister? More attention should be given to that matter.

55. He also noted with concern that the Special Rapporteur had elected to tie himself down by stating in the introduction to his twelfth report that he would limit the list of crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge. There were two obstacles to the achievement of that objective. The first was the draft statute, which might force the Special Rapporteur not to limit, but to lengthen the list, although that would not change the constraints inherent in the definition of crimes. The second obstacle derived from the nature of the victim, namely, mankind as a whole, which might also appeal to the Special Rapporteur to lengthen the list. Mankind was referred to in nearly all legal texts nowadays. Perhaps some consideration should be given to the impact on any list of crimes of the inclusion of mankind in the law; in other words, it might be asked whether a list of crimes, even a limited one, should be closed off to any change.

56. Mr. YANKOV thanked the Special Rapporteur for his succinct report, which had nevertheless led to a somewhat unusual debate in the Commission. The Special Rapporteur had tried to find a common denominator for a great many questions in order to facilitate consensus and rightly so, for an instrument of such great importance as the draft Code of Crimes against the Peace and Security of Mankind could attain its objective only if it was accepted by the majority of States. The draft articles themselves should, in his view, be considered in the light of the results achieved in the Working Group on a draft statute for an international criminal court.

57. He did not believe that the Commission could change the title of the draft. It was, after all, used in General Assembly resolution 177 (II) of 21 November 1947, in which the Assembly had given the Commission its mandate and had asked it to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal.<sup>7</sup> He was proposing that argument not because he was old-fashioned, but simply to warn the Commission against any attempt to change a title which had been established many years previously and gave a number of indications about the type of crimes to be covered. The word "code" was used in many areas, including technical fields, because a code was more specific than a convention. He did not see how the use of that term could impair the Commission's work and, consequently, he was in favour of retaining it for the time being for reasons of both form and substance.

58. However, he agreed that some concepts should be reviewed and he therefore endorsed the Special Rapporteur's

idea of limiting the list of crimes to be included in the draft Code to the most serious ones—the "crimes of crimes", as Mr. Pellet had called them.

59. There was no question that the coordination of the work of the bodies responsible for the draft Code and for the draft statute was indispensable and that was not a novel idea, since such coordination had already been established at the forty-fifth session. On matters relating both to the draft Code and to the draft statute, the Working Group on a draft statute for an international criminal court had requested the views of both the Special Rapporteurs concerned. The question now was how to strengthen that coordination. Like other members of the Commission, he believed that the Code should form part of international criminal law so that all States parties could incorporate it in one way or another into their internal law. It might be worthwhile to look into that matter.

60. As far as the settlement of disputes was concerned, he shared the view of Mr. Arangio-Ruiz that a substantive provision should be included in the draft to provide expressly for dispute settlement machinery. He suggested that the Special Rapporteur should submit proposals on that subject in his next report.

61. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on the concision and clarity of his twelfth report. The Commission would have been able to complete its work on the draft if it had not been obliged, after the adoption of the draft on first reading and at the request of the General Assembly, to give priority to the draft statute for an international criminal court, for much of international public opinion seemed to be in favour of the establishment of such a court and the rapid adoption of such a statute.

62. The general debate on the twelfth report clearly showed that the draft Code continued to give rise to significant problems, particularly part two concerning the crimes themselves. One of the problems related to the title of the draft. He would have no objection if it was changed, as long as that was done at the end of the current exercise, after the Commission had completed its consideration of the crimes to be covered by the Code. In any event, the draft Code should not be given an extremely general title, such as "draft code of international crimes", because that might create confusion with article 19 of part one of the draft articles on State responsibility.<sup>8</sup> There was no doubt that there was a link between the draft Code and the statute for an international criminal court. In fact, the draft statute should contain the definitions included in the draft Code, which predated it, but, in view of the mandate entrusted to it by the General Assembly and the status of its work, the Commission would not be well advised to consider the draft Code and the draft statute together. However, if the draft statute was adopted on first reading and approved by the General Assembly, the Commission should take it into account during its consideration of the draft Code on second reading and, where appropriate, include the terminology used in the draft statute in the draft Code.

<sup>7</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook* . . . 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127). Text reproduced in *Yearbook* . . . 1985, vol. II (Part Two), para. 45.

<sup>8</sup> See footnote 4 above.

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

*The meeting rose at 1 p.m*

## 2346th MEETING

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

*Chairman:* Mr. Vladlen VERESHCHETIN

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

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

[Agenda item 4]

### TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

#### ARTICLES 1 TO 4

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

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

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

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

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

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

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

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

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

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

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

are at present unforeseeable, something which would be most unfortunate. A general definition was therefore virtually indispensable. In that connection, the Commission might wish to consider article 26, paragraph 2 (a), of the draft statute for an international criminal court as adopted by the Working Group at the forty-fifth session<sup>5</sup> and also to reflect on the question of the link with international crimes under article 19 of part one of the draft on State responsibility.<sup>6</sup>

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

11. The title of article 3, in the French text, should be brought into line with paragraph 1. Whereas the former used the word *sanction*, the latter spoke of *châtiment*, which to his mind had a moral rather than a legal connotation. Article 3 should also be read in conjunction with article 7, paragraph 1, of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991.<sup>7</sup> What article 3 lacked above all, however, was another paragraph providing that failure to prevent the commission of a crime could itself be a crime. Such a provision would meet the concern of Brazil, as expressed in its comments on article 2, and also of Norway with regard to article 12.

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

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

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

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

<sup>6</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

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

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

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

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

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

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

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

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

20. He did not share the view that the second sentence of article 2 was redundant, and was opposed to deleting it. The question of individual criminal responsibility, which formed the subject of articles 3 and 4, was also touched upon in articles 11 to 13, and possibly in articles 14 and 15, and he would wish to see those articles grouped together and their subject-matter dealt with somewhat along the lines of article 7 of the statute of the International Tribunal. He was not in favour of deletion of article 4, although in his view it failed to bring out sufficiently the element of underlying intent. Article 5 of the Definition of Aggression<sup>8</sup> could serve as a useful model in that connection.

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

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

<sup>8</sup> General Assembly resolution 3314 (XXIX), annex.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### ARTICLES 5 TO 7

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

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

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

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

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

*The meeting rose at 1.05 p.m.*

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## 2347th MEETING

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

*Chairman:* Mr. Vladlen VERESHCHETIN

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

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

[Agenda item 4]

**DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT<sup>4</sup>**  
(concluded)\*

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

2. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the Working Group had completed a first reading of the draft statute, taking into account the comments made by the members of the Commission during plenary meetings and further suggestions made by the members of the Working Group themselves. The Working Group had five major tasks to perform. In the first place, it had to establish a workable system for the future international criminal court on the basis of the draft statute. Secondly, it had to endeavour to formulate a clearer and more transparent set of articles having regard to the criticisms made at the forty-fifth session concerning some of the provisions in the draft statute and, in particular, the jurisdictional provisions. Its third—and perhaps also its most important and most difficult—task was to place appropriate limitations on the jurisdiction of the court and on the exercise of that jurisdiction. It was a matter on which States had expressed concern during the debate on the question in the Sixth Committee (A/CN.4/457, sect. B) and which posed a problem, as only some of the crimes defined in international law instruments could fall within the jurisdiction of the court. In the end, the Working Group had come to the conclusion that, even though useful, it would not suffice to draw up a list of the crimes under general international law over which the court should have jurisdiction. The Working Group considered that it should also provide for limitations not only on its jurisdiction, but also on the exercise of that jurisdiction, apart from the limitations arising out of the consent requirements in relation to particular States. That idea had been canvassed fairly broadly in the plenary debate and it was essential to retain it if an acceptable statute was to be drafted. Fourthly, the Working Group should try to introduce a system which was complementary to the criminal justice systems of States in areas where those systems were effective. Fifthly, the Working Group should ensure coordination between the draft statute and the draft Code of Crimes against the Peace and

Security of Mankind for all the articles common to both instruments, in other words, certain basic articles such as the article which dealt with the *non bis in idem* rule. The Special Rapporteur on the topic of the draft Code had continued his cooperation with the Working Group and he for one was confident that it would be possible to achieve an identity of views with regard to the wording of those articles, whose objective, it should be remembered, was not identical, but parallel. The draft statute extended the jurisdiction of the court to crimes which were not contained in the draft Code and the Code was intended to be an instrument which could be implemented by national courts, but, in that case, independently of any statute, as well as by international courts.

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

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

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

\* Resumed from the 2334th meeting.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

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

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

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

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

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

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

ARTICLES 5 TO 7 (concluded)

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

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

11. He also agreed with article 7. Obviously, crimes against the peace and security of mankind were very serious crimes and could therefore not be statute-barred.

It would, however, be advisable to reflect further on the view of the United Kingdom of Great Britain and Northern Ireland according to which such a rule could, in certain cases, hamper reconciliation between two communities that might have been at odds in the past, or even amnesty. Otherwise, he could accept the general principle of the non-applicability of statutory limitations.

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

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

<sup>5</sup> Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.

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

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

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

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

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

18. Mr. MIKULKA said that article 5 on the responsibility of States was a kind of saving clause. He thus agreed with its content, but considered its wording unfortunate, since it seemed to rule out the existence of any connection between the criminal responsibility of an individual and the responsibility of the State. Yet the broad consensus within the Commission as to the distinction between those two concepts should not take away from the fact that there was sometimes a connection, and indeed an overlap, between the two concepts. The Commission had recognized that certain criminal acts of individuals, as acts of agents of the State, established both their criminal responsibility and the responsibility of the State itself and that one and the same act could thus constitute both a crime within the meaning of the Code and an internationally wrongful act within the meaning of the draft articles on State responsibility.<sup>7</sup>

<sup>7</sup> Ibid.

Furthermore, at the preceding session, the Commission had also accepted, when adopting article 10 of the draft on State responsibility, on satisfaction,<sup>8</sup> that, in certain cases, in order for the reparation owed by a State to be full reparation, it must also include satisfaction. Yet, according to paragraph 2 of that article, one of the elements of satisfaction was the criminal prosecution of the individuals whose conduct had been at the origin of the internationally wrongful act of the State. Article 5 thus had a valuable place in the draft, in that it specified that the State could not exhaust the whole content of its international responsibility by prosecuting the individual who had committed the act; its wording must nevertheless be improved.

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

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

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

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

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

<sup>8</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 54.

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

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

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

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

27. Mr. VILLAGRÁN KRAMER said that the report presented by the Chairman of the Working Group on a draft statute for an international criminal court emphasized the Commission's preference for a code limited to the most serious crimes. The Commission was thus entering an area where caution was called for. There was no reason for some members of the Commission to be concerned about the question of compatibility between the Code and the statute: the Special Rapporteur would

ensure that the two were compatible. It might be more difficult to ensure harmony between the Code and the draft articles on State responsibility and it was from that point of view that article 5 should be considered. However, if the Commission decided to limit the Code to the most serious crimes and not to include the other crimes, the rule enunciated in article 5 would become unnecessary because it was simply a rule of international law. He nevertheless wondered whether introducing the concept of gravity did not lead logically to incorporating in the Code the concepts of aggravated responsibility and aggravating circumstances. Thus, with regard to the *non bis in idem* rule, he considered that *res judicata* admitted of some exceptions, in particular where new facts came to light of which the first judges had not been aware. As the Working Group had noted, rules of revision must be provided for in conjunction with the *non bis in idem* rule.

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

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

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

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

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

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

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

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

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

36. Mr. CALERO RODRIGUES said he hoped that the Special Rapporteur would be able to provide a new version of article 6 before it was considered by the

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

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

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

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

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

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

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

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

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

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

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

#### ARTICLES 8 TO 10

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*The meeting rose at 1 p.m.*

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## 2348th MEETING

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

*Chairman:* Mr. Vladlen VERESHCHETIN

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

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<sup>9</sup> See footnote 5 above.

**State responsibility (continued)\* (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>2</sup> A/CN.4/L.501)**

[Agenda item 3]

**FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)\***

1. Mr. ARANGIO-RUIZ (Special Rapporteur), summing up the discussion, thanked members for their guidance and said that he would do his best to cover all the opinions and, where possible, the various shades of opinion, expressed during the discussion.

2. In making his comments, he felt obliged to start with the general question—discussed by most speakers—whether the distinction between international “delinquencies” made in article 19 of part one of the draft and the term “crime” used therein should be maintained. With regard to terminology, he deemed it necessary to explain, above all, that in speaking of delinquency he had not intended to stress any criminal law connotation of the wrongful acts singled out as crimes in article 19 of part one of the draft,<sup>3</sup> although he believed that such a connotation was intended in article 19. He had used the term “delinquency”—a term used, *inter alia*, by Oppenheim—as shorthand for the expression “internationally wrongful act”. As far as the substance of the matter was concerned, the debate had shown that most members seemed to have taken the view that the most serious breaches of international law should not be treated in the same way as “ordinary” breaches. Although some members had apparently based their view on a difference of degree alone, the prevailing opinion was that the distinction was based upon a difference in nature as well as in gravity. A few had expressed the view that the draft on State responsibility should not deal with a distinct category of wrongful acts specifically defined as “crimes”, whereas Mr. Rosenstock, Mr. Idris and Mr. He had favoured the elimination from the draft of any distinction whatsoever, regardless of the terms used.

3. Despite the differences and nuances, the majority view was that article 19, notwithstanding its defects, should stand, subject to improvement on second reading in the light of the developments that had taken place in the practice of States and in the literature over the past 20 years and, of course, in the light of the Commission’s choices with regard to the consequences. Despite some reservations, a fair number of members were apparently in favour of maintaining the term “crimes”, but they did not exclude the possibility that something better could be found. Others, however, considered that the term “crimes” should be dropped. Some members had suggested that there should in particular be a reference to extremely serious violations of *jus cogens* rules, while

others had been opposed to any term implying a national criminal law analogy.

4. The basic elements of the definition were generally accepted and particularly the reference to the violation by a State of an international obligation of essential importance in safeguarding fundamental interests of the international community. The list in paragraph 3 of article 19 was generally believed to be less satisfactory, most speakers suggesting that it should in due course be reconsidered. Some speakers, however, seemed to be decidedly opposed to the inclusion of a list of examples in the body of the text rather than in the commentary.

5. A few members had suggested that for the time being the Commission should postpone making any choice with respect to the definition, that it should submit to the General Assembly the text adopted on first reading that did not deal with the consequences of crimes, and that it should call the attention of the Assembly to the doubts expressed by numerous members about the possibility of codifying the matter until a better definition of crimes had been worked out. Mr. Calero Rodrigues and Mr. Vereshchetin thought that the fate of article 19 and the consequences of crimes would be determined only in the course of the second reading of the articles. However, the majority of members—save for those totally opposed to the article 19 distinction—thought that the Commission should not lose momentum, that it should explore all possibilities at the present stage and, only after making a tentative choice, should it verify the solution on second reading. According to those members, solutions in the form of articles should be proposed by the Special Rapporteur for debate in due course and for possible consideration by the Drafting Committee at the next session.

6. Assuming that a definition was accepted—more or less in conformity with the formulation of article 19 in 1976<sup>4</sup>—the next issue was: who would be competent to determine that a crime had been committed in a given case and to implement the applicable regime? As was apparent from the debate, two sets of problems had to be distinguished in that regard. One problem was which organ would be competent to settle the possible disputes over the existence and attribution of a crime, the legitimacy of the reaction, and the measures still to be applied to the situation—namely, which organ would have the last word. Some members—Mr. Mikulka and Mr. Pellet—seemed to suggest that that problem should be dealt with in part three of the draft. The other problem—surely a part two problem—was who could legitimately react, either by means of demands to comply with substantive obligations such as cessation, reparation, satisfaction and guarantees of non-repetition or by means of countermeasures or sanctions.

7. With regard to the first problem, the solution envisaged by some members was the establishment of the compulsory jurisdiction of ICJ, perhaps in an additional protocol. Other members questioned that solution in view of the reluctance of States to submit important issues to the Court, and also the voluntary nature of the Court’s jurisdiction. At all events, many speakers

\* Resumed from the 2343rd meeting.

<sup>1</sup> *Yearbook* . . . 1993, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>3</sup> For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>4</sup> *Yearbook* . . . 1976, vol. II (Part Two), pp. 95 *et seq.*

advocated the need for a verification mechanism of a judicial nature, which could take a decision on the basis of the law.

8. As to the second problem—namely, who could legitimately react—a distinction could be made between opinions relating to the ideal solution and opinions relating to possible realistic solutions. As far as the ideal solution was concerned, it had generally been advocated in the debate, except by the few speakers who were radically opposed to the idea of a special regime for crimes, that the reaction to a crime, including the characterization and attribution of a crime, should emanate from an international organ capable of interpreting and implementing the “will” of the “international community as a whole”. Such an organ would apply, directly or through binding decisions addressed to States, the consequences of crimes as provided for in more or less mandatory terms. There was also general agreement, however, that the international community was not at present endowed, and was not likely to be endowed in the near future, with a sufficiently representative organ entrusted with the function of implementing the regime for crimes and organizing the reaction, subject to an appropriate judicial verification of the legitimacy of characterization and reaction. Almost all speakers agreed that, at least for crimes which consisted of aggression or breach of the peace, a system of collective reaction was provided for under Chapter VII of the Charter of the United Nations, though it was not conceived for, nor easily adaptable *per se* to, the implementation of a regime of responsibility.

9. Regarding, in particular, the *de lege lata* or *de lege ferenda* competence of organs of the United Nations in the implementation of the reaction to crimes, the majority of members had stressed the inadequacy of the Security Council's powers with regard to the specific subject-matter of international responsibility, even for such a crime as aggression. They seemed to share his view, as expressed in his fifth report (A/CN.4/453 and Add.1-3), that the Council would not qualify as the organ which had specific competence for a collective reaction to crimes, either *ratione materiae* (for example, with regard to reparation) or from the standpoint of legal versus political evaluation criteria or, for that matter, from the standpoint of an elementary requirement of impartiality, which was hardly reconcilable, *inter alia*, with the fact that the so-called power of veto would ensure virtual immunity for some States. Although on the one hand, the regime to be envisaged for the implementation of the consequences of crimes should in no way call into question the Council's powers relating to the maintenance and restoration of peace, it would, on the other hand, be inappropriate to assume that the Council could be unconditionally recognized as a competent body for the implementation of the legal regime of international crimes of States, especially, but not exclusively, with regard to the three categories of crimes other than aggression. In view of those difficulties, some members had suggested either that the definition of crimes could be confined to the hypotheses covered by Chapter VII of the Charter or that the crimes relating to those hypotheses could be dealt with separately in order to take better account of the Council's possibilities for action with respect to such crimes. While it seemed doubtful that such solutions would

resolve difficulties that were due to the obviously political—and not judicial—composition and function of the Council, they could be usefully explored.

10. A number of speakers thought that the Security Council's function was political and above the law, its aim being the maintenance of international peace and security. The Council was concerned neither with the prerequisite that a crime should have been committed nor with stating the law and sanctioning the perpetrator of the crime. The same speakers stressed that there must be no interference with the Security Council in the performance of its specific function. In particular, (a) no amendment to the Charter designed to establish new functions should be envisaged; and (b) the draft should not include any provisions likely to affect the Security Council's specific function; on the contrary, it should contain a saving clause to the effect that the provisions of the draft relating to crimes were without prejudice to the Charter procedures for the maintenance of international peace and security.

11. Other speakers had been inclined to rely on the Security Council only for the implementation of the consequences of the crime which corresponded to the hypotheses covered by Chapter VII of the Charter. Yet others had suggested a more liberal or generous interpretation of the Council's powers, with a view to encompassing crimes other than those corresponding to Chapter VII hypotheses. One member had made some interesting remarks on the desirability of re-evaluating, with regard to international crimes of States, the role of the General Assembly as an expression of the conscience of that international community as a whole, which was evoked in article 19 of part one.

12. A majority of members had given cautious consideration to the possibility of leaving the reaction to a crime in the hands of individual, or small groups of, injured States, except, presumably, in the case of those consequences of crimes that would coincide with the consequences of a delict. However, some collective response by the “international community” was generally deemed to be desirable either through United Nations organs, such as the Security Council or the General Assembly—the latter being competent to deal with all of the kinds of situation that might involve a crime—or, according to a few speakers, through other collective bodies yet to be established. Some among that numerous group of speakers had also suggested consultation procedures. A number of speakers had been firmly opposed to leaving any room for unilateral initiatives by States or groups of States, particularly in the case of the most severe measures or sanctions, in the absence of any manifestation of a “collective will”. Another group of speakers had considered that some room for unilateral measures should be left for all States, either in the event of failure of a timely and effective reaction of the so-called organized international community or to supplement such a collective reaction, provided, however, that no armed reaction was acceptable. Unilateral reaction should, in any case, be confined within the limits applicable to organized reactions.

13. As to the objective aspects of the consequences of international crimes of States—in other words, the

nature and degree of the aggravated consequences of crimes as distinguished from delicts—useful suggestions had been made with regard to both the substantive and the instrumental consequences.

14. So far as substantive consequences were concerned, many comments by members indicated widespread acceptance of the idea that not all the exceptions envisaged for ordinary delinquencies should apply to the “criminal” State’s obligation to provide reparation and/or satisfaction. A number of members were of the view that, in the case of restitution in kind and of satisfaction in particular, provision should be made for differences. More particularly, (a) in the case of restitution in kind, no extenuating circumstances would be admissible in favour of the lawbreaking State except for *jus cogens* limitations and physical impossibility; and (b) satisfaction could include not only severe punitive damages but also measures affecting internal sovereignty or domestic jurisdiction, such as disarmament, or curtailment or dismantling of certain kinds of industries. In addition, the State which committed a crime would not benefit from the exclusion of forms of satisfaction that would offend its dignity. Almost all speakers, however, had stressed the need to safeguard the population of the lawbreaking State.

15. In regard to the instrumental consequences, namely, countermeasures, there had been broad agreement on the prohibition of armed measures, even in the case of crimes, except, of course, for measures taken in individual or collective self-defence and for measures taken by the Security Council under Chapter VII of the Charter for situations involving the crime of aggression. Those generally-accepted exceptions seemed to confirm the preference of most members for differential treatment of the crime of aggression, as opposed to the other kinds of crimes listed in article 19.

16. In the matter of collective self-defence, one speaker had emphasized that the draft should stress the limits of self-defence and, in particular, the point that a State was entitled to act in collective self-defence only at the request of the State which had been attacked or on the basis of a treaty of alliance or of a regional security treaty.

17. There had otherwise been general consensus that, except for self-defence, the use of force must remain the exclusive prerogative of the “organized international community” and of the Security Council in particular. Force for crimes other than aggression, such as genocide, and humanitarian intervention could be used only on the basis of prior authorization by that community.

18. The stronger—though certainly not armed—measures envisaged should not, in the view of most speakers, reach the degree of intensity of measures applied by the victorious party against a vanquished State. Any measure attaining a high degree of intensity should, according to one view, be conditional upon a collective decision genuinely representative of the common interest of the acting States; unilateral initiatives or the initiatives of small groups were to be condemned. A number of speakers had included among the measures in question the pursuit of the criminal liability of the responsible individuals who occupied key positions in

the structure of the lawbreaking State. The individuals responsible would be deprived of any immunity.

19. Two members had held that another limitation applicable to the reactions to crimes, in addition to the prohibition of force, would be the non-violation of *jus cogens* rules.

20. A number of speakers, notably Mr. Pellet, Mr. Bowett, Mr. Eiriksson, Mr. Crawford and Mr. Mahiou, had suggested that, subject to the rule of proportionality, to be applied *mutatis mutandis* in the case of crimes as well, the measures directed against the State that was the author of a crime could go beyond the mere pursuit of reparation. Some speakers had stressed the need to condemn any measures affecting the territorial integrity of the State or the identity of the people, even in the case of crimes.

21. One important caveat often mentioned concerned the population of the lawbreaking State. Although it would be impossible to avoid all prejudice to the, presumably innocent, people, care should be taken to avoid any particularly severe effects for the population. A few speakers had, nevertheless, noted that the population should itself be made aware of the possible dangers to them that could arise from attitudes which amounted to more or less overt complicity in the criminal actions of a democratic or non-democratic Government or a despot.

22. Given the wide variety of views he had summarized, it was perfectly possible that he had made errors in identifying them and in interpreting them correctly. It seemed to him, however, that, apart from the few speakers who, as a matter of principle, contested the legal or political propriety of the distinction between delicts and crimes, only one member specifically contested the existence of any differentiation in consequences as between crimes and delicts.

23. With reference to the obligations that might be incumbent upon the injured States—*de lege lata* or *de lege ferenda*—in relation to the taking of measures on behalf of the “international community”, a certain degree of consensus had emerged during the debate. Thus, a general obligation would exist for all States not to recognize as valid in law any situation from which the lawbreaking State had derived an advantage as a result of the crime. It had been stressed, however, that that obligation would not be automatic and would exist only after some form of intervention by the so-called organized international community. A related general obligation would be the obligation not to help in any way the lawbreaking State to maintain a situation created to its advantage by the crime. A few speakers had, in addition, referred to a general duty of active solidarity with the victim State or States that would also be incumbent upon all States. The kinds of behaviour which such a general obligation would encompass had not, however, been specified. The only additional requirement mentioned was that all States should comply in good faith with the measures decided by the international community, or by States themselves acting in concert, in response to an international crime of a State. Doubts had been expressed, however, about the *de lege lata* foundation of the duty in question.

24. As to the conclusions to be drawn from the debate, while no firm and specific solutions had emerged, there had been sufficient indications of the lines to be followed in dealing with the consequences of international crimes of States. On the basis of those indications, he should be able to work out his proposals in the form of articles or paragraphs for parts two and three relating to the consequences of crimes. The Commission could then discuss them at the next session and, if it so decided, could refer them to the Drafting Committee. Together with the completion of the work already in progress on parts two and three, that should enable the Commission to conclude the first reading of the draft on State responsibility on time.

25. Mr. ROSENSTOCK said the Special Rapporteur's summing-up failed to take into account the fact that some members of the Commission were strongly opposed to constructing the entire edifice of State responsibility with article 19 of part one as part of its foundation. Others had indicated they would accept the ideas underlying article 19 but not the form of language used, which was heavily weighted towards penal implications and connotations of criminality. Still others had suggested that the idea of State crimes did not imply criminal responsibility. Taken altogether, therefore, a substantial number of members of the Commission were not in favour of predicating elements in part two of the draft on the language or concepts contained in article 19. If a constructive effort was to be made towards completion of the first reading of parts one and two, much less part three, during the current quinquennium, it would be advisable to suggest, for inclusion in part two or part three, alternatives or variations based on the assumption of a distinction, not between crimes and delicts, but between less serious and more serious acts.

26. Mr. CALERO RODRIGUES said that, following the Special Rapporteur's summing-up, he wished to make his position on the draft articles quite clear. He did not oppose the Commission's attempting to elaborate new articles at the current session. His main concern, however, was that there should be no delay in concluding the work on State responsibility during the current quinquennium.

27. The CHAIRMAN, speaking as a member of the Commission, emphasized that, in his statements on the topic, he had never intended to express anything other than strong support for article 19 of part one. True, he thought it should be brought up to date, but he was doubtful about the possibility or desirability of dealing with the consequences of crimes, especially in view of the complexity of the subject. Such an effort might prevent the Commission from completing its work on State responsibility during the time-limit established for that work.

28. Mr. ARANGIO-RUIZ (Special Rapporteur) said he thought his summing-up had reflected the views just outlined by Mr. Calero Rodrigues and the Chairman. He had indicated that some members of the Commission were concerned about whether incorporation of the idea of the consequences of State crimes would prevent the Commission from completing its work on State responsibility within the time-frame allotted to it. He had

responded to that concern by saying that, unless a majority of members opposed such an approach, he was prepared to submit appropriate draft articles at the next session. That would be perfectly feasible if the Drafting Committee was able to keep working at its present pace through to the end of the present session. Conclusion of the work on first reading could then be projected for 1996.

29. Mr. Rosenstock's viewpoint, too, had been reflected, though perhaps not with all the detail he would have liked. It had been indicated that a majority of members of the Commission had been in favour of dealing with the idea of crime, though some would have preferred to use a term other than "crime", and some thought no analogies should be made with national criminal law. The problem of territorial amputations and the need to avoid any measures that would seriously affect the population of the lawbreaking State had also been mentioned. His summing-up may not have reflected all the nuances of the various positions expressed, but such a task was outside the scope of the exercise.

30. It was imperative for the Commission to give him a clear indication as to how to proceed with his work. If it so desired, he would endeavour to produce articles that would reflect the largest possible number of viewpoints expressed during the debate. He would not be able to accommodate all positions. Those who were unhappy with his product would, of course, be able to express fully their dissenting views and act upon them.

31. Mr. Sreenivasa RAO thanked the Special Rapporteur for his enormous efforts in identifying and synthesizing the broad outlines of the concept of crime that had emerged from the Commission's rich and enlightening debate. During that debate, members had been speculating on the nuances and implications of the concepts of crimes and their consequences. The main lines of thought could now be distilled, and a decision had to be taken as to the direction of future work. Should the Special Rapporteur produce new articles? Or would that delay the Commission's completion of the draft, which had already been pending for a very long time since the adoption of part one on first reading? A prudent approach might be to acknowledge that, despite the indisputable value of further exploring various aspects of State responsibility, the time factor must win out, and the work done so far must be consolidated.

32. Mr. VILLAGRÁN KRAMER said the Special Rapporteur's summing-up had shed light on the general trends in the Commission's current thinking. If that thinking was scrutinized in the light of the commentary to article 19, drafted in 1976,<sup>5</sup> a substantial evolution could be discerned on a number of specific points. The Special Rapporteur had fulfilled the first aspect of his responsibility—to outline the views of members of the Commission—but that did not release him from the task of submitting a detailed report drawing conclusions on the basis of the guidelines given during the debate.

<sup>5</sup> Ibid.

33. A number of questions still had to be resolved, including whether there was a difference between crimes, or serious offences, and mere delicts, and whether such a distinction resulted in aggravated responsibility commensurate with the gravity of an offence. The Commission must determine whether there were any international crimes other than aggression and genocide. Personally, he would argue that there were. As for the term "crime", it was difficult to see how its use could be denied, since it was incorporated in the Definition of Aggression<sup>6</sup> and in the Convention on the Prevention and Punishment of the Crime of Genocide.

34. Another question was what additional measures would have to be applied in respect of serious offences that entailed aggravated responsibility. The Special Rapporteur posited a reaction either from the "organized international community" or from individual States in the form of countermeasures. But the Commission's thinking on exactly what penalties were permissible in such cases had yet to be clearly delineated.

35. Lastly, the Special Rapporteur appeared to be trying to legislate for the future alone, leaving aside the whole area of *lex lata*, which would permit the Commission to find common ground on State responsibility.

36. Mr. TOMUSCHAT thanked the Special Rapporteur for a very good, succinct summary. A consensus was, he believed, within the Commission's reach, but it would be difficult to achieve if the Special Rapporteur worked on the assumption that international crime had some penal implications; on that basis, there was a risk of ending up in total disagreement. Like Mr. Villagrán Kramer, he thought that all members could probably agree on aggravated consequences in the case of the commission of an international crime. He further agreed that it would be most regrettable if the Commission were to balk, at the present late stage, at continuing to deal with the question of international crime. Were it to do so, the work on the topic of State responsibility as a whole, begun more than 30 years ago, would probably drag on until the year 2000 and beyond. It was incumbent on the Commission to finalize its work on the topic, if possible by the end of its mandate in 1996. The Commission should not be unduly daunted by the difficulties of the task and should make every effort to reach some agreed solution—which might, of course, fall short of the ideal—casting it in the form of draft articles, as the world community expected.

37. Mr. PAMBOU-TCHIVOUNDA said that he wished to associate himself with the chorus of congratulations addressed to the Special Rapporteur on his remarkable exercise in producing such a clear summing-up of what had been a most complex debate. If some members considered that their views had not been correctly reflected, it was certainly their right to say so, but challenging the exercise as a whole was another matter. The Special Rapporteur had identified certain trends of opinion within the Commission as he understood them, taking as the basis article 19—which, incidentally, had been drafted and approved on first reading by the Commission well before his time. Whether members liked it

or not, article 19 did exist, and to pursue the argument about its choice of terms was futile. The Special Rapporteur should be encouraged to proceed to the next stage of his task along the lines he had suggested. The Commission would then have every opportunity to criticize the results.

38. Mr. MAHIOU said that, both in his fifth and sixth reports, the Special Rapporteur had raised more questions than he had answered. It was important that he should now move on to a more positive stage and present the Commission at its next session with new draft articles reflecting, as far as possible, the responses of members to the questions formulated earlier. The positions of some members had already evolved in the course of the debate and might well develop further. The Special Rapporteur was to be congratulated on his gallant attempt to reflect all the emerging trends in his summing-up. He wished to join with Mr. Pambou-Tchivounda and Mr. Mahiou in inviting the Special Rapporteur to present the Commission with new draft articles at the next session.

39. Mr. BOWETT said that the problem of international crimes fell into three parts: defining the concept, whether in the terms of article 19 or otherwise; the application of the concept, once defined; and, if it were found that the concept could be applied, the question of consequences. He was apprehensive that the Special Rapporteur might be proposing to go straight to the third of those points without dealing with the first or second. He had little enthusiasm for dealing with the consequences of a concept that could be neither defined nor applied.

40. Mr. ARANGIO-RUIZ (Special Rapporteur), having thanked members for their congratulations, said that he had difficulty in understanding Mr. Bowett's remark. He had been taught in law school that a legal fact was defined on the basis of its legal consequences. His task, as he saw it, was to find out what were the substantive and instrumental consequences, *de lege lata* or *de lege ferenda*, of certain acts, and then to inquire as to who should implement those consequences. Only when those two questions had been answered would it become evident whether a difference between the two categories of internationally wrongful acts really existed. With all due respect, he was surprised at Mr. Bowett's suggestion that a definition should be provided *in abstracto*. The course he was proposing to take was surely the more pragmatic and therefore, so to speak, the one an Englishman like Mr. Bowett should prefer.

41. Mr. BOWETT said that he was happy to hear the Special Rapporteur express an intention to deal with problems of application. He continued to doubt whether the problem could be resolved by working backwards, but was prepared to be favourably surprised when new draft articles came up for consideration at the next session.

42. Mr. KUSUMA-ATMADJA remarked that, for various reasons, none of the members of the Commission were entirely happy with article 19 as drafted. Some, including himself, were unhappy with the use of the term "crime", which had connotations of the concept of crime in municipal law, but accepted it for want of anything better. A further major difficulty was that

<sup>6</sup> General Assembly resolution 3314 (XXIX), annex.

both the Special Rapporteur and the Commission as a whole had tried to grapple with too many issues at once. He would suggest that the Commission should agree to carry on using article 19 as a preliminary basis, on the understanding that the article might be redrafted at some time in the future. In the meantime, it should invite the Special Rapporteur to produce a set of draft articles and, in doing so, to refrain from attempting to cover too much ground and thus to keep the discussion at a more practical level. For the time being, the Special Rapporteur might avoid using the word "crime" or, if he did use it, to place it in inverted commas. Notwithstanding his own objections to article 19 and in particular, as stated earlier, to paragraph 3 (d) in connection with transboundary pollution, he was prepared to proceed on that basis. The Commission should give the Special Rapporteur clear guidelines on what it expected him to do. The Special Rapporteur should not be prevented from drawing up the new articles that needed to be drafted on the question of internationally wrongful acts, although it would be unwise to embark on part three of the draft, which was likely to prove extremely controversial.

43. Mr. GÜNEY thanked the Special Rapporteur for his detailed summary of a number of important and complex questions, on which a difference of opinion clearly remained. It would be regrettable at the present stage not to complete the work already done, despite the difficulties that the question raised. The Special Rapporteur had encountered problems in defining the concept and preferred to start with the practical aspect by treating the consequences, which must of necessity follow or be a function of either the conceptual or the instrumental definition. The Commission had no choice but to allow the Special Rapporteur to proceed. Once texts were presented on those issues that had currently given rise to considerable reservations, the Commission must seek to reconcile those differences of opinion.

44. The CHAIRMAN proposed the following conclusion to the debate:

"The International Law Commission thanked the Special Rapporteur for his conclusions. It takes note of the Special Rapporteur's intention to present at the next session articles or paragraphs on the matter under discussion to be included in parts two and three. It also notes that the Special Rapporteur intends to proceed in such a way as to enable the Commission to conclude the first reading of the draft by the end of the current quinquennium of the International Law Commission."

45. Mr. Sreenivasa RAO said that, in the absence of organized and accepted institutions, any effort to deal with consequences would inevitably lead to an arbitrary exercise of power and might well degenerate into more lawlessness. Yet apart from the case of aggression, which was covered by Chapter VII of the Charter of the United Nations, no such institutions existed. He therefore hoped that the Special Rapporteur could present proposals on consequences from the practical point of view, identifying the institutions that would apply the principles in question.

46. Mr. ROSENSTOCK said it was not his intention to stand in the way of agreement on the Chairman's

proposal if that was the general view, but he had reservations about the wisdom of that approach. If part two, much less part three, was to be concluded before the end of the current quinquennium, the Special Rapporteur must proceed on the assumption that the Commission was examining potential consequences of extremely serious wrongful acts by States and should not include other, more polemical, concepts that failed to enjoy sufficiently broad support in the Commission.

47. Mr. de SARAM said that it could not be inferred that there was a consensus in the Commission on the concept in article 19 of part one as it stood. In fact, there was a substantial body of opinion that had reservations in that regard. Similarly, considerable concern persisted within the Commission as to how the concept would be applied. It therefore did not seem to be a good idea to move on to the subject of consequences. He agreed with Mr. Rosenstock that the best course was to proceed on the assumption that there were internationally wrongful acts of an extremely serious nature for which special provision needed to be made, but that was as far as the Commission could go.

48. He agreed with the Chairman's summing-up, namely, that the Commission should thank the Special Rapporteur and indeed believed that his abilities and experience were such that no one should be requested to provide the articles in his place. The Special Rapporteur must none the less bear in mind the reservations that had emerged in the debate with regard to the concept as it currently stood in article 19 and its application.

49. Mr. HE thanked the Special Rapporteur for his succinct and useful summing-up. In his view, the concept of State crime was unacceptable and was used incorrectly in the realm of State responsibility. The Commission must reconsider the concept on second reading of the draft. For the time being, it should proceed with its work on the understanding that two categories were involved: on the one hand, ordinary delicts and on the other, serious delicts. That way, it would be possible to arrive at the same conclusions as with "crimes". The Commission should ask the Special Rapporteur to continue with his work on the understanding that different delicts incurred different forms of a responsibility, depending on their seriousness.

50. Mr. AL-BAHARNA said he endorsed the Special Rapporteur's approach and agreed with members who maintained that the Commission should not redraft article 19 at the present late stage. The provision should remain and a distinction should be made between crimes and delicts. In accordance with its mandate, the Commission should finish the first reading of the draft without further delay. Mr. Bowett (2341st meeting) had said that he did not think that the elements provided by article 19 were sufficient because he had not seen the logic of the Special Rapporteur's drafting articles on consequences before agreement was reached on definition and application. That was not very helpful to the Special Rapporteur, who should be allowed to proceed on the course he had proposed.

51. Some members of the Commission had taken exception to the concept of "crimes" being attributed to a State, something that showed how difficult the prob-

lem would be if the Commission reopened discussion on the definition of the concept in article 19: if it did so, it would never complete the first reading on time.

52. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to place on record that he had been appointed Special Rapporteur in 1987 and had produced articles in reports almost every year since 1988, but the only time the Drafting Committee had elaborated articles had been in 1992. This had been because the Commission and the General Assembly had had what they had regarded as more urgent business, above all the draft Code of Crimes against the Peace and Security of Mankind. The drafting work on State responsibility had thus been delayed. He would do his best to meet the deadline by 1996, which was possible if the Commission was firm, in 1995 and 1996, in setting aside all the time necessary for the Drafting Committee to do its work. Indeed, the Commission should be able to complete not only "crimes" but also articles 11 and 12, whatever remained on part two and also part three, which should present fewer difficulties.

53. He wished to reassure members of the Commission who were concerned about the use of the term "crime". For the time being, he was ready, if it were really necessary, to refer to "crimes" as *la chose* (the thing). He was unable to refrain from noting, however, that the term "crime" was, none the less, important: it could not be ignored that the term "crime" was in common use among the public and in the media. Even if, as Mr. He had said, one could substitute for the term "crimes" the expression "most severe delicts", the impression would still remain that, in such cases, something was involved that went beyond mere reparation.

54. Be that as it may, one should keep in mind that the term "crime" was embodied in an article adopted on first reading in 1976. For his part, he would try, the following year, to prepare articles dealing with the consequences. It would be for the Drafting Committee to work out the name.

55. The CHAIRMAN said that if he heard no objection, he would take it that the Commission agreed to approve his proposed conclusions.

*It was so agreed.*

*The meeting rose at 5.30 p.m.*

## 2349th MEETING

*Friday, 3 June 1994, at 10.40 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, 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. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada.

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

[Agenda item 4]

#### TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)\*

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

2. Mr. MAHIOU said that article 1 raised the question whether the Code should include a conceptual, generic definition or simply a reference to the crimes which would be listed in it. A good conceptual definition would be acceptable, but was not absolutely necessary. Article 1 as drafted was not a definition and its title (Definition) was therefore deceptive. It would be better to entitle it "Scope of the Code" and to simplify the text in the following way: "The crimes defined in this Code are crimes against the peace and security of mankind." In any case, the Drafting Committee might base its work on the proposal put forward by the Government of Bulgaria (A/CN.4/460, para. 8).

3. Article 2 should be reduced to its first sentence only, the second being controversial and not really necessary. Article 3, paragraph 3, raised the problem of attempt, a concept not applicable to all crimes. The solution would therefore be to delete the square brackets and specify the relevant articles. The suggestion made by the Government of Belarus (*ibid.*, para. 27) that the competent courts should be given the right to decide for themselves whether the concept of attempt was applicable to specific cases before them was attractive, but, unlike criminal courts, which, in most legal systems, had unlimited competence and were empowered to interpret certain concepts, the international criminal court would have well-defined powers and it was not certain that States would want to leave it a great deal of room for manoeuvre. Circumspection was therefore called for. Article 4 could be deleted provided that article 14, with which it was connected, was amended accordingly; otherwise, the wording of article 4 would have to be changed.

4. Article 5 was entirely justified: it was true that the Code was meant to apply only to individuals, but the

\* Resumed from the 2347th meeting.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

crimes committed by individuals which it covered were often committed on behalf of the State or for its account. The wording, however, was confusing, as it could be interpreted to refer to two types of criminal acts, that of the individual and that of the State. That was more than a drafting problem. Article 5 had to be read in conjunction with some articles of the draft on State responsibility, namely, articles 5 and 8 of part one<sup>4</sup> and article 10, paragraph 2 (d), of part two.<sup>5</sup> On the last of those points, it should be noted, in particular, that satisfaction did not relieve the State of other possible consequences of the crime, such as reparation. The best way to deal with the problem, taking all those links into account, would be to redraft article 5 to read:

“The prosecution of an individual for a crime against the peace and security of mankind shall be without prejudice to any responsibility of the State under international law.”

5. Article 6 raised the problem of the harmonization of the draft Code and the draft statute for an international criminal court. The wording of articles 6, 8, 9 and 10 of the draft Code could not, except for very specific reasons, differ from that of the corresponding articles of the draft statute. He had some reservations about article 6, paragraph 2. While recognizing the importance of the criterion of territoriality in international law and the need to take it into account, he warned the Commission about two risks: that of too lenient or accommodating a judgement, which would be dangerous, and that of a judgement prompted more by revenge than by a concern for justice. A country that requested the extradition of an individual suspected of a crime against the peace and security of mankind had to produce sufficient proof in support of its request.

6. He would prefer crimes against the peace and security of mankind, being crimes of the gravest magnitude, not to be subject to statutory limitations. He nevertheless considered that the possibility of a pardon should not be ruled out and that the extremely rigid rule stated in article 7 should be made more flexible; the statutory-limitation period should be as long as possible, but should not be spelled out and should depend on national legislation.

7. He would not comment on articles 8 to 10 of the draft Code until he had acquainted himself with corresponding articles 44, 45 and 41 of the draft statute. The question was whether those articles should or should not be drafted in identical terms.

8. Mr. BENNOUNA said he was concerned that work was going on in parallel on subjects closely related to each other, one being the draft Code of Crimes against the Peace and Security of Mankind, thus giving rise to a problem not only of coordination, but also of substance.

9. Was the Code linked or was it not to the existence of an international criminal court? The original hypothesis had been that of universal jurisdiction. Now, however,

the concept of international criminal jurisdiction was beginning to loom large. Did the Commission intend to elaborate a code which would be incorporated in the statute of an international criminal court or an autonomous code which would contain only general principles drawn primarily from international conventions and a general list of crimes not accompanied by penalties and to which it would be possible to accede without becoming a party to the statute of the international criminal court? Did the Code and the court form a single whole? So long as those questions had not been answered, it would be futile and unsound to undertake a technical analysis of the articles of the draft Code. The Commission could not side-step taking a legal policy decision when the need for one was imperative.

10. Mr. PAMBOU-TCHIVOUNDA said that the idea of considering draft articles 8, 9 and 10 together had not arisen only out of concerns as to method and efficiency. What was involved, rather, was a regrouping under the uniform banner of the general principles of law common to all the major contemporary legal systems which governed legal proceedings, and particularly criminal proceedings, and the functioning of the court. It was apparent from the intrinsic unity of the three provisions that there was indeed a connection between the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court; to separate the work on the two drafts for the purpose of the exercise would perhaps have been nothing more than a tactic which, in the final analysis, would prove to be artificial. It was impossible, when examining the articles of the draft Code, not to think of the draft statute. The Code existed only through the instrument that would apply it—the court. The *raison d'être* of the court was the application of the Code. It would be extremely surprising if the initial, basic provisions of the Code had but one practical objective, one basic ideology—to reassure States as to the approach to, and the actual bases of, the mechanism for the protection of international law and order against a large scale of crimes whose adverse effects transcended borders. The function of the three articles was therefore not only to provide reassurance, but also to point the way.

11. Viewed, then, from the standpoint of their overall function, the three articles provided for a highly civilized approach to the policy for dealing with crime which could have a direct effect on mankind and could give it an image that was less abstract, less distant, less unreal, one concerned with peace-keeping and with self-regulation.

12. The starting-point and the point of arrival, the core of the system it was hoped would be established, was the accused, in other words, one person, or group, a part of mankind itself. That person must be given all the guarantees necessary for the success and effectiveness of the treatment that any extraordinary offender deserved. The object of draft articles 8, 9 and 10 was therefore the same.

13. He was a little perplexed as to where the articles should be placed and in which instrument or instruments they should be included. If the question arose with respect to the draft Code, namely, with respect to one

<sup>4</sup> For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>5</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 76.

instrument, it arose *a fortiori* when two or more distinct instruments were designed to meet the same concern, each embodying provisions drafted in strictly identical terms—as could be seen, incidentally, from the table of the articles common to both drafts which had been circulated to the members of the Commission by the secretariat. At some point or other, the Commission would have to coordinate the two instruments now being drafted—the draft Code and the draft statute. He trusted that such coordination would result in a consolidation of their respective content in a logical and harmonious manner, failing which, as Mr. Bennouna had stated, the Commission would not be doing its job properly. That line of reasoning was all the more valid because the rules set forth in draft articles 8 to 10 were designed to be applied. They dealt with the law to be applied—irrespective of whether the rules were substantive or procedural—by the international criminal court. The Commission should ponder the ultimate purpose of the separation it planned to make in the context of the formulation of those rules and, in the final analysis, the practical value of such separation, and should ask itself in which direction it was heading and why its work took that, and not some other, form.

14. Mr. FOMBA said that he had no special comment to make on article 8, which dealt with judicial guarantees, one of the fundamental rules of international law and of human rights instruments. With regard to article 9, however, it would be difficult for him to take a position until he had an answer to the questions whether, first, the court would in fact be established and, if so, whether it would have exclusive jurisdiction and, secondly, whether, in that case, its jurisdiction would extend to the “crimes of crimes”, such as genocide, or to all crimes that might be contemplated. The Special Rapporteur envisaged two possibilities: either the decision would be handed down by an international criminal court or it would be handed down by a national court, in which connection he adduced highly relevant arguments. He himself did not yet know what his final position on the article would be, but he agreed that, in the absence of anything better, the wording borrowed from article 10 of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991<sup>6</sup> was acceptable.

15. The rule of non-retroactivity laid down in article 10, which was also well established in criminal law, provided that the law should stipulate for the future, not the past, though there was nothing to prevent States from agreeing on rules with retroactive effect. The unconditional application of such a rule in the context of the Code would certainly give rise to difficulties, but the arguments put forward in paragraph 4 of the commentary to article 10<sup>7</sup> were fairly persuasive in justifying the retention of paragraph 2 of the article.

<sup>6</sup> Hereinafter referred to as the “International Tribunal”. For the statute, see document S/25704, annex.

<sup>7</sup> For the commentary to article 10, originally adopted as article 8, see *Yearbook* . . . 1988, vol. II (Part Two), p. 70.

16. Mr. HE said that, in his view, article 9, paragraph 3, as adopted on first reading was incompatible with the *non bis in idem* principle with which the article dealt and which was a basic principle of criminal law. The new wording proposed by the Special Rapporteur in paragraph 104 of his twelfth report was based on article 10 of the statute of the International Tribunal, which was not very felicitous. The International Tribunal had been set up by a resolution of the Security Council<sup>8</sup> which provided for measures that were binding on all States Members of the United Nations to maintain peace and security in the region, whereas the draft Code and draft statute were addressed only to States that would become parties to them on a voluntary basis. Moreover, the International Tribunal had primacy over national courts and had power to review decisions handed down by national courts in the States of the region. The international criminal court would be created under completely different conditions and would not have the same functions. It was therefore doubtful whether it was necessary and feasible to include provisions in the draft Code similar to those that appeared in the statute of the International Tribunal. It was clear that the *non bis in idem* principle would be difficult to apply at the international level, as States were not generally ready to accept the jurisdiction of an international court except in cases where, in view of the seriousness of the crimes committed, exclusive jurisdiction had to be conferred on an international court. He trusted, however, that it would be possible to find a more suitable and better balanced form of wording to provide for the application of the principle within the framework of an international criminal court acting in parallel with national courts.

17. Mr. GÜNEY said that, in his view, article 9, paragraph 3, as worded was incompatible with the *non bis in idem* principle. The Special Rapporteur’s proposed new wording, which was based on the statute of the International Tribunal, was more acceptable and should enable the problem to be solved.

18. He said that he had no objection to make with regard to article 10, paragraph 1, which restated a fundamental principle of criminal law, that of non-retroactivity. Since paragraph 2 set forth exceptions, which also formed part of the fundamental principles of criminal law, it should be retained in the draft Code provided that the expression “in conformity with international law” was deleted to avoid any confusion in practice.

19. Article 13, dealing with official position and responsibility, entirely excluded immunity arising out of the official status of the person who committed a crime. Some thought should perhaps be given to the question of the immunity the leaders of a State might enjoy with regard to judicial proceedings.

20. Article 14 dealt both with defences and extenuating circumstances. Two different concepts were involved, however. Defences divested an act of its wrongful character, whereas extenuating circumstances did not remove the wrongful character of the act, but merely mitigated the criminal consequences. It would

<sup>8</sup> Security Council resolution 808 (1993) of 22 February 1993.

therefore be preferable for the two notions to be the subject of two separate provisions.

21. Mr. de SARAM said that he was concerned about the provisions of article 9, which obviously raised technical difficulties, as could be seen from the Special Rapporteur's exhaustive commentary. The *non bis in idem* principle was indisputably a fundamental principle of law generally applied by national courts. His misgivings concerned the way in which the principle was transposed to the international level. Referring to article 14, paragraph 7, of the International Covenant on Civil and Political Rights, which set forth the principle in question, he wondered precisely what interpretation should be placed on the last words of the provision, "in accordance with the law and penal procedure of each country". It also appeared, as one Government had pointed out, that article 9, paragraph 3, was incompatible with the corresponding provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. He therefore wondered whether it would be possible to achieve the objective sought in the draft statute and the draft Code if such an approach was adopted and whether justice would be any better served if a person was prosecuted again for a crime for which he or she had already been tried and convicted. He feared that that provision would not facilitate acceptance of the draft Code or the draft statute by all States.

22. Furthermore, he did not think that paragraph 2 (b) of the new text of article 9, proposed by the Special Rapporteur, which was modelled on article 10 of the statute of the International Tribunal, diminished those difficulties, for, while that provision might be applicable in the context of the International Tribunal, it had no place in a statute or code of a more general nature. No account was taken, for example, of the fact that, in many countries, judges strove, despite many difficulties, to ensure respect for the principles of law. He thus did not regard that provision as conducive to general accession to the Code. He asked for clarification and the opinion of the Special Rapporteur on that point.

23. Mr. ROSENSTOCK said he thought that, as currently formulated, article 11 was likely to pose serious problems. There was no connection between the existence of an order from a Government or from a superior and the question of guilt. To suggest otherwise was to ignore established law and practice. The part of the sentence following the words "criminal responsibility" should be deleted or at least re-examined at a later date. He noted in passing that, contrary to what was stated in the point of view of the Special Rapporteur to that article, the General Assembly had not adopted that principle, but had simply taken note of it.

24. Article 12 also raised a number of problems. The logical starting-point would be the phrase "if they knew or had information", which introduced a notion that was correct, but that was perhaps stated rather too simplistically. The specific criteria according to which a superior could be regarded as responsible for an act should be spelled out. The general idea underlying the article was acceptable, but the concept of "presumption of responsibility" referred to in the report warranted further

consideration, bearing in mind the rule stated in article 8 concerning the presumption of innocence.

25. Article 13 was acceptable. The same could not be said of article 14 and, in particular, of the Special Rapporteur's proposed new text which, in his view, was an oversimplification of the previous text and was likely to give rise to a regrettable confusion between self-defence in the case of an individual and that provided for in Article 51 of the Charter of the United Nations. Self-defence as referred to in article 14 could be invoked only in extremely limited circumstances. He also thought that the article would need to be expanded if it was intended to include the notion of state of necessity.

26. Lastly, he was ready to accept article 15, although he pointed out that the word "mitigating" would be preferable to the word "extenuating", but he wondered whether consideration should not also be given to dealing with aggravating circumstances.

27. Mr. KABATSI said that he endorsed article 8, which set forth the minimum guarantees to which any accused person must be entitled. He also accepted the *non bis in idem* principle embodied in article 9. However, he found it harder to accept the exceptions to that principle which were provided for. If the international criminal court was set up, he could understand that, in certain cases and in so far as it represented the international community, it should be empowered to assess the impartial or independent nature of a judgement of a national court and, where appropriate, to initiate a second trial. Like Mr. Sreenivasa Rao (2347th meeting), however, he could not accept that a State should be empowered to pronounce on the impartiality and independence of the institutions and judicial system of another State and to try an accused person for a second time. He thus welcomed the fact that the Special Rapporteur ruled out the possibility of States trying a case in their own courts which had already been tried by another national court.

28. With regard to the content of article 9, paragraph 5, or the new text of article 9, paragraph 3, proposed by the Special Rapporteur, he thought that, even when the international criminal court was empowered to try an accused person for a second time, the trial must not take place if the accused had already received a sentence equal to or more severe than the maximum sentence that the court was able to pass. In his opinion, the text should take account of that consideration.

29. Article 10 posed no problem of principle. However, he thought that only paragraph 1, which referred to the Code itself, was really necessary. The reference to other treaties or to domestic law contained in paragraph 2 was redundant.

30. Mr. FOMBA said that he had no difficulty in accepting draft articles 11 to 13, which reflected his point of view on the matters under consideration.

31. Articles 14 and 15, concerning defences and extenuating circumstances, were the result of the Special Rapporteur's proposal to divide former article 14 into two new articles. On the question whether separate articles should be devoted to those two notions, he consid-

ered that such an approach was justifiable, noting that it was difficult to rely on a comparative approach between domestic criminal law and the international criminal order and, furthermore, that a brief analysis of the new French Penal Code was in any case scarcely conclusive. As to substance, he thought that the two articles constituted an acceptable basis which could certainly be improved.

32. Lastly, with regard to the statement in the twelfth report, that judicial practice originating in Anglo-American law made no distinction between the notions of coercion and state of necessity, he noted that the expressions used in the French Penal Code, “act governed by the need for self-defence”, “act strictly necessary to the objective pursued” or “act necessary for the protection of the person or property”, for example, did not seem to be any more specific.

33. Mr. Sreenivasa RAO said that, in the case of acts as grave as crimes against the peace and security of mankind, he wondered whether the Code should even provide for defences and extenuating circumstances relevant for the determination of the penalties to be imposed. If such a regime were to be included, it should perhaps take into consideration the observation of the United Kingdom of Great Britain and Northern Ireland on article 14, according to which the more grave the crime, the less likely it was that a wide panoply of defences and extenuating circumstances would be permitted.

34. Furthermore, the Commission must clearly specify in the Code the defences and extenuating circumstances that it considered pertinent in order to avoid any double standards or arbitrariness in sentencing. Governments had been nearly unanimous in calling for clarity and precision in that regard. In that connection, the Commission should deal not only with extenuating circumstances, but also with aggravating circumstances. He did not share the view, expressed by the Special Rapporteur in his twelfth report, that it was not appropriate to discuss aggravating circumstances since the crimes considered there were deemed to be the most serious of the most serious crimes; that would be missing the point. The Commission needed to consider the circumstances under which the crime was committed rather than the elements constituting the crime. It might, as had been suggested by the Government of Norway, combine various factors dealt with or potentially to be dealt with under articles 11 to 13 and group them into two categories: extenuating circumstances and aggravating circumstances. The Commission should take the time to carry out that task if only to demonstrate its interest in the observations of Governments which had taken the trouble to study the draft articles. Nevertheless, in the event that the Code was applied by national courts, an easy solution would be to refer to the laws of the country involved for the determination of extenuating or aggravating circumstances, as had been suggested by the Government of Paraguay. At the same time, the reference in former article 14 to the “competent court” did not help to clarify the issue.

35. By failing to make it any clearer whether reference was being made to a national court or to an international court, the proposed new article 15 was hardly more enlightening. It was fair to assume, as the Belarusian

Government had done, that, if the provisions of the Code were to be applied by national courts, it could be stipulated that the crimes should be punished in a manner commensurate with their extreme danger and seriousness. However, it should be noted that the defences provided for under national law were not based on the same premises as the defences referred to in the draft Code and therefore had to be adapted to the requirements of the Code. Among the many defences and extenuating circumstances cited by Governments, there was one on which the Commission had to take a stand, namely, that of insanity, which was invoked almost automatically by national courts, but which threatened to make the draft Code meaningless, since the perpetrators of such horrible crimes could all be considered insane. There might also be aggravating circumstances, including the status and personality of the author of the crime, awareness of the seriousness of the consequences of the crime, premeditation or coercion leading to a crime.

36. A comparative analysis of the draft Code, the draft statute for an international criminal court and the statute of the International Tribunal demonstrated that articles 11 to 14 of the draft Code were not strongly reflected in the two other instruments and that the few concepts they had in common differed in the importance and interplay of their various elements. In view of the observations of Governments, the Commission must develop those concepts as fully as possible in order to ensure the widest possible acceptance of the Code and so that the development of international criminal law would be based on the most solid foundations possible.

37. Mr. de SARAM said that, as mentioned by the Special Rapporteur, article 11 was based on principle IV of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,<sup>9</sup> but the element added to that principle, namely, that it was possible for an individual not to comply with the order of a superior, might lead to very serious problems in applying the Code. In respect of article 14, failure to provide for defences would deprive the accused of a fundamental right. At the same time, was the Commission obliged to engage in the legal casuistry that tended to dominate national criminal law? In fact, it would suffice to state that the applicable law was that of the country of which the criminal was a national, that of the country of which the victim was a national or that of the territory in which the crime had been committed. In respect of article 15, extenuating circumstances would be determined by the judge pronouncing the sentence and, therefore, as the Special Rapporteur had indicated initially, article 15 was unnecessary.

38. Mr. VILLAGRÁN KRAMER said that the debate the Commission had just begun on the issue of extenuating or aggravating circumstances was of the highest order and that the Commission must always bear in mind the observations of Governments. The tragedy of the Second World War had given rise to the doctrinal rigidity of the 1950s, but, with time, the international community had gained a better understanding of the issues and was able to demonstrate more flexibility. In the case

<sup>9</sup> *Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), para. 45.

of obeying the orders of a superior, for instance, those issuing blatantly illegal orders were considered responsible, without extenuating or aggravating circumstances: that had been recognized even by national courts, such as a court in the United States of America which had had to try a famous case of that kind during the Viet Nam War.

39. How could an aggressor exercise the right of self-defence? The Commission had thus to choose between a rigid system of correspondence between crimes and punishments, which would make it necessary to provide for extenuating or aggravating circumstances, and a system of minimum and maximum penalties, which left it to the court to evaluate the circumstances. As to defences, it was difficult, not in legal, but in human terms, to admit that such crimes could be justified and, for that reason, it was best not to mention that matter.

40. Mr. MAHIOU said that the proposed new wording of article 14 raised more problems than it solved. None of the defences it mentioned could justify an act such as genocide, for instance. The clear-cut text might make it seem that such crimes could be justified. The ambiguity could at least be mitigated somewhat by incorporating into the article the conditions of admissibility set forth in the Special Rapporteur's twelfth report. Paragraph 159 of the report also introduced a further ambiguity between the self-defence provided for in Article 51 of the Charter of the United Nations, which could be invoked by States, and individual self-defence as provided for in criminal law. Possible confusion between those two types of self-defence might lead to serious consequences and article 14 therefore had to be clarified and supplemented; otherwise, the defences in question could not legitimately be invoked.

41. Mr. THIAM (Special Rapporteur) said that the self-defence referred to in article 14 applied only to aggression and not to any other crime. Short of leaving the way open for all kinds of abuses, it was entirely legitimate for the leaders of a State accused of aggression to invoke self-defence if that State had been attacked. The same self-defence invoked by the attacked State should be able to be invoked by the leaders of that State.

42. Mr. MIKULKA said that the Special Rapporteur's reply clarified even less the ambiguity pointed out by Mr. Mahiou because it completely contradicted the first sentence of paragraph 159 of the report, which stated that the self-defence referred to in the article was not related to the international responsibility of the State provided for in Article 51 of the Charter of the United Nations. He agreed with the third sentence of that paragraph, which indicated basically that, where the leaders of a State ordered the exercise of the right of self-defence, that act did not constitute a crime within the meaning of the Code, but he did not believe that that should be considered as a general justification. Humanitarian law was applicable to all and, in the case of aggression, it applied both to the aggressor and to the victim. The concepts of coercion and state of necessity referred to in that paragraph applied to acts by individuals and not to acts by States; self-defence must therefore be understood in the national law sense and was perhaps not justified in the context of article 14. Self-

defence was, moreover, always subject to the rule of proportionality, so that the defence of physical integrity in the event of aggression could not justify genocide, colonialism or apartheid. The Special Rapporteur's basic idea was that, because national legislation provided for defences, the draft Code should do the same, but the wording of article 14 was none the less hardly satisfactory.

43. The CHAIRMAN said that the Special Rapporteur might wish to include his reply to Mr. Mikulka in the general statement that he would make on the topic as a whole at the next meeting, after which the Commission would decide whether to refer the draft articles to the Drafting Committee.

*The meeting rose at 1.10 p.m.*

## 2350th MEETING

*Tuesday, 7 June 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

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

### Welcome to Mr. Nabil Elaraby

1. The CHAIRMAN extended a warm welcome to Mr. Elaraby, the new member of the Commission.
2. Mr. ELARABY thanked the Chairman for his welcome and said that he greatly looked forward to working with his fellow members of the Commission.

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

[Agenda item 4]

### TWELFTH REPORT OF THE SPECIAL RAPporteur (concluded)

3. The CHAIRMAN invited the Special Rapporteur to sum up the debate.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

4. Mr. THIAM (Special Rapporteur), thanking his colleagues for their continued interest in the topic despite 13 years of discussion, said the reason why the topic was so difficult was that it lay at the crossroads of criminal law, which was very strict, and politics, which was a field in which the vocabulary was vague and imprecise, hence the problems that had arisen in drafting a text acceptable to all members of the Commission. Yet progress had been made, because the text was now being considered on second reading, and he hoped to be able to present his final report at the forty-seventh session in 1995.

5. As to the main issues that had emerged during the debate, one of the first was the actual title of the draft Code. Mr. Tomuschat (2344th meeting) had argued that the title had been drafted immediately after the end of the Second World War and had thus been influenced by the ideas of the time. According to Mr. Tomuschat, the title should be more modern and less closely linked to the events of the Second World War. In his own opinion, the subject continued to be topical, as could be seen by the recent events in the former Yugoslavia, in Rwanda and elsewhere, where crimes against humanity and war crimes were still being committed. If the title were to be changed, he did not see what it could be replaced with. A "Code of International Crimes" would be too broad, because the draft Code was restricted to the most serious crimes that constituted a danger for mankind and universal civilization.

6. With regard to article 1 (Definition), he had explained in a number of previous reports why the Commission had adopted a definition of crimes by enumeration rather than a general definition. Nevertheless, some members of the Commission still favoured a general, or as they sometimes called it, conceptual, definition. He had no objection, but for the past 13 years not one general definition had been proposed. An enumeration was a valid definition too. The Government of Bulgaria had suggested a general definition followed by an indicative, and not limitative, enumeration. He liked that idea and had retained it for the time being, but he was also open to other proposals.

7. Article 2 (Characterization) confirmed the independence of international law, as opposed to internal law. While there was general agreement on the first sentence, the second sentence, which read: "The fact that an act or omission is or is not punishable under the international law does not affect this characterization," had met with opposition, some members of the Commission contending that it was redundant and did not add anything new. He did not object to it being deleted, but it did explain and underpin the first sentence and he was therefore in favour of keeping it.

8. Once it was admitted that international criminal law was a separate science, it must be possible to characterize the acts punished under that law. Characterization was usually a matter for the court. When someone accused another of a particular act, he did not have to characterize the act, but simply to describe its consequences. For example in complaints for murder, the court must verify if the characterization given by the complainant was correct in accordance with the facts

contained in the complaint. That was sometimes very difficult.

9. With regard to article 3 (Responsibility and punishment), it was not enough to find that a crime had been committed: the link between the act and the perpetrator's responsibility must also be established. A number of members had contested the use of the word *châtiment* in the French version and proposals had been made to replace it by *punition* or *sanction*, which were more or less synonymous. He would abide by the Drafting Committee's decision.

10. The concept of "attempt" in paragraph 3 had been discussed at some length. He had been asked which crimes under the Code could be regarded as an attempt and which could not. Unfortunately, he could not draw such a distinction. Engaging in such an exercise was pointless, as it was a matter for the courts to decide. They were in a better position to do so, and in that regard he endorsed the opinion of the Government of Belarus (A/CN.4/460, para. 27).

11. Article 4 (Motives) was difficult and he did not see why the draft Code should devote a separate article to the subject. Motives varied greatly. Crimes could be committed for money, but also out of jealousy or pride and even for more noble sentiments, such as honour. The members of the Commission had thought that the subject could be treated under article 14, on defences and extenuating circumstances, and he had therefore asked for article 4 to be deleted, especially as it was, in its present form, confusing, complicated and superfluous. He believed that he had broad support on that point.

12. One member had argued that article 5 (Responsibility of States) was incomplete. It was, in fact, limited to crimes committed by representatives of a State. When a State official committed a wrongful act, the State was usually held responsible for that act. Some members of the Commission contended that the State could not always be held responsible, because some individuals committed acts independently of the State. That was true, but he had in mind those responsible who were connected with the State in one form or another. Admittedly, an individual could sometimes commit very serious international crimes without having any direct link to a State. For example, some terrorist groups with no visible link whatsoever to the State had committed crimes against the peace and security of mankind. But even leaving aside cases in which the State was an accomplice to terrorist crimes, the State still had special obligations: terrorists did not act in a vacuum. It was difficult to conceive how terrorist groups present in one State could commit serious crimes in another State without the first State being involved. If a State had a sound security system, it could not ignore the presence in its territory of terrorist groups that were fomenting crimes in the territory of another State. Article 7 of the Draft Declaration on Rights and Duties of States,<sup>4</sup> provided that every State had the duty to ensure that conditions prevailing in its territory did not menace international peace and order. Whenever a crime was committed against the

<sup>4</sup> Adopted by the Commission at its first session, in 1949. *Yearbook* . . . 1949, pp. 286 *et seq.*

peace and security of mankind, there was a State behind it, either through negligence or complicity. In any event, that did not change article 5 as it now stood, because it was confined to the responsibility of States for the acts of its officials.

13. The question of criminal State responsibility had been constantly raised. Article 5 covered State responsibility resulting from acts committed by its officials. Some members had interpreted that to mean that States must be held criminally responsible. He was not a partisan of State criminal responsibility, for reasons that he had evoked on a number of occasions. Those who defended article 19 of part one of the draft on State responsibility should reread it: at no point did the provision itself or the commentary refer to such responsibility.<sup>5</sup>

14. Lastly, he did not see how a State could incur criminal responsibility. Sanctions against a State were another matter, because they were political in nature and were taken by political bodies, for example the embargoes imposed by the Security Council or the political sanctions imposed by a State that had conquered another. In short, State responsibility as understood under article 5 was international, but not criminal.

15. In principle, the obligation to try or extradite, set out in article 6, was universal. When an exceptionally serious crime was committed and violated the fundamental interests of mankind, all States were concerned. The State in whose territory the crime was committed had jurisdiction to judge. The purpose of paragraph 2 of the provision was to anticipate cases in which several States wanted to try a case. Paragraph 3 provided for the subsequent establishment of an international criminal court, which would retain jurisdiction in the event of a disagreement with a State about which body should try a case. No order of priority had been established in regard to extradition, but the Drafting Committee had given special consideration to the State in whose territory the crime had been committed, leaving open the possibility that an international criminal court might one day be established.

16. As to article 7, on the non-applicability of statutory limitations, there had been a difference of opinion. Some members thought that absolute non-applicability was too strict and might prevent national reconciliation and amnesty. Others argued that, given the seriousness of the crimes under consideration, statutory limitations must not apply. In his opinion, the Commission should not take a position until the drafting of the Code was completed. He had already explained in earlier reports why he was in favour of keeping the number of crimes to a strict minimum. Once the crimes were determined, the Commission could then decide whether or not statutory limitations applied. For example, the draft Code currently included threat of aggression and crimes related to the environment. It was difficult to see why there should be no statutory limitation for them. The example illustrated why he had not wanted to begin with the general principles governed by the Code: he would need to know first what crimes were involved.

17. There had not been much debate on article 8, the general consensus being that the accused must enjoy judicial guarantees. One member thought that, in addition to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights,<sup>6</sup> the draft should also make reference to regional conventions. Personally, he disagreed. In the drafting of an international instrument, documents that were universal in scope, not regional texts, should be taken as the basis.

18. Article 9 involved the transposition of the *non bis in idem* principle, which was essentially a rule of internal law, to international law. At the internal level, there was no problem as the national courts had to abide by the rule. In the case of international law, however, difficulties arose because of the lack of any supranational authority which could impose its decisions on States. The rule had therefore been introduced into international law gradually, first at the regional level by means of treaties or agreements between several States which provided that a decision handed down in one State would have legal effect in another State, and then, at the universal level, by virtue of the International Covenant on Civil and Political Rights. The draft Code could not now ignore the important issues raised by the rule. In the Drafting Committee, two opposing schools of thought had emerged. Some members, who considered that the rule was so important that it amounted to a subjective right of the individual, were strongly in favour of it being included in the Code. Others were opposed to it, for practical reasons: a State could, such members argued, circumvent the rule to the benefit of an individual who, for instance, took refuge in the State with which he had political affinities and whose courts were more likely to be indulgent to ensure that he was not tried in another State where the courts might be more severe. In the light of the two differing views, it had been necessary to find a compromise, and that compromise was reflected in article 9, which first set forth the basic rule and then provided for the two exceptions in paragraphs 4 (a) and 4 (b). There was, however, a third exception which could arise because of a possible mistake in characterization, as, for example, where a person was tried for murder but it subsequently transpired that his real motive had been genocide.

19. There was one serious mistake in the terminology used in the French text of the article and it pertained to the words *de droit commun*, which had no place in the article since all crimes against the peace and security of mankind were crimes *de droit commun*. Indeed, he had proposed that the term *crimes ordinaires* should be used instead. If the crimes under the Code were treated not as crimes *de droit commun* but as political crimes, there would be significant consequences because accused persons who were tried for political crimes enjoyed a better regime in prison than that imposed on prisoners *de droit commun*. He would therefore ask the Drafting Committee to re-examine the term *de droit commun*. He had also been asked about the word "impartial", which appeared in the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Terri-

<sup>5</sup> *Yearbook* . . . 1976, vol. II (Part Two), pp. 95 *et seq.*

<sup>6</sup> General Assembly resolution 217 A (III).

tory of Former Yugoslavia since 1991.<sup>7</sup> He agreed that that word was not correct in the context inasmuch as one State could not judge the impartiality of another, at least by law.

20. Article 10 had been accepted by the Commission as a whole and therefore called for no comment. Article 11 differed only slightly from the provision in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,<sup>8</sup> on which it was based. There was just one problem with the article, while the order of a Government or a superior could not generally be invoked to escape criminal responsibility, everything depended on the nature of the order. Some orders were so manifestly illegal that any person who obeyed them would be criminally responsible. That was not always the case, however. It would be very difficult for a private in the army, for instance, to know whether an order he had received was in conformity with the norms of international law. The matter could none the less be taken care of in the commentary.

21. He recognized that his proposed new article 14, which dealt with self-defence, coercion and state of necessity, was extremely brief. It would perhaps have been better to deal, on the one hand, with self-defence, which was indeed a defence, and on the other, with coercion and state of necessity, which were not defences but elements that mitigated the responsibility of the person who committed the crime, without, however, removing the criminal nature of the act itself. It was widely acknowledged, and it was also clear from part one of the draft on State responsibility, that self-defence precluded wrongfulness. He had simply intended to say, that, if a State charged with aggression invoked self-defence, and that was accepted, the wrongfulness of the act would be precluded. Consequently, the leaders of the State would not be tried for aggression. It had not sought to suggest that it was possible to respond to aggression by genocide.

22. Coercion, on the other hand, did not preclude wrongfulness, but it could be taken into consideration in removing responsibility. Thus if a person charged with a crime had acted as a result of coercion which it had been impossible for him to resist, he would be relieved of criminal responsibility. A state of necessity was to be distinguished from coercion in that it involved an element of choice. The most common example cited was that of a mother who stole a piece of bread to save her child who was dying of hunger. The mother was faced with a choice, and decided to steal the bread. The wealth of judicial practice cited in his fourth report<sup>9</sup> also showed that coercion and state of necessity could be taken into consideration in removing or mitigating responsibility and therefore justified the inclusion of a reference to such circumstances in the draft Code.

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

<sup>8</sup> *Yearbook* . . . 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook* . . . 1985, vol. II (Part Two), para. 45.

<sup>9</sup> *Yearbook* . . . 1986, vol. II, (Part One), p. 53, document A/CN.4/398.

23. Extenuating circumstances formed the subject of a new article 15. There was, of course, no obligation to include a provision on extenuating circumstances in the draft Code, but it was generally recognized that the courts were entitled to examine any circumstances—personal, family or other—that diminished the responsibility of the accused.

24. As stated in his twelfth report, he did not believe it appropriate to discuss aggravating circumstances, since the crimes covered in the Code were the most serious of the most serious crimes. How then was it possible to envisage circumstances that would aggravate the crimes still further? If the Commission none the less considered that such a provision should be incorporated in the Code, the Drafting Committee could no doubt attend to the matter.

25. With regard to the settlement of disputes, he had requested the secretariat to distribute a text in French prepared by the International Association of Penal Law, which might serve as a useful basis for discussion in the Commission or in the Drafting Committee.

26. Mr. ARANGIO-RUIZ, referring to the proposed article on dispute settlement circulated by the Special Rapporteur, suggested that the phrase "an international criminal court, if one exists or" (*une juridiction pénale internationale, s'il en existe une, ou devant*) should be deleted.

27. The CHAIRMAN said that, having considered the question of the way in which the work on the draft Code and on the draft statute for an international criminal court should proceed, the Enlarged Bureau recommended that articles 1 to 14 of the draft Code, together with the revisions proposed by the Special Rapporteur, should be referred to the Drafting Committee for a second reading in the light of the Commission's discussion, on the understanding that the Special Rapporteur would, together with the Chairmen and members of the Working Group on a draft statute for an international criminal court and of the Drafting Committee, ensure that the parallel provisions of the draft Code and the draft statute were consistent. It further recommended that the Draft Committee should not consider articles 1 to 14 at the present session.

28. Mr. BENNOUNA, thanking the Enlarged Bureau for its efforts to find a solution to a difficult problem, said that, unfortunately, he was not altogether satisfied with its recommendation. The whole situation was far from clear, but the main question was whether the Commission should continue to proceed on the basis of two separate assumptions rather than one, namely, that there would be a code and it would be implemented by an interactional criminal court. That approach had, in fact, been endorsed by the General Assembly, at any rate implicitly. He noted that some members of the Commission favoured an international criminal court which could meet the need of States to try specific crimes—he was thinking, in particular, of the aerial incident at Lockerbie<sup>10</sup>—especially where there was an impasse because

<sup>10</sup> See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3.

the accused could not be tried for the crime either in the State of which they were nationals or in the State on whose territory the crime had been committed, as both States were suspected of not being impartial. Such a court, which would have to be extremely flexible, would be constituted as and when the need arose. There was, however, an alternative model which would fill a permanent need to act as a deterrent and impose punishment for serious crimes on the basis of rules laid down in a code that could be supplemented in line with developments in international law.

29. The members of the Enlarged Bureau had, in his view, displayed an ostrich-like attitude, hiding their heads in the sand rather than tackling the problems head on. Perhaps it was all part of the constructive ambiguities—to borrow the language of the United Nations—which supposedly made for progress. Specifically, however, he thought the Commission should decide which model to adopt before turning to the question of harmonizing the work on the draft Code and the draft statute.

30. The CHAIRMAN said that he would be grateful if Mr. Bennouna could propose a specific amendment to the Enlarged Bureau's recommendation.

31. Mr. BENNOUNA said that the draft Code and the draft statute could not be separated and must be treated as one. Indeed, that was the approach the Commission had originally adopted. The Commission should also decide that the purpose of the court was to give authority to the Code and, to that end, efforts should be directed at achieving harmonization. Specifically, he would propose that the draft articles under consideration should be analysed along with the provisions of the draft statute and, once progress had been made, the draft as a whole should be referred first to the Working Group on a draft statute for an international criminal court and then to the Drafting Committee.

32. Mr. VILLAGRÁN KRAMER said he wished to place on record that no Latin American members of the Commission had adopted, or ever would adopt, an ostrich-like attitude to the problems under discussion. Latin American jurists had a very clear picture of reality. Each and every one of the points raised by Mr. Bennouna had been discussed in the Working Group on a draft statute for an international criminal court. The Special Rapporteur had also been present at all times and had ensured that the provisions of both texts were compatible. The Chairman of the Working Group had submitted a document distilling the essence of the views expressed over the past month during the Working Group's deliberations. All the problems mentioned by Mr. Bennouna—the nature of the future legal institution, its interrelations with the United Nations and the mechanisms by which it would be set up—had been thoroughly discussed in the Working Group. Special emphasis had been placed on the most crucial issue, namely the list of the crimes to fall under the court's jurisdiction, and articles 22 and 27 had been drafted in an effort to address that issue. The Enlarged Bureau's decision was simply intended to enable the Commission to examine the draft Code and draft statute together, with a view to ensuring compatibility.

33. Mr. CRAWFORD pointed out that the Working Group on a draft statute for an international criminal court had been given a timetable by the Enlarged Bureau, with the Commission's approval, envisaging the submission of its final report on 26 June 1994. In order to meet that deadline it had had to proceed on the basis of the assumptions set out in the reports of the Working Group at the forty-fourth and forty-fifth sessions<sup>11</sup> and the discussion thereon in plenary. To reopen the question of the links between the draft Code and the draft statute would be to take a step backwards rather than to advance the Commission's work. The ties between the two instruments were indeed important; when the Code came into force, it was to be one of the matters within the jurisdiction of the court—but not the only one, and the Commission had now been working for three years on that assumption.

34. An additional problem of coordination was to ensure that the provisions of the Code relating to basic guarantees of due process—*non bis in idem*, *nullum crimen sine lege*, and so on—should be phrased identically in the draft Code and in the draft statute. The Working Group, with the assistance of the Special Rapporteur, would do everything possible to achieve that end, but it was also essential for such concordance to be pursued by whatever body was entrusted at the Commission's next session with completing the work on the draft Code.

35. The Working Group on a draft statute for an international criminal court was to have ceased to exist after the present session came to an end. If the Commission would prefer the draft Code to be dealt with in future by a working group rather than the Drafting Committee, arrangements could be made for that approach. However, he saw no reason why the Drafting Committee would not be the appropriate body for making good progress on the draft Code at the forty-seventh session.

36. Mr. TOMUSCHAT said the criticism levelled by Mr. Bennouna was not justified. The Commission's work had been based on decisions adopted two years previously. The idea of moving ahead with the elaboration of a draft statute for an international criminal court independently of the work on the draft Code of Crimes against the Peace and Security of Mankind had been approved by a large majority in the General Assembly, and the Sixth Committee had responded very positively as well.

37. True, there was a link between the Code and the court, but it was unidirectional: a court could exist without a code of international crimes, for many such crimes were already defined in existing instruments, such as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Prevention and Punishment of the Crime of Genocide. On the other hand, a code could not be envisaged without the existence of a court.

38. The Commission's subsidiary bodies were working with full cognizance of the overriding need for harmonization of the Code and the statute. The Special Rapporteur

<sup>11</sup> *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.

teur on the draft Code was personally overseeing the work on the draft statute, with a view to consistency in both endeavours. There was no need to create yet another body to be responsible for coordination. The Working Group should continue its efforts as originally envisaged.

39. Mr. MAHIU said that Mr. Bennouna's comments usefully highlighted the three problems before the Commission: the link between the Code and the statute, coordination of the work on both instruments, and designation of a body to be responsible for such coordination. On the first problem, the Commission had decided to pursue its work on the two topics independently, in the knowledge that a link would have to be established at some point before that work was completed. He agreed with Mr. Tomuschat that a Code without a court would be of very little use. On the second problem, it was true that articles 6, 8, 9 and 10 of the draft Code had to be harmonized with the corresponding provisions of the draft statute. The Working Group was apparently fully aware of that imperative and was arranging its efforts accordingly.

40. As to the third problem, now that the draft Code was ready for consideration on second reading, it was the Drafting Committee, and not the Working Group, that should take responsibility for future work on it. He believed the Drafting Committee should take up the draft Code at the present session, but that it should leave aside articles 6, 8, 9 and 10, which paralleled provisions in the draft statute, on the understanding that the Working Group would pursue its efforts to ensure concordance with the wording of the draft statute.

41. Mr. BENNOUNA, replying to a query from the CHAIRMAN, said he still thought it unrealistic to refer the draft Code to the Drafting Committee at the present session. He welcomed Mr. Mahiou's comments and recalled that the Special Rapporteur himself had said he could not finalize some of the general principles until the list of crimes was completed. He would therefore urge the Commission to await its next session and the submission of the next report by the Special Rapporteur before sending the draft articles to the Drafting Committee.

42. Mr. THIAM (Special Rapporteur), responding to a question from the CHAIRMAN, noted that, even if the draft articles were sent to the Drafting Committee at the present session, the Committee need not take action on them right away: it could await the submission of the remainder of the articles the following year. That way, the Commission would be acting in keeping with its established practice, which was to refer draft articles to the Drafting Committee once it had completed consideration of them in plenary, and the Committee would also be able to benefit from the additional material to be submitted at the next session. His main concern was to ensure coordination of the work on the draft Code and on the draft statute.

43. Mr. BENNOUNA said he could endorse the referral of the draft articles to the Drafting Committee at the present time, on the understanding that they would be taken up only at the next session, when additional material would shed new light on the whole topic. The question raised by Mr. Mahiou remained unresolved,

however. Should articles 6, 8, 9 and 10, which were closely related to the work on the draft statute, be sent to the Drafting Committee at the present time? He thought not. Lastly, he firmly opposed submitting the draft Code directly to the General Assembly without prior consideration by the Drafting Committee.

44. Mr. CRAWFORD, referring to Mr. Mahiou's proposal for consideration in the Working Group of the articles in the draft Code that paralleled those in the draft statute, said he did not think a formal decision had to be taken. The Working Group would do everything possible to avoid divergences between the texts.

45. The CHAIRMAN said that he would take it that the Commission agreed with the proposal by the Enlarged Bureau that the work on the draft Code and on the draft statute should be coordinated by the Special Rapporteur on the draft Code and by the Chairmen and members of the Drafting Committee and the Working Group, and that the draft articles should be referred to the Drafting Committee on the understanding that not all of them would be dealt with at the current session.

*It was so agreed.*

46. Mr. BARBOZA said he hoped the decision would not overburden the Drafting Committee, which would be called upon to consider a number of articles of the topic for which he was Special Rapporteur, namely international liability for injurious consequences arising out of acts not prohibited by international law.

#### Cooperation with other bodies

[Agenda item 8]

#### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

47. The CHAIRMAN invited Mr. Tang, Secretary-General of the Asian-African Legal Consultative Committee, to address the Commission.

48. Mr. TANG (Observer for the Asian-African Legal Consultative Committee) said he was honoured to address the Commission for the first time on behalf of the Asian-African Legal Consultative Committee (AALCC), especially in the presence of the Committee's current President, Mr. Yamada. The secretariat of the Committee attached great significance to its traditional and long-standing ties with the Commission. The presence of the current Chairman of the Commission at the Committee's thirty-third session, held at Tokyo at the beginning of 1994, had underscored the spirit of cooperation between the two bodies.

49. All the topics being considered by the Commission were of great interest to the Committee's member Governments. Careful analysis of the discussions at the thirty-third session of the Committee on the report of the Commission on the work of its forty-fifth session<sup>12</sup> revealed three distinct trends, namely, endorsement, a

<sup>12</sup> Yearbook . . . 1993, vol. II (Part Two), document A/48/10.

more cautious approach, and a wish to reserve comment until the Commission adopted a full set of draft articles on a particular topic.

50. The question of international watercourses, as well as appearing prominently on the Commission's agenda, also formed part of the work programme of the Committee. The debate in the Committee had reflected the difficulties of developing a set of legal norms to regulate the non-navigational uses of international watercourses, a subject which touched upon several important issues, such as the national economies of watercourse States, ecological balance and environmental protection. It had been felt that the diversity of circumstances and characteristics pertaining to different river systems and the vastly divergent interests of States had to be taken into account. The need had been emphasized to integrate law and policy concerning international watercourses with similar concerns in the wider context of environmental conservation and sustainable development. The Committee had expressed its concern at the growing misuse of freshwater resources, and had noted with appreciation the progress being made in the Commission on the second reading of the draft articles on the topic of the law of the non-navigational uses of international watercourses. However, the view had also been expressed that inclusion of confined groundwater in the international watercourses system would complicate the issue and might create many difficulties. In that regard, the Committee was particularly interested in the establishment of a mechanism to settle disputes on the uses of international watercourses among riparian States.

51. The Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law had been generally thought to bring out the importance of establishing a global regime that would effectively protect human beings and the environment from the rapidly increasing adverse consequences of haphazard or unplanned development. The view had been expressed that, in the formulation and elaboration of the draft articles on preventive measures, the Commission should give due consideration to the special needs of developing countries. In connection with the topic of State responsibility, most delegates had expressed concern about the desirability of formulating a legal regime of unilateral countermeasures, given the inherent danger of abuse with such a regime. One delegate had opposed recourse to reprisals on the ground that they were inequitable and could involve abuses of power. Another had raised the question whether the dispute settlement procedures envisaged in the draft articles furnished an effective remedy in situations of resort to unlawful or disproportionate countermeasures. The Committee secretariat thought that those questions required consideration.

52. In connection with the question of the jurisdiction of the proposed international criminal court, the view had been expressed that, pending the elaboration of a code of crimes against the peace and security of mankind, jurisdiction should initially be restricted to well-defined crimes under universally accepted international conventions, it being pointed out in that regard that the concept of crime under general international law lacked specificity. It had been proposed that the United Nations

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances should be treated on a par with other international conventions in the sense that breaches of the Convention should be considered international crimes rather than undesirable conduct.

53. Several members of the Committee had endorsed the Commission's decisions on the selection of two new topics for its programme of work, "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". They had concurred with the Commission's view that those topics responded to a need of the international community and that the international climate was propitious for them to be considered. The Committee secretariat would continue to prepare notes and comments on substantive items considered by the Commission with a view to assisting representatives of the Committee's member States in the Sixth Committee in their deliberations on the report of the Commission. An item entitled "Report on the work of the International Law Commission at its forty-sixth session" would be placed on the agenda of the thirty-fourth session of the Committee.

54. Reviewing some of the substantive items considered at the Committee's thirty-third session and the current work programme, he said that an item entitled "Decade of International Law" had been on the agenda of the Committee since the adoption by the General Assembly of resolution 44/23 in which it proclaimed the United Nations Decade of International Law. The Chairperson of the Sixth Committee had addressed the Committee on the subject, and the item remained on the Committee's programme of work as well as on its active agenda. On his return to New Delhi he would give priority to finalizing and forwarding to the Legal Counsel a summary of AALCC activities in connection with the realization of objectives for the current phase of the United Nations Decade of International Law. The Committee secretariat had actively cooperated with the Government of Qatar in convening an International Conference on Legal Issues Arising under the United Nations Decade of International Law, in March 1994.

55. The items considered at the thirty-third session had included a report on the progress of work of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea,<sup>13</sup> as well as a report on the informal consultations convened by the Secretary-General of the United Nations. The Committee had noted with satisfaction that the United Nations Convention on the Law of the Sea was to enter into force in November 1994 and had reminded member States to give consideration to the need to adopt a common policy and strategy for the period before commercial exploitation of deep seabed minerals became feasible. The Committee secretariat would continue to cooperate with relevant international organizations in ocean and marine affairs and would endeavour to assist member States in formulating and adopting municipal legislation for the exploration and exploitation of the national resources of the exclusive economic zone. The former Secretary-General of the

<sup>13</sup> Document LOS/PCN/130 and Add.1.

Committee, Mr. Njenga, had participated in the Regional Leadership Seminar on Marine and Ocean Affairs, held at Addis Ababa at the beginning of 1994, and his paper, entitled "An outline on the implementation of strategy and programme of action", had been adopted by the Seminar and was now under consideration by ECA and the International Ocean Institute.

56. The Committee, one of the first organizations to consider the question of the establishment of a safety zone for refugees, was in the process of examining other issues relating to the status and treatment of refugees, a problem of particular concern to the Governments of the region. At its thirty-third session, held at Tokyo, the Committee had considered a brief on "Model legislation on refugees" and, following an offer by UNHCR, had seconded an officer to work at UNHCR Headquarters. The Committee secretariat had drafted detailed model legislation on the rights and duties of refugees in the light of codified principles of international law and of the practice of States in the region. It was to be transmitted to all member States for comments at the Committee's next session. The AALCC secretariat was also working closely on the matter not only with UNHCR but also with OAU.

57. Three years previously, the Committee secretariat had been mandated to undertake an in-depth study on the privatization of public sector undertakings and the liberalization of economic activities as a means of increasing economic efficiency, growth and sustainable development in the context of economic restructuring programmes. A special meeting on developing institutional and legal guidelines for privatization and post-privatization regulatory framework had been held at the Committee's thirty-third session. The IBRD had assisted in convening the Special Meeting and had sent two experts to facilitate the deliberations. The Committee secretariat had prepared the proceedings of the Special Meeting and the report for publication, and they would be widely distributed so as to ensure extensive dissemination of the guidelines throughout the Asian-African region.

58. Recognizing the utility and importance of joint ventures as instruments of foreign investment and transfer of technology from transnational corporations and medium-sized enterprises in both developed and developing countries to private and public sector enterprises in many developing countries, the Committee secretariat had prepared a guide on legal aspects of industrial joint ventures in Asia and Africa. The Committee had adopted the Guide and had requested the secretariat to update it periodically in the light of relevant amendments that might be introduced in the national laws of member States. Accordingly, the secretariat was continuing to monitor developments in that field.

59. The secretariat's advisory role included assistance to member States in preparing for codification conferences convened by the United Nations. In that connection, the secretariat had been represented at the meeting of the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa; and at the thirty-third session, the Committee had con-

sidered a brief on the proposed convention. At the same session, it had also had before it secretariat studies on the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change. Following the establishment of the Commission on Sustainable Development, the AALCC secretariat had been monitoring the work of that Commission as a follow-up to the United Nations Conference on Environment and Development. The secretariat was proposing, jointly with UNEP, to organize a meeting in 1994 of a group of experts to consider environmental issues, including the question of the implementation of Agenda 21<sup>14</sup> and, in particular, the question of problems faced by developing countries in implementing international agreements on environmental matters.

60. Other items on the Committee's work programme included the preparation of documents and studies on such diverse subjects as the deportation of Palestinians as a violation of international law, particularly the Geneva Conventions of 12 August 1949; an Agenda for Peace;<sup>15</sup> extradition of fugitive offenders; the debt burden of developing countries; and international trade law matters. Work on all those topics was in progress, and they were among those to be considered at the Committee's thirty-fourth session, scheduled to be held at Doha, in March 1995. He wished to take the present opportunity to extend to the Chairman of the Commission, on behalf of the Committee and on his own behalf, an invitation to participate in that session.

61. The CHAIRMAN thanked the Secretary-General of AALCC for his interesting statement. Having been deputed by the previous Chairman of the Commission, Mr. Barboza, to attend the Committee's thirty-third session, held at Tokyo in January 1994, he wished to report briefly on his impressions. Mr. Yamada's unanimous election to the office of President of the Committee had been particularly gratifying. A substantial report on the Commission's activities had received an attentive hearing, a particularly lively discussion which took place in connection with the Commission's work on the topic of the law of the non-navigational uses of international watercourses. As reported by Mr. Tang, considerable attention had been given to the problem of privatization, as well as to the question of the status and treatment of refugees and displaced persons, and other important matters. It had been his impression that, as Mr. Yamada had pointed out in his closing remarks, the session had been too overloaded with work to be able to give sufficient in-depth consideration to some of the questions on the agenda. He hoped Mr. Tang would receive the observation in the friendly and constructive spirit in which it was intended.

62. An important organizational decision taken at the thirty-third session had been the transfer of the Committee secretariat from New Delhi to Doha. It was to be hoped that the practical difficulties of the transfer would

<sup>14</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol.I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: Resolutions adopted by the Conference, resolution I, annex II.

<sup>15</sup> Document A/47/277-S/24111, para. 40.

not stand in the way of the very efficient and useful work being done by the secretariat. Another important organizational decision had been the appointment of Mr. Tang to succeed the former Secretary-General, Mr. Njenga. He wished to address the warmest congratulations to Mr. Tang on his appointment and express his confidence that the useful links between the two bodies would continue in the future.

63. Mr. YAMADA, speaking as the current President of AALCC, said that the Committee's achievements as an advisory body on legal matters to the participating States in Asia and Africa were impressive. In the 1970s the Committee had made an active contribution to the development of the law of the sea. In recent years, as a permanent observer to the United Nations, it had been closely involved in the Organization's work and, in particular, in the United Nations Conference on Environment and Development and the World Conference on Human Rights, and had endeavoured to coordinate a common approach among its participating member States at those conferences and to watch carefully their implementation of the decisions taken at those important events.

64. The Chairman, who had represented the Commission at the Committee's thirty-third session, appeared to share some of his own misgivings about the current status of the Committee. In his view, the Committee had not in recent years been able to conduct in-depth legal deliberations on topics of common interest to its member States, because its agenda included too many items of interest to only a few members. Moreover, the discussions had often been plagued by politicization. The Committee was also confronted with serious financial constraints as a result of non-payment of dues by a large number of member States. He strongly felt that the Committee should embark on a new phase under the leadership and guidance of the new Secretary-General and, in that connection, wished to make two suggestions for the new Secretary-General's consideration.

65. First, the Committee should focus its activities on legal matters by making the best use of its strong point as a forum for legal specialists and as the only intergovernmental organization of its kind in Asia and Africa. It was important, from that point of view, for the Committee to avoid politicization of its agenda and to keep the number of issues to be discussed at its annual sessions to a minimum, so that a professional and detailed discussion could take place on each item. The main objective of the deliberations should be a frank exchange of views on the legal aspects of each problem, possibly leading to a harmonized approach to questions of common concern. The project of drawing up model legislation on refugees seemed to be a good initiative, and he hoped to see the text completed at the Committee's next annual session.

66. The second suggestion concerned the relationship between the Committee and the Commission, two bodies which had maintained close cooperation for more than 30 years. Under article 4 of its statute, the Committee was required to examine questions that were under consideration by the Commission and to arrange for the view of the Committee to be placed before the Commission. In his view, that requirement of the statute had not

been fully met by the Committee in recent years owing to lack of time during its annual sessions to discuss each of the items under consideration in the Commission. He hoped that the Committee would make full use of that provision to present more inputs from Asian and African perspectives to the work of the Commission and to make its relationship with the Commission more organic and mutually stimulating.

67. He wished Mr. Tang every success in his new post.

68. Mr. de SARAM, speaking on behalf of members of the Commission from the Asian region, thanked the Secretary-General of AALCC for his interesting and enthusiastic statement. AALCC was committed to raising the awareness of Governments in the Asian-African region of the ramifications of the legal subjects under review in the United Nations system. It was gratifying to note that it had chosen to give the deliberations of the Commission special attention in that connection. He wished AALCC all the best in pursuing its impressive programme of work in the development of international law.

69. Mr. KABATSI, speaking on behalf of members of the Commission from the African region, congratulated the Secretary-General of AALCC on his statement. He had rightly noted that, when elaborating topics of international law, the Commission should pay particular attention to the needs of developing countries, for no development or codification of international law would receive general acceptance unless developing countries were involved. The work of AALCC was of great importance to the Commission, which often drew inspiration from international legal bodies like AALCC in an ongoing process that was bound to continue. He wished the Secretary-General of AALCC every success in his new duties.

70. Mr. TOMUSCHAT, speaking on behalf of members of the Commission from the western European region, thanked the Secretary-General for a clear report. The Commission greatly benefited from AALCC activities: the process of cross-fertilization assisted both bodies in their quest for imaginative solutions to modern problems in international law. Recent world events had once again shown that the law, if just and equitable, was one of the stabilizing factors that could ensure international peace, while inadequate responses to urgent issues could become a threat. AALCC interest in such issues as international environmental law and the status of refugees was commendable, and often shed important light on the Commission's own work. He wished the Committee and its Secretary-General all the best in their future work and hoped that the Committee's close cooperation with the Commission would not only continue, but would grow stronger in the years ahead.

71. Mr. MIKULKA, speaking on behalf of members of the Commission from the eastern European region, said he, too, congratulated the Secretary-General of AALCC on his election and welcomed his report on AALCC activities. He particularly appreciated the attention paid to topics that mirrored those on the Commission's agenda. That interaction had long been shown to be useful and fruitful, and he was convinced that it would

continue in future. He wished to extend his wishes to AALCC for every success in the future.

72. Mr. VILLAGRÁN KRAMER said that the Latin American members of the Commission, on whose behalf he was speaking, wished to thank the Secretary-General of AALCC for his statement. The work of the various regional forums was of great significance and often paralleled that of the Commission. The responses found in one region to challenges of contemporary international life could be compared and shared with other regions. With the end of the cold war, for example, politicization and ideological confrontation were diminishing everywhere, opening the way to progress in humanitarian affairs. He wished the Secretary-General every success in leading AALCC forward.

### Organization of work of the session (*continued*)\*

[Agenda item 2]

73. The CHAIRMAN informed the Commission that the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law was of the view that the time allocated to the consideration of his tenth report (A/CN.4/459) would be more profitably used in the Drafting Committee, which had a number of draft articles on the topic before it, than in the framework of the plenary. The Enlarged Bureau, which had considered the matter, therefore suggested that most of the plenary meeting time allocated to the topic should be set aside chiefly for meetings of the Drafting Committee on the same topic, without precluding the possibility that part of the time thus freed might be allocated, if necessary, to the Working Group on a draft statute for an international criminal court. The proposal meant that there would be no debate on the topic in plenary at the present session.

74. If he heard no objection, he would take it that the Commission agreed to the proposal of the Enlarged Bureau.

*It was so agreed.*

75. The CHAIRMAN noted that the Commission was beginning to be pressed for time and appealed to the members of the Drafting Committee and of the Working Group on a draft statute for an international criminal court to proceed as expeditiously as possible and to make optimum use of the limited time available to them.

*The meeting rose at 1.25 p.m.*

\* Resumed from the 2335th meeting.

## 2351st MEETING

*Friday, 10 June 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. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

### International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/457, sect. C, A/CN.4/459,<sup>1</sup> A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

#### TENTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. BARBOZA (Special Rapporteur), introducing his tenth report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/459), said that it related to the first step in the work on the subject as foreseen by the Commission in the decisions taken on the basis of the recommendations of the Working Group it created at its forty-fourth session.<sup>2</sup> At that time, the Commission had decided that the draft articles<sup>3</sup> should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm, and then with the necessary remedial measures. Once the Commission had completed consideration of the proposed articles on those two aspects, it would decide on the next stage of its work. When consideration of the issue of prevention had been completed, in the context of the response measures proposed in chapter I of the tenth report, the Commission would have to examine the responsibility and liability issues to which the articles would give rise, in other words, the roles of the State and of the operator, as well as the provisions common to both. Lastly, the tenth report considered the issue of the procedural means available to enforce liability.

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> *Yearbook . . . 1992*, vol. II (Part Two), document A/47/10, paras. 344-347.

<sup>3</sup> For the texts of draft articles 1 to 10, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 9 *et seq.* For the revised articles proposed by the Special Rapporteur, which were reduced to nine, see *Yearbook . . . 1989*, vol. II (Part Two), para. 311. Further changes to some of those articles were proposed by the Special Rapporteur in his sixth report, see *Yearbook . . . 1990*, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add.1, annex; and *ibid.*, vol. II (Part Two), para. 471.

2. He proposed the use of the term "response measures" in referring to prevention *ex post facto*. At the Commission's forty-fifth session, a substantial number of members had expressed the view that prevention *ex post facto*, in other words, measures adopted after the event to prevent or minimize transboundary harmful effects, should not be regarded as preventive measures, which always came before the event. He was not entirely convinced by that argument. In his view, prevention involved two things: the incident itself and the damage it might cause. The *ex post facto* preventive measures to which he was referring were to be taken after the occurrence of an incident, but before all the damage had been caused. The purpose of such measures was therefore to control, or intercept, the chain of events that were set in motion by an accident and resulted in damage. Consequently, it was not possible to deal with them as part of reparation. In the tenth report, an example was given of the pollution of an international watercourse which showed that measures that could even be regarded as rehabilitative in the State of origin could be of a preventive nature in the context of transboundary harm. International practice regarded *ex post facto* measures as a matter of prevention and he had found no indication whatsoever to the contrary. If the Commission still wished the term "preventive measures" to refer only to measures taken prior to the incident, it would have to adopt another term for prevention *ex post facto*, such as "response measures".

3. After dealing with the issue of prevention, both *ex ante* and *ex post facto*, the report turned to that of liability, the main feature of the topic, as was apparent from its title. The first question that arose was whether there was some form of strict State liability for transboundary damage. The previous Special Rapporteur, Mr. Quentin-Baxter, had taken the view that there could be that kind of liability and that it would be incurred if all else failed; he himself was inclined to adopt the same viewpoint, though international practice had not followed that trend, but tended towards the civil liability of the operator. The only instrument which provided for the "absolute" liability of the State was the Convention on International Liability for Damage caused by Space Objects due to the fact that at the time of its signature States had regarded space activities as their exclusive concern.

4. The civil liability channel had several advantages: compensation of the victims of transboundary harm was determined by a court, through due process of the law, so that the victims did not have to rely on the discretion of the affected State, which might not, for political or other reasons, take action. The State of origin, for its part, did not need to respond to the action of a private individual before the national courts of another State, and that might prevent some difficulties. Civil liability was, however, always strict liability. Indeed, it was in hazardous activities that the application of that form of no-fault liability in modern legal systems had its origin. There were two irrefutable legal principles which could not be discarded simply because the operator was in one country and the victim in another: whoever caused the risk and profited from the hazardous activity must be liable for its injurious consequences; and, it would be inequitable to place the burden of proof on the victim.

The draft articles under consideration could provide the international mechanism by which the strict liability of the operator could be affirmed.

5. There was the question of whether the State should share in the operator's liability. According to international practice, there were several possibilities: the State could have no liability for transboundary damage caused by accidents; the operator could have strict liability for damage caused and the State would have to provide the funds for that portion of compensation which was not satisfied by the private operator or his insurance; and the operator could have strict primary liability for the damage caused and the State could have subsidiary liability for that portion of the compensation which was not satisfied by the operator, provided that the damage would not have occurred if the State had not failed to comply with one or more of its obligations. That third possibility was what the Commission had termed "indirect causality", at the time it was considering the reports of Mr. Roberto Ago. Such a system, combining failure by the State to fulfil one or more of its obligations and "indirect causality" was set forth, for instance, in the proposed draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

6. The fourth situation found in international practice was one in which the State bore both strict liability and responsibility for a wrongful act, depending on where the harm occurred, an example of that was the Convention on International Liability for Damage Caused by Space Objects. In his view, that last alternative should be rejected, the Commission and the Sixth Committee of the General Assembly having in the past expressed their preference for a subsidiary liability of the State. Of the three remaining possibilities, he preferred the first, namely, non-participation by the State in the payment of compensation, which he proposed choosing, along with the third, namely, State responsibility (for a wrongful act) for the portion of compensation not covered by the operator or his insurance if the victim proved the "indirect causality" of action by the State of the accident. He ruled out the second possibility because he saw it as a form of strict liability which States might be reluctant to accept, but he remained open to any suggestion should the Commission decide to proceed otherwise.

7. Concerning liability for a wrongful act or no-fault liability and whether or not the State intervened in a subsidiary manner, thus far, only the relationship between a State and injured persons had been explored. What, then, of the State-to-State relationship on the international plane resulting from the failure of a State to comply fully with its own obligations? As stated in the draft articles on State responsibility, such a failure gave rise to a number of obligations: cessation of the wrongful conduct, restitution in kind, compensation, satisfaction and assurance and guarantees of non-repetition. With regard to cessation, the State of origin would be under an obligation to cease the conduct constituting a wrongful act having a continuous character. That continuous act would generally consist in the State's failure to take the measures required by the draft articles and cessation of that act would be in keeping with the view expressed at the forty-fifth session of the Commission that a dangerous

activity performed without the appropriate precautionary measures being taken ceased to be a lawful activity under international law. It went without saying that the wrongful act in question must be duly proved to be such and that the affected State could therefore not oppose a lawful activity by the State of origin.

8. The State injured by the breach could request that all appropriate forms of reparation should be made, as provided for in the current wording of articles 7, 8, 10 and 10 *bis* of part two of the draft on State responsibility.<sup>4</sup> In addition, the injured State would be able to take the appropriate steps following a breach of an obligation. In other words, it would have the right to take any appropriate countermeasures under the same general conditions of lawfulness to which countermeasures were subject under international law. It should be remembered that the obligations of prevention were obligations of due diligence and that the State was required only to attempt to prevent accidents and harm. If an accident and transboundary harm occurred while the activity in question was being carried out, strict liability of the operator would automatically come into play in order for the private victim to obtain compensation. The affected State nevertheless kept its rights regarding the other consequences of the breach: it could make diplomatic representations and take such steps—for example, countermeasures—as were necessary to make the State of origin fulfil the requirement in question by ceasing the wrongful act. The coexistence of obligations of prevention, the breach of which resulted in State responsibility, and of a regime of strict liability for the operator made it necessary to draw a very clear distinction between the two and was perhaps the reason why prevention and liability were in practice covered by separate instruments.

9. Turning to the issue of civil liability, he said that, in the case of hazardous activities, international conventions generally provided for strict liability of the operator. The existing civil liability regimes had certain features in common: (a) the operator bearing liability must be clearly identified, liability being joint and several when several operators bore liability; (b) the operator was invariably obliged to take out insurance or to provide some other financial guarantee; (c) where possible, compensation funds were to be established; (d) in order for the system to function, the principle of non-discrimination must be respected; in other words, the courts of the State of origin should accord the same protection to nationals and to non-nationals, to residents and to non-residents; (e) in all matters not directly covered by the convention, the law of the competent court applied, provided it was consistent with the convention; (f) except where otherwise provided, judgements enforceable in one court were to be equally enforceable in courts of all States parties to the convention; and (g) monetary compensations awarded could be transferred without restriction in the currency desired by the beneficiary.

10. The fact that the party bearing liability for any harm was clearly identified had the advantage not only of putting the potentially liable parties on notice and making them do their best to avoid causing harm, but

also of facilitating redress of the injured party in case of harm. A review of civil liability regimes showed that liability was channelled through the operator, on the grounds that the operator: (a) was in control of the activity; (b) was in the best position to avoid causing harm; and (c) was the primary beneficiary of the operation and should therefore bear the cost of the operation to others. Basing himself on the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, which, because of its general character, was of particular interest for the study of the topic, he proposed provisions for defining the operator and his liability, stipulating in substance that operator referred to the person who exercised the control of an activity; that the operator bore liability for any significant transboundary harm caused by that activity during the period in which he exercised control over the activity; and that, if several operators were involved in an incident, they were jointly and severally liable, unless an operator proved that he was liable only for part of the harm, in which case he would be liable only for that part of the harm.

11. Relying on existing civil liability conventions, he was proposing provisions under which the operator conducting activities covered by the topic under consideration had to provide a financial guarantee. To that end, it would be for the State to require the operator to take out insurance or to set up a financial security scheme in which operators would have to participate. Actions for compensation could be brought directly against the insurer or the financial guarantor. Existing conventions had identified various courts as competent to hear claims. The list included courts having jurisdiction in the place: (a) where the harm occurred; (b) where the operator resided; (c) where the injured party resided; or (d) where preventive measures were supposed to have been taken. Each of those courts offered advantages in terms of gathering evidence and by virtue of its link with the claimant or the defendant. In his view, the first three possibilities should be retained.

12. In order for civil liability regimes to be effective, the competent courts must ensure equal treatment before the law for nationals and non-nationals, residents and non-residents. The draft articles should therefore include a provision to that effect. The Commission might decide that the principle set forth in article 10 of the draft<sup>5</sup> was sufficient; otherwise, a specific article with equivalent language should be included in the section under consideration.

13. In respect of causality, dealt with in chapter III, section G, of the tenth report, he proposed, in keeping with a provision of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, that, in considering evidence of a causal link between acts and consequences, the court should take due account of the increased danger of damage inherent in the dangerous activity, that is to say, of the specific risks of certain dangerous activities causing a given type of damage. The text of the proposed article did not, however, establish a presumption of causality between incident and harm.

<sup>4</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 52.

<sup>5</sup> See footnote 3 above.

14. With regard to the enforceability of the judgement, he noted that an effective civil liability regime must provide for the possibility of enforcing a judgement in the territory of a State other than the one in which the judgement had been pronounced. Otherwise, any efforts made by a private party to seek redress before a domestic court might be in vain. It was for that reason that civil liability conventions usually contained provisions on the enforceability of judgements, but also provided for certain exceptions, among them fraud; non-respect for due process of the law; and cases where the judgement was contrary to the public policy of the State where enforcement was being sought or was irreconcilable with an earlier judgement. Consequently, the party seeking enforcement must comply with the procedural laws of the State where the judgement would be enforced.

15. With regard to exceptions to liability, the grounds set forth in civil liability conventions included armed conflict; unforeseeable natural phenomena of an exceptional and irresistible character; wrongful intentional conduct of a third party; and gross negligence of the injured party. Those were reasonable grounds for exceptions to liability in respect of damages resulting from the activities considered in the report. With regard to State responsibility for wrongful acts, such as failure to comply with preventive provisions, the grounds for exception were those mentioned in chapter II, section C, of the tenth report.

16. Chapter IV of the report dealt with the statute of limitations in respect of liability. Under civil liability conventions, the time-limit varied from one year, as in the Convention on International Liability for Damage Caused by Space Objects, to 10 years, as in the Vienna Convention on Civil Liability for Nuclear Damage. Time-limits were determined on the basis of various considerations, such as the time within which harm might become visible and identifiable or the time that might be necessary to establish a causal relationship between harm and a particular activity. Since the activities covered in the report were similar to those dealt with in the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, the three-year statute of limitations provided therein seemed appropriate for civil liability claims, on the understanding that no procedure could be instituted after 30 years from the date on which the incident resulting in harm had occurred.

17. The last chapter of the report dealt with procedures to enforce civil liability. In the event that a State was objectively responsible for failing to comply with its obligations of prevention, the procedural channel available was State to State and, consequently, the normal diplomatic procedures and the usual methods of settling disputes were applicable. However, where a State had to face a private party or another State before a domestic court, the situation could become more complicated and some of the possibilities referred to in the report could consequently be set aside. Thus, where a State was subsidiarily responsible for a wrongful act for amounts not covered by the operator or his insurer, it might have to appear before a domestic court. That possibility alone was sufficient reason to discard that type of State responsibility. Other situations also gave rise to serious diffi-

culties, for instance, where an affected State suffered immediate damage, as in the case of damage to its environment. Under such circumstances, the affected State might have to bring an action before a national court, which could be the competent domestic court of that same State. That might pose problems for the defendants. That type of difficulty was one reason to consider solutions such as that proposed by the Netherlands in the IAEA standing committee for considering the amendment of the Convention on Third Party Liability in the Field of Nuclear Energy, of 1960, and the Vienna Convention on Civil Liability for Nuclear Damage, of 1963, namely, the creation of a single forum such as a mixed claims commission, which would be competent to hear claims between States, between private parties and States, and between private parties.

#### Closure of the International Law Seminar

18. The CHAIRMAN said that the International Law Seminar, whose thirtieth session was coming to a close that day, was an opportunity for the members of the Commission to hold an exchange of views with young lawyers from various countries on topics of international law under discussion in the Commission and other national and international bodies. He expressed the hope that the participants would benefit from their experience and continue to take an interest in, and publicize, the Commission's work. He wished them a safe journey home.

19. Mrs. NOLL-WAGENFELD (Director of the Seminar), speaking on behalf of the Director-General, who was unfortunately unable to attend the meeting, said that she wished first of all to thank the members of the Commission who had made an active contribution to the Seminar and, in particular, Mr. Arangio-Ruiz, Mr. Tomuschat and Mr. Villagrán Kramer, whose expert advice had been so helpful to the three working groups established on the following topics: the legal bases for the establishment of an international criminal court; international crimes (art. 19 of part one of the draft on State responsibility), and reservations to multilateral treaties. The results of research carried out jointly by the participants in the Seminar had been presented the day before and would be distributed to the members of the Commission at a later time.

20. She also thanked Mr. Mahiou, Mr. Mikulka, Mr. Villagrán Kramer and Mr. Yankov, who had given lectures on topics currently before the Commission and on other international law subjects of current interest, namely, State succession, United Nations peace-keeping operations, State immunity from civil and commercial jurisdiction, the new Constitution of ITU in the light of the Vienna Convention on the Law of Treaties, the World Conference on Human Rights, war crimes and the establishment 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.

21. In conclusion, she drew the attention of the members of the Commission to a thorny problem that had arisen at each session in the past two or three years, that

of the interpretation services available for the Seminar. She recalled that the Seminar was organized by the United Nations, but was not funded from the Organization's budget. In other words, it could have interpretation services only when they were not being used by other bodies. So far, the efforts made by the Secretary to the Commission to have the Seminar included in the calendar of conferences had unfortunately been fruitless. The French-speaking and Spanish-speaking participants suffered most from that situation. All participants were fully aware that a lawyer intending to specialize in international law should understand English, French and, if possible, Spanish and should be able to express himself fluently in one of those three languages, but they were at the start of their careers and that was the stage at which they required the interpretation services. She therefore appealed to the members of the Commission who represented their countries in the Sixth Committee of the General Assembly to persuade the Committee to consider the problem and solve it in the interests of participants in future sessions of the Seminar.

22. Mr. TOMUSCHAT said that the quality of the work done by the participants in the Seminar had been impressive and he welcomed the fact that their reports, which would certainly provide the members of the Commission with valuable insights for their own work, were to be distributed. Many young lawyers, particularly from third-world countries, had been able to deepen their knowledge of international law and of United Nations practice by attending the Seminar. Its continuity should therefore be a common concern of the international community, the wealthier States naturally being called on to shoulder the immediate financial burden of an undertaking whose benefits would eventually accrue to the international community as a whole. In that connection, he said that his Government regularly provided funds for the Seminar and that four fellowships had been financed out of those funds in the current year. All Governments should be encouraged to do the same.

23. Mr. VILLAGRÁN KRAMER also stressed the high quality of the work done by the participants in the Seminar and which foreshadowed far-reaching developments in legal thinking in the years to come.

24. Mr. ARANGIO-RUIZ welcomed the research work submitted to him and expressed pleasure at the exchanges of views he had had with participants in the Seminar who expressed an interest in his topic.

25. He was convinced that the duration of the Seminar—three weeks—was quite inadequate as a means of becoming familiar with the Commission's work and deriving a real benefit from it. The Commission should explore means of persuading Member States to contribute more substantially to the financing of the Seminar; and, if funds were not sufficient, consider the possibility of reducing the number of participants, but making the Seminar twice as long.

26. Mr. GHERAIRI, speaking on behalf of the participants in the International Law Seminar, expressed appreciation to the organizers of the Seminar and the members of the Commission, thanks to whom the participants had been able to work in the best possible conditions. They were honoured to have had the opportunity to attend the

meetings of the Commission, as well as those of its Drafting Committee and its Working Group, thus being present at the conception of international rules. They came from different countries and horizons and would return home enriched by the experience of diversity which had taught them to cultivate a sense of compromise, nuance and consensus.

*The Chairman presented participants with certificates attesting to their participation in the thirtieth session of the International Law Seminar.*

*The meeting rose at 11.30 a.m.*

## 2352nd MEETING

*Tuesday, 14 June 1994, at 12.40 p.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. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. Kabatsi, 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.*

### Organization of work of the session (concluded)\*

[Agenda item 2]

1. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the Working Group hoped to conclude its work in the course of the afternoon. By the end of the following week, the Commission could expect to have before it, in as many of its working languages as possible, an extensively revised draft statute containing no passages in square brackets and no alternative texts. The Working Group had also prepared a commentary on the revised articles. However, since it could not be translated in time, the commentary would not be issued as part of the Working Group's report and would be circulated among members of the Commission as a "non-paper".

2. He wished to make certain observations. The first was that the Working Group had been, and still was, engaged in an exercise of extraordinary difficulty, both because of the time constraints imposed on the Commission by the General Assembly and because of the trail-blazing nature of the task. The second point, which arose from the first, was that every member of the Working

\* Resumed from the 2350th meeting.

Group had made concessions in agreeing on the text. The revised draft statute, which had been considered very carefully, did not reflect the experience or methods of any one legal system but was an amalgam of various systems. Every member of the Working Group was undoubtedly dissatisfied with one or another of the draft's provisions, having regard to the particularities of his own legal system. However, very broad consensus had been reached on the basic structure and approach, and the consensus had grown greater with time. He wished to thank the Working Group's members for the work done so far and to salute their willingness to produce a text worthy of serious consideration by the General Assembly, where it would certainly receive the closest attention. Lastly, he thanked the secretariat for its very substantial assistance to the Working Group in its efforts.

3. The CHAIRMAN, noting that the Working Group hoped to conclude its work that afternoon, as originally envisaged, congratulated the members on their endeavours thus far.

4. Mr. ARANGIO-RUIZ drew attention to the new addendum to his sixth report on the topic of State responsibility (A/CN.4/461/Add.2), which had been distributed in English and French that morning, and expressed the hope that, as Special Rapporteur, he would be afforded an opportunity to introduce that document briefly at a forthcoming plenary meeting.

5. The CHAIRMAN, noting that the Commission had already held six meetings on the topic of State responsibility as originally planned, suggested that the Special Rapporteur's request should be accommodated at the next scheduled plenary meeting.

6. After a procedural discussion in which Mr. BENNOUNA, Mr. ARANGIO-RUIZ, Mr. EIRIKSSON, Mr. GÜNEY and Mr. ROSENSTOCK took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the arrangement he had suggested.

*It was so agreed.*

*The meeting rose at 1 p.m.*

## 2353rd MEETING

*Tuesday, 21 June 1994, at 10.10 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. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam,

Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

### Tribute to the memory of Mr. César Sepúlveda Gutiérrez

1. The CHAIRMAN said that it was his sad duty to inform the members of the Commission of the death, on 11 June 1994, of Mr. Sepúlveda Gutiérrez, who had been a member of the Commission from 1987 to 1991. For many years, he had also been a professor of international law in his native land, Mexico. In that capacity and as author of a work entitled *Derecho Internacional*,<sup>1</sup> he had had a great formative influence on many students of international law from Mexico and other Latin-American countries.

*At the invitation of the Chairman, and in the presence of Mr. Miguel Marín-Bosch, Ambassador, Permanent Representative of Mexico to the United Nations Office at Geneva, the members of the Commission observed a minute of silence in tribute to the memory of Mr. César Sepúlveda Gutiérrez.*

2. Mr. SZEKELY said that, in view of the immense esteem in which Mr. Sepúlveda Gutiérrez had held the Commission, it was the most appropriate body in which to pay tribute to him and to express their gratitude and respect for him, that had been universally felt. In so doing, the Commission expressed the feelings of generations of students who, like himself, had attended the university courses given by Mr. Sepúlveda Gutiérrez or had read his writings. In the years to come, many more would continue to benefit from the contribution of that eminent jurist and great international lawyer.

3. Mr. BARBOZA expressed his condolences to the representative of Mexico, who was present at the meeting. With the death of Mr. Sepúlveda Gutiérrez, the Latin American countries had lost an extremely eminent figure in the world of international law.

4. The CHAIRMAN said that he would send a letter of condolences to Mrs. Sepúlveda Gutiérrez on behalf of the Commission and would also enclose a copy of the summary record of the meeting.

**State responsibility (continued)\* (A/CN.4/453 and Add.1-3,<sup>2</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>3</sup> A/CN.4/L.501)**

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(concluded)\*

5. The CHAIRMAN recalled that the draft articles adopted by the Drafting Committee at the forty-fifth ses-

\* Resumed from the 2348th meeting.

<sup>1</sup> Mexico, Editorial Porrúa, 1981.

<sup>2</sup> *Yearbook* . . . 1993, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

sion of the Commission including articles 11 and 12 were still pending before the Commission.<sup>4</sup> The Commission had not acted on those draft articles pending the submission of the commentaries thereto.<sup>5</sup> The Special Rapporteur, in chapter I, section D, of his sixth report (A/CN.4/461 and Add.1-3), had submitted his views on the pre-countermeasures dispute settlement provisions so far envisaged for the draft on State responsibility. Section D contained, *inter alia*, new proposals by the Special Rapporteur on articles 11 and 12 of part two of the draft.

6. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, although chapter I, section D, seemed to be self-explanatory, he wished to refer to the main features of the revised proposals contained therein.

7. The revised text of article 11 differed on only one substantive point from the wording of that article as it had been adopted by the Drafting Committee.<sup>6</sup> The difference in the drafting consisted in a change at the beginning of paragraph 1 and the interpolation of an explanatory paragraph 2. Article 11, as adopted by the Drafting Committee at the forty-fifth session, began with the clause:

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled, subject to . . . , not to comply . . .

That meant that the entitlement of the injured State to resort to and maintain countermeasures would start from the moment when the wrongful act had been committed or perceived and would continue until that State had obtained complete cessation and full reparation from the wrongdoing State. Countermeasures—and not just provisional measures—would therefore be justified from the very moment when the existence of an internationally wrongful act was perceived by the injured State and up until the moment when the wrongdoing State had not only completely ceased the wrongful act, but also completely eliminated the physical or moral consequences of that act.

8. Two consequences would seem to derive from that entitlement conferred on the injured State and which, in his view, should be reconsidered.

9. The first consequence was that resort to countermeasures by an injured State would be legally possible as soon as that State believed, rightly or wrongly, that an unlawful act was being or had been committed. Countermeasures could legally be resorted to *ab initio*, regardless of any explanations, justifications or assurances the wrongdoing State could give or would be ready to give. In the simplest case, the wrongdoing State might explain, perhaps convincingly, that no wrongful act had been committed or was being committed. Another possibility was that the wrongdoing State would immediately accede to the injured State's demand for cessation

and/or reparation, but that it would need some time—perhaps a relatively short time—to achieve complete cessation or full reparation. Other possibilities could be interpolated from those two. For example, the wrongdoing State could show—perhaps very convincingly—the existence of circumstances that precluded wrongfulness.

10. It was in view of such possibilities, among others, that he considered the wording adopted by the Drafting Committee at the forty-fifth session of the Commission to be seriously deficient; and he, therefore, could not refrain from proposing that the Commission should revert to the concept of “adequate response”. However, considering that that wording had been part of his original proposal<sup>7</sup> which was not retained by the Drafting Committee, he had done his utmost to find a solution that would not involve a mere return to the original wording. His efforts, however, had been unsuccessful. He had felt obliged to reintroduce the words “adequate response”. However, he had thought of adding, in paragraph 2 of the revised text of article 11, what he assumed was a clear explanation of the expression “adequate response”. It would be for the Commission and the Drafting Committee to decide, at the appropriate time, whether to include that explanation as an integral part of article 11, as proposed in section D, and which he strongly recommended, or as a part of the commentary. Arguments could be put forward in favour of either solution. The essential question was whether, in substance and in form, that explanation attained the objective of reducing the vagueness of the concept of “adequate response” that had caused it to be rejected by the Drafting Committee at the preceding session. Apart from that issue, however, he did not suggest any other modification to article 11 as it had been adopted by the Drafting Committee at the preceding session. The essence of that text remained unchanged.

11. He then turned to the revised text of article 12, as contained in section D, which he would take up paragraph by paragraph.

12. With regard to paragraph 1 (*a*), it could be seen that the text he proposed was a drastically softened version of the prior-recourse-to-dispute-settlement requirement which had appeared in the draft article he proposed at the forty-fourth session.<sup>8</sup> Many—although not all—members of the Commission had expressed misgivings with regard to the severe terms in which that requirement had been worded, notwithstanding the fact that the majority of the members of the Commission and the Drafting Committee had favoured the requirement in principle; its effect had been to require the injured State to have exhausted all dispute settlement means available under general international law, the Charter of the United Nations or any other instrument. That had been asking too much. That was why the new proposal, in chapter I, section D, of the sixth report, left out all the controversial elements and referred in a neutral manner to compliance with the existing dispute settlement obligations of the injured State.

<sup>4</sup> For the text of articles 11 to 14, concerning countermeasures, adopted by the Drafting Committee, see *Yearbook . . . 1993*, vol. I, 2318th meeting, para. 3.

<sup>5</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 35, document A/48/10, para. 204.

<sup>6</sup> See footnote 4 above.

<sup>7</sup> *Yearbook . . . 1992*, vol. II (Part Two), p. 25, footnote 56.

<sup>8</sup> *Ibid.*, p. 27, footnote 61.

13. The wording chosen to express that condition introduced a major element of flexibility into article 12. The solution to the question whether attempts at peaceful settlement of disputes should or should not precede the adoption of countermeasures, would depend, in each specific case, on how strict the existing dispute settlement obligations were determined to be. Such a determination would remain, at least initially, within the traditionally unilateral discretion of each State and, above all, of the injured State.

14. The flexibility of that provision to existing settlement obligations—those existing at the relevant time between the injured State and the State committing the internationally wrongful act—also left more room for further developments with regard to the interaction between the regime of countermeasures and the law concerning dispute settlement. States would be encouraged, more than they would be by a text which ignored that element, to pay some attention to that interaction when they worked out and negotiated, at some time in the future, their commitments in the area of dispute settlement.

15. A further feature of the text of paragraph 1 (a) was the mention of negotiation, in addition to third-party procedures, thus meeting the wish of a number of members, both of the Commission and of the Drafting Committee, to see negotiation expressly included among the means of settlement to be resorted to with priority.

16. Paragraph 1 (b) merely reintroduced the prior communication requirement. He believed that that requirement had been omitted inadvertently from the draft adopted by the Drafting Committee at the forty-fifth session.

17. Paragraph 2 contained another substantial softening of both the prior-settlement-means requirement and of the prior communication requirement. That was even more important when assessing the degree of flexibility of the proposed revised draft article. Paragraph 2 exempted the injured State from both requirements whenever (a) it confined itself, for the time being, to provisional measures of protection; or (b) the wrongdoing State did not cooperate in good faith in the settlement procedures proposed by the injured State in conformity with paragraph 1 (a).

18. Considering the broad scope of the concept of provisional measures of protection and considering that, of course, such measures were not subject to the prior communication requirement, the proposed draft article would leave ample room for the injured State to choose the means of unilateral reaction to be employed. But at the same time, bearing in mind the difficulty of stretching the concept of provisional measures beyond reasonable limits, some protection would be provided to the wrongdoing State. That latter consideration should at least reduce the weight of the argument that the broad scope of the concept of interim measures of protection would make the requirements of paragraph 1 (a) and (b) of article 12 illusory. As he had noted in section D, slight progress was better than no progress at all.

19. Paragraph 3 was in conformity with the corresponding paragraph of the article adopted by the Drafting Committee.

20. He had no doubt that, if the revised wording of articles 11 and 12 were referred to the Drafting Committee, as he hoped they would be, the Committee would, as usual, be able to improve upon it. His concern was to ensure that, in its task of codifying and developing the law of unilateral countermeasures, the Commission should attain three essential objectives: (a) to strike a balance between the position and interests of any prospective injured State and any prospective wrongdoing State; (b) to strike a balance between unilateral measures on one side and available dispute settlement means on the other side, for the sake of justice and equality in relations between States, which were equal under the law, but frequently very unequal as to their economic and political power; and (c) to strike a balance between mere codification and progressive development in the regime of both unilateral measures and dispute settlement means.

21. He hoped it would be seen that the proposed revised draft articles did not curtail in any measure the right of injured States to protect themselves against breaches of international law and that, furthermore, they left the door open to any useful innovations that States might be willing to adopt in the future with regard to the relationship between the right of unilateral reaction on one side and dispute settlement obligations on the other side.

22. Mr. YANKOV asked the Special Rapporteur and the Chairman of the Drafting Committee to explain how the Drafting Committee intended to proceed with regard to the Special Rapporteur's additional proposals on questions that the Committee had already considered. Would there be a global reconsideration or only a consideration of the amendments proposed?

23. Mr. VILLAGRÁN KRAMER said that he welcomed the opportunity that had been afforded to the Special Rapporteur to express his views on articles 11 and 12. However, he wished to point out that, ever since the preceding session, in the course of which Mr. Mikulka, in his capacity as Chairman of the Drafting Committee, had submitted the text of the articles adopted by the Committee, the Commission had been waiting to take up consideration of those articles. The Special Rapporteur was certainly entitled to submit observations and to request the Drafting Committee to "reconsider" provisions it had already adopted, but other members of the Commission were entitled to request that they should be considered in plenary. Referring them to the Drafting Committee was likely to delay the completion of the consideration of substantive questions on first reading by one or two years.

24. He also wished to protest at the use, in the Spanish version of chapter I, section D, of the word *descuido* with respect to the work of the Drafting Committee. He did not think that the Drafting Committee had shown any signs of negligence in its consideration of the articles and he asked for that passage to be corrected.

25. Mr. TOMUSCHAT said that he would like to know what practice, if any, the Commission followed where articles already adopted by the Drafting Committee were referred back to that Committee. He asked that question purely for information purposes, since it was for the Commission to decide on whatever procedure it thought best.

26. Mrs. DAUCHY (Secretary to the Commission) said, in general and provisionally, that the situation had already arisen in which articles submitted to the Commission in plenary by the Drafting Committee had been referred back to the latter after a general debate to enable the Committee to reconsider them in the light of that debate. The secretariat would endeavour to find specific instances.

27. Mr. BOWETT (Chairman of the Drafting Committee) said that he too was not entirely in agreement with the proposals made by the Special Rapporteur at the preceding session. His reservations particularly concerned the notion of an "adequate response", the requirement of prior exhaustion of all available settlement means and the prior communication requirement. Notwithstanding the difficulties to which the text gave rise, however, the Drafting Committee had done remarkable work on finding a compromise solution. Since then, the Special Rapporteur had continued to give much thought to the question and he was now submitting an important proposal which might lead to a solution still better than that proposed by the Drafting Committee. The task of the Drafting Committee was, after all, to facilitate the work of the Commission by submitting to it the best possible drafts, a task which took precedence over procedural issues. It would thus be best for the Drafting Committee simultaneously to reconsider the draft articles it had adopted at the preceding session and the new proposals of the Special Rapporteur. However, the consideration of other topics must not suffer as a result and the Drafting Committee should therefore devote no more than two meetings to the reconsideration of draft articles 11 and 12.

28. Mr. Sreenivasa RAO said that, like some other members of the Commission, albeit a minority, he had always considered that, in the absence of commonly accepted mechanisms and institutions to determine whether there was an internationally wrongful act and what reactions were reasonable, appropriate and legitimate, and having regard to the political and economic inequalities between States, the most perfect regime that the Commission might come up with would still be in danger of creating more abuses than anything else and of doing little to further the rule of law in the international community. If the Commission was nevertheless obliged to come to grips with the establishment of such a regime, it should place emphasis on the means of limiting the possibility of abuse and on specifying more clearly the types of reaction to which the injured State would have the right to recourse. In view of those reservations regarding the substance of the question of countermeasures, the Special Rapporteur's new proposals concerning articles 11 and 12 contained one positive and one negative element. The first concerned the re-emergence in article 11 of the notion of "adequate response", which was deemed necessary by those who regarded unilateral

determination and the immediate adoption of countermeasures as unacceptable. In article 12, on the other hand, there was a weakening of the element of limitation and, as a corollary, a broadening of the injured State's latitude to take countermeasures. The obligation to have exhausted all available settlement means had constituted a minimum, the suppression of which posed problems, particularly in view of the fact that the Drafting Committee appeared in general to favour a broadening of the injured State's room for manoeuvre at the expense of that of the wrongdoing State. Consequently, it was to be feared that, once the Drafting Committee had before it the Special Rapporteur's new proposals, it would once again reject the notion of "adequate response" that had been reintroduced into article 11, while eagerly accepting the softening of article 12, thereby widening the gap that divided those members of the Commission who were in favour of elaborating a regime under which the measures taken unilaterally by powerful and other States would have a legal basis and those who considered that the Commission should not embark upon such a course. He hoped that the Drafting Committee would at least avoid dissociating the two elements of the Special Rapporteur's proposal and would treat it as a whole.

29. Mr. BARBOZA urged the Commission not to return in plenary to questions that were notoriously controversial. In his view, the Special Rapporteur's proposals should have been submitted directly to the Drafting Committee, a body in which all members of the Commission had an opportunity to make their views heard. He therefore supported the proposal of the Chairman of the Drafting Committee.

30. Mr. TOMUSCHAT said that he too agreed with the Chairman of the Drafting Committee and stressed the need not to devote more than two meetings of the Drafting Committee to that question.

31. Mr. VILLAGRÁN KRAMER said that he was no longer opposed to the submission to the Drafting Committee of the Special Rapporteur's proposals concerning articles 11 and 12, if reconsideration of those articles was to take up no more than two meetings. Articles 11 to 14 certainly dealt with the regime of countermeasures, but part three of the draft, which established a relationship between countermeasures and dispute settlement systems, was the most important part.

32. Mr. AL-KHASAWNEH, supported by Mr. KABATSI, said that the Special Rapporteur's proposals might in fact offer a better solution than the one found at the Commission's preceding session. He thus favoured referral back to the Drafting Committee. While he hoped that the Drafting Committee would be able to complete its consideration of the proposals in two meetings, he would prefer it to take as much time as was necessary.

33. Mr. de SARAM said that he had no particular objection to the proposal made by the Chairman of the Drafting Committee, although he would have preferred more flexibility with regard to the time to be devoted to the question. Nevertheless, in his view, it must be clearly indicated that the question of countermeasures was of considerable importance for the topic of State responsibility as a whole. It would be unduly optimistic to

think that there would be full consensus in the Drafting Committee. Consequently, it was important that the views of those who had been unable to join the consensus should be reflected when the Chairman of the Drafting Committee reported to the Commission in plenary. Basically, one very important element was the relationship between the injured State and the wrongdoing State before the right to resort to countermeasures was applied. It would also be useful if, when considering the Special Rapporteur's proposals, the Drafting Committee had before it the text of the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted during the Uruguay Round of Multilateral Trade Negotiations.<sup>9</sup> One problem that continued to face the Drafting Committee was that not all its members seemed to be equally aware of the difficulties, and that it led to much futile haggling.

34. Mr. SZEKELY and Mr. RAZAFINDRALAMBO said that they supported the proposal made by the Chairman of the Drafting Committee.

35. Mr. TOMUSCHAT asked when the commentaries to articles 11 and 12 would be submitted to the Commission. His main concern was that the Commission should be able to complete its consideration of the draft articles on State responsibility before the end of its members' current term of office, which expired in 1996. He wondered whether there might not be a case for drawing up a timetable of work to that end.

36. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had naturally never intended to offend the Drafting Committee or any of its members. What he had meant by the word "oversight" was simply that the Drafting Committee had been so preoccupied by the key question whether and to what extent dispute settlement means should be resorted to prior to countermeasures that it had not discussed the question of prior communication.

37. With regard to the next step to be taken, the majority of those members of the Commission who had expressed their views seemed to agree with the proposal made by the Chairman of the Drafting Committee.

38. In respect of the commentaries to articles 11 to 14, those relating to articles 13 and 14 were ready, as was that relating to article 11, which would have to be amended to conform to whatever decision was made with regard to the concept of "adequate response". The commentary to article 12 was being drafted, but there was no danger that the Commission would have to postpone the consideration and adoption of that article until its next session. There was also no reason to believe that the Commission would not be able to complete its first reading of the draft articles on State responsibility by the 1996 deadline.

39. It was to be hoped, then, that the members of the Commission were all determined that the first reading should proceed under the best possible conditions and,

consequently, the possibility of making further improvements should not be ruled out merely on the grounds that it was not feasible for the Drafting Committee to hold another meeting. The Drafting Committee would surely be able to demonstrate the ingenuity and good will needed to find an appropriate solution. Contributions in that respect from the members of the Commission who were not members of the Drafting Committee but who were interested in articles 11 and 12 would be welcome.

40. Mr. VILLAGRÁN KRAMER said that the secretariat should correct the Spanish version of chapter I, section D, so that it did not imply that the Drafting Committee had been negligent. The Committee had devoted 26 meetings to the consideration of articles 11 to 14 and none of the members had the feeling that they had been negligent.

41. The CHAIRMAN said that the secretariat would make the necessary changes and that, for his part, the Special Rapporteur might wish to find another term in English for "oversight". He confirmed that there had been no negligence on the part of the Drafting Committee and that it had in fact devoted 26 meetings to consideration of the question.

42. He agreed that the first reading of the draft articles absolutely had to be completed by the forty-seventh session in 1996 at the latest. The Special Rapporteur's request that his new proposals should be referred to the Drafting Committee for consideration had been endorsed by many members of the Commission and by the Chairman of the Drafting Committee, on the understanding that there would be no consequent delay in the normal work of the session. The Chairman of the Drafting Committee wished to limit consideration of the matter to two meetings, while other members of the Commission were in favour of a more flexible approach. He himself was convinced that the Drafting Committee was in the best position to decide. He proposed that the Commission should request the Drafting Committee to consider the possibility of amending articles 11 and 12 in the light of the new proposals by the Special Rapporteur, it being understood that, if amendment proved impossible, the Commission would take up in plenary the consideration of those articles on the basis of the text adopted at the preceding session by the Drafting Committee.

*It was so decided.*

**The law of the non-navigational uses of international watercourses (continued)\*\* (A/CN.4/457, sect. E, A/CN.4/462,<sup>10</sup> 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]

CONSIDERATION OF THE DRAFT ARTICLES  
ON SECOND READING

43. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Draft-

<sup>9</sup> Annexed to the Marrakesh Agreement Establishing the World Trade Organization (GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts* (Sales No. Gatt/1994-4), annex 2, pp. 404-433).

\*\* Resumed from the 2339th meeting.

<sup>10</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

ing Committee on the articles on the law of the non-navigational uses of international watercourses that it had adopted on second reading at the current session (A/CN.4/L.492 and Corr.1 and 3).

44. Mr. BOWETT (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that it had devoted a total of 13 meetings, held between 9 May and 20 June 1994, to the topic under consideration. He expressed his gratitude to the Special Rapporteur, Mr. Rosenstock, the members of the Drafting Committee and the secretariat for their valuable assistance.

45. He recalled that at the forty-fifth session the then Chairman of the Drafting Committee had presented the text of articles 1 to 6 and articles 8 to 10 adopted on second reading by the Drafting Committee.<sup>11</sup> The Drafting Committee had retained the texts as recommended with the exception of a few minor changes, based on suggestions made by the Special Rapporteur in his second report (A/CN.4/462). In addition, the Committee had examined on second reading articles 5 and 7, which had been left pending, as well as all the articles that the Commission had referred to it at the current session, namely, articles 11 to 32 and the new article 33 proposed by the Special Rapporteur to deal with the settlement of disputes. Lastly, in accordance with the mandate entrusted to it by the Commission, the Drafting Committee had adopted a draft resolution (A/CN.4/L.492/Add.1) in which it suggested how the Commission should proceed if it should decide to deal with unrelated confined groundwaters in the draft articles.

46. The titles and texts of articles 1 to 33, as adopted by the Drafting Committee on second reading, read:

#### PART ONE

#### INTRODUCTION

##### *Article 1. Scope of the present articles*

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

##### *Article 2. Use of terms*

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

##### *Article 3. Watercourse agreements*

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to

the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

#### *Article 4. Parties to watercourse agreements*

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

#### PART TWO

#### GENERAL PRINCIPLES

##### *Article 5. Equitable and reasonable utilization and participation*

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

##### *Article 6. Factors relevant to equitable and reasonable utilization*

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the dependency of the population on the watercourse;

(d) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(e) existing and potential uses of the watercourse;

(f) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

<sup>11</sup> *Yearbook* . . . 1993, vol. I, 2322nd meeting, para. 5.

(g) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

*Article 7. Obligation not to cause significant harm*

1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States.

2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering such harm over:

(a) the extent to which such use has proved equitable and reasonable taking into account the factors listed in article 6;

(b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.

*Article 8. General obligation to cooperate*

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

*Article 9. Regular exchange of data and information*

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

*Article 10. Relationship between different kinds of uses*

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

PART THREE

PLANNED MEASURES

*Article 11. Information concerning planned measures*

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

*Article 12. Notification concerning planned measures with possible adverse effects*

Before a watercourse State implements or permits the implementation of planned measures which may have a significant ad-

verse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

*Article 13. Period for reply to notification*

Unless otherwise agreed:

(a) a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate the findings to it;

(b) this period shall, at the request of a notified State for which the evaluation of the planned measure poses special difficulty, be extended for a period not exceeding six months.

*Article 14. Obligations of the notifying State during the period for reply*

During the period referred to in article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

*Article 15. Reply to notification*

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall communicate this finding to the notifying State within the period applicable pursuant to article 13, together with a documented explanation setting forth the reasons for the finding.

*Article 16. Absence of reply to notification*

1. If, within the period applicable pursuant to article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

2. Any claim to compensation by a notified State which has failed to reply may be offset by the costs incurred by the notifying State for action undertaken after the expiration of the time for a reply which would not have been undertaken if the notified State had objected within the period applicable pursuant to article 13.

*Article 17. Consultations and negotiations concerning planned measures*

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

*Article 18. Procedures in the absence of notification*

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have a significant adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be

accompanied by a documented explanation setting forth its reasons.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

#### *Article 19. Urgent implementation of planned measures*

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

### PART FOUR

#### PROTECTION, PRESERVATION AND MANAGEMENT

##### *Article 20. Protection and preservation of ecosystems*

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

##### *Article 21. Prevention, reduction and control of pollution*

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

##### *Article 22. Introduction of alien or new species*

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse States.

##### *Article 23. Protection and preservation of the marine environment*

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

##### *Article 24 [26]. Management*

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

##### *Article 25 [27]. Regulation*

1. Watercourse States shall cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

##### *Article 26 [28]. Installations*

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer significant adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

### PART FIVE

#### HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

##### *Article 27 [24]. Prevention and mitigation of harmful conditions*

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

##### *Article 28 [25]. Emergency situations*

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, such as in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations,

immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

#### PART SIX

#### MISCELLANEOUS PROVISIONS

##### *Article 29. International watercourses and installations in time of armed conflict*

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

##### *Article 30. Indirect procedures*

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations, through any indirect procedure accepted by them.

##### *Article 31. Data and information vital to national defence or security*

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

##### *Article 32. Non-discrimination*

Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate, on the basis of nationality, or residence, or place where the injury occurred, in granting to such persons in accordance with its legal system access to judicial or other procedures or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on under its jurisdiction.

##### *Article 33. Settlement of disputes*

In the absence of an applicable agreement between the watercourse States concerned, any watercourse dispute concerning a question of fact or the interpretation or application of the present articles shall be settled in accordance with the following provisions:

(a) If such a dispute arises, the States concerned shall expeditiously enter into consultations and negotiations with a view to arriving at equitable solutions of the dispute, making use, as appropriate, of any joint watercourse institutions that may have been established by them;

(b) If the States concerned have not arrived at a settlement of the disputes through consultations and negotiations, at any time after six months from date of the request for consultations and negotiations they shall at the request of any of them have recourse to impartial fact-finding or, if agreed upon by the States concerned, mediation or conciliation;

(i) Unless otherwise agreed, a Fact-Finding Commission shall be established, composed of one member nominated by each State concerned and in addition a member not hav-

ing the nationality of any of the States concerned chosen by the nominated members who shall serve as Chairman;

(ii) If the members nominated by States are unable to agree on a Chairman within four months of the request for the establishment of the Commission, any State concerned may request the Secretary-General of the United Nations to appoint the Chairman. If one of the States fails to nominate a member within four months of the initial request pursuant to paragraph (b), any other State concerned may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the States concerned who shall constitute a single member Commission;

(iii) The Commission shall determine its own procedure;

(iv) The States concerned have the obligation to provide the Commission with such information as it may require and, on request, to permit the Commission to have access to their respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its inquiry;

(v) The Commission shall adopt its report by a majority vote, unless it is a single member Commission, and shall submit that report to the States concerned setting forth its findings and the reasons therefor and such recommendations as it deems appropriate;

(vi) The expenses of the Commission shall be borne equally by the States concerned.

(c) If, after 12 months from the initial request for fact-finding, mediation or conciliation or, if a fact-finding mediation or conciliation Commission has been established, 6 months after receipt of a report from the Commission, whichever is the later, the States concerned have been unable to settle the dispute, any of them may, subject to the agreement of the States concerned, submit the dispute to a permanent or ad hoc tribunal or to the International Court of Justice.

#### PART ONE (Introduction)

##### ARTICLE 1 (Scope of the present articles)

47. No change had been made in the text of article 1, which had been adopted by the Drafting Committee on second reading at the forty-fifth session and which, as explained at the time,<sup>12</sup> included the notion of "management" taken from Agenda 21<sup>13</sup> adopted at the United Nations Conference on Environment and Development and from article 26 of the draft articles under consideration.

##### ARTICLE 2 (Use of terms)

48. The Drafting Committee had discussed at length the Special Rapporteur's proposal that the phrase "and flowing into a common terminus" should be deleted from the definition of "watercourse" given in paragraph (b). It had noted that, during the general debate, attention had been drawn to a number of cases in which retention of the "common terminus" requirement would exclude from the scope of the draft articles major international watercourses universally recognized as such, in particular, the Rhine, the Danube, the Rio Grande and

<sup>12</sup> Ibid., para. 6.

<sup>13</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol.I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: Resolutions adopted by the Conference, resolution 1, annex II.

the Mekong, cited by the Special Rapporteur. But the Drafting Committee had also noted that such situations were rather exceptional. Moreover, in some other instances, also cited by the Special Rapporteur, the watercourses in question separated into a number of streams and tributaries which reached the sea far removed from each other. In the Drafting Committee's opinion, the "common terminus" requirement did not mean that the watercourse must terminate at a precise geographic location. According to that interpretation, which would be elaborated in the commentary, the phrase "common terminus" did not unduly limit the scope of the draft articles. On the other hand, it had the advantage, as noted in paragraph (7) of the commentary to article 2 adopted on first reading,<sup>14</sup> of imposing certain limitations on the geographic scope of the draft articles and avoiding the situation in which the construction of a canal linking two different systems would be regarded as turning them into a single system.

49. In the light of those considerations, the Drafting Committee recommended that the phrase "flowing into a common terminus" should be retained, but qualified by the adverb "normally" in order to make it clear that there were cases to which that requirement did not apply. In addition, in the English text of paragraph (b), the Drafting Committee had replaced the term "underground water" by the term "groundwater", which was the one used in the commentaries adopted on first reading.

#### ARTICLE 3 (Watercourse agreements)

50. At the preceding session, the Drafting Committee had decided to replace the word "appreciable" by the word "significant" (*significatif* in French and *sensible* in Spanish) and to indicate in the commentary that it had done so in order to avoid the ambiguity of the word "appreciable", which might mean either "capable of being measured" or "significant", and not as a means of raising the threshold.

#### ARTICLE 4 (Parties to watercourse agreements)

51. The text adopted on first reading had not been changed.

#### PART TWO (General principles)

#### ARTICLE 5 (Equitable and reasonable utilization and participation)

52. The text adopted on first reading had not been changed.

#### ARTICLE 6 (Factors relevant to equitable and reasonable utilization)

53. At the preceding session, the Drafting Committee had made no change in the text of article 6 adopted on first reading. At the present session, it had added a factor to the list of factors in paragraph 1: the dependency of the population on the watercourse (subpara. (c)), as an

element which watercourse States must take into account to ensure that their conduct was in conformity with the obligation of equitable utilization contained in article 5. The concept of dependency was both quantitative and qualitative in that both the size of the population dependent on the watercourse and the extent of its dependence were to be taken into account.

54. The French version of the title had been simplified and brought into line with the English version by eliminating the words *à prendre en considération*.

#### ARTICLE 7 (Obligation not to cause significant harm)

55. In the comments made both in writing and in the Sixth Committee, Governments, taking the view that the relationship between the concepts of "equitable and reasonable utilization" and "significant harm" was unclear, had raised questions about the relationship between articles 5 and 7. From the text adopted on first reading, it was impossible to determine whether "equitable and reasonable utilization", the subject of article 5, was subordinated to the obligation not to cause "significant harm", as provided for in article 7, or vice versa. Some Governments as well as some members of the Commission had proposed that article 7 should be deleted on the ground that the principle of "equitable and reasonable utilization" provided sufficient protection and incorporated the obligation not to cause "significant harm". But other Governments and some members of the Commission had not agreed with that interpretation and felt that it was important to keep article 7.

56. Taking everything into account, the Drafting Committee had decided not to delete article 7, but instead to redraft it to avoid inconsistency with article 5 and to respond to the concern of the Governments and members of the Commission who believed that the concept of "reasonable and equitable utilization" should not relieve watercourse States of the obligation not to cause significant harm to other watercourse States.

57. The Drafting Committee had finally agreed on a text for article 7. It was generally agreed that, in certain circumstances, "equitable and reasonable utilization" of an international watercourse might still involve some significant harm to another watercourse State, for example, when a watercourse State built a dam which would provide hydroelectric power to hundreds of thousands of people, but which would cause significant harm to a few hundred people in another riparian State whose recreational fishing would be destroyed. Taking into account the factors listed in article 6, the most likely conclusion would be that in the hypothetical case in question the construction of the dam was reasonable and equitable even though it caused significant harm to the other riparian State.

58. However, while it was true that the State wishing to construct the dam should be permitted to do so because the activity was within the parameters permitted by article 5 on reasonable and equitable utilization, it was equally true that the State should not be relieved from the obligation to consider the interests of the other riparian State. That obligation was the exercise of due

<sup>14</sup> For the commentary to article 2, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 70-71.

diligence in the utilization of the watercourse in such a way as not to cause significant harm to other watercourse States. In the example cited, that would mean that the State constructing the dam should exercise, even in the design, construction and operation of the dam, due diligence not to cause significant harm to other riparian States.

59. If, despite the equitable and reasonable utilization of the watercourse and the exercise of due diligence, significant harm was caused to another watercourse State, the parties should consult, first, to verify whether the use of the watercourse was reasonable and equitable; secondly, to check whether some ad hoc adjustments to the utilization could eliminate or minimize the harm; and, also, in case harm had occurred, whether compensation would be possible for the victims.

60. Article 7 had thus been drafted in two paragraphs. Paragraph 1 dealt with the general obligation of watercourse States to exercise due diligence in their utilization of an international watercourse in order not to cause significant harm to other watercourse States. Article 7 as adopted on first reading was categorical that watercourse States should use the international watercourse in such a way as not to cause significant harm to other watercourse States. That obligation was now modified to the exercise of due diligence to avoid significant harm. Paragraph 2 dealt with the situation in which, even with the exercise of due diligence, significant harm had been caused. The watercourse States must then consult each other on the issues covered by subparagraphs (a) and (b). The words "in the absence of agreement to such use" meant that, if the watercourse States had already agreed to such a use of the watercourse, then there was no obligation to comply with the procedures provided for in subparagraphs (a) and (b). However, if they had not agreed to such a use, then the watercourse State which was suffering significant harm might invoke subparagraphs (a) and (b).

61. Obviously, the request for consultation would be made in most cases by the State suffering the harm. If the State utilizing the watercourse was in a position to know that, in the course of its utilization, harm would be caused to another watercourse State, it should take the initiative to begin consultations with that State. The issue had also been covered by other articles, but the Drafting Committee had felt that it would be preferable to keep the possibility open in article 7 as well.

62. The purpose of the consultations was spelt out in subparagraphs (a) and (b). Subparagraph (a) provided that the parties should consult to determine whether the use of the watercourse had been reasonable and equitable taking into account the factors referred to in article 6. In the view of the Drafting Committee, the burden of proof that a particular use had been reasonable and equitable lay with the State causing the harm. That rule was clear in international law. It was therefore not necessary to state it expressly in the article, but it would be mentioned in the commentary in order to avoid any misunderstanding. Subparagraph (b) provided that the watercourse States should also consult to see whether ad hoc adjustments might be made to the utilization causing the harm in order to eliminate or reduce the harm and

whether compensation should be paid to those suffering particular harm.

63. The title of the article remained unchanged.

#### ARTICLE 8 (General obligation to cooperate)

64. The text adopted on first reading had not been changed.

#### ARTICLE 9 (Regular exchange of data and information)

65. At the preceding session, the Drafting Committee had replaced the words "reasonably available", for which there was no adequate equivalent in some working languages, by the words "readily available". The Drafting Committee had maintained the text as adopted at the preceding session on second reading.

#### ARTICLE 10 (Relationship between different kinds of uses)

66. At the preceding session, the Drafting Committee had made a modification in the wording of the title only and had maintained the text as adopted on second reading.

#### PART THREE (Planned Measures)

#### ARTICLE 11 (Information concerning planned measures)

67. The text adopted on first reading had not been changed.

#### ARTICLE 12 (Notification concerning planned measures with possible adverse effects)

68. The text adopted on first reading had also been left unchanged except for the replacement of the word "appreciable" by the word "significant" for reasons of consistency, bearing in mind the change made to article 3 by the Drafting Committee at the preceding session.

#### ARTICLE 13 (Period for reply to notification)

69. The Drafting Committee had agreed that, as a rule, a period of six months should be sufficient for the notified State to study and evaluate the possible adverse effects of planned measures. It believed, however, that, in certain special or exceptional cases, the initial assessment by the notifying State of the effects of planned measures might have taken a much longer period of time and that, in such cases, it would not be fair to grant the notified State only six months to make its reaction known. Subparagraph (b) was intended to meet that concern. While it protected the interests of the notified State, it did so in a balanced fashion, first, by making it incumbent on that State to show that the evaluation of the planned measures posed special difficulties and, secondly, by limiting the possible extension of the initial period to six months. The Drafting Committee had decided that it was necessary to provide for a specified maximum, bearing in mind that the notifying State might be incurring costs during that period, for instance, for the payment of interest on loans, and that it should not be

subjected to undue delays. Of course, the parties could agree to depart from the time-limits provided for in subparagraphs (a) and (b), as was made clear by the words "Unless otherwise agreed" which governed both paragraphs.

ARTICLE 14 (Obligations of the notifying State during the period for reply)

ARTICLE 15 (Reply to notification)

70. The Drafting Committee recommended that articles 14 and 15 should remain as adopted on first reading. The commentary to article 15 would, however, clarify the relationship between that article and article 13 so far as time-limits were concerned and would make it clear that the words "as early as possible" left unimpaired the time-limits provided for in article 13 and the corresponding entitlements of the notified State. Its purpose was to encourage the notified State not to wait until the end of those time-limits to react, unless necessary. The sooner the consultations started and the earlier the notifying State could review its planned measures, the better it would be for all concerned.

ARTICLE 16 (Absence of reply to notification)

71. Because of the possibility of a six-month extension of the period for reply to notification, the words "within the period referred to in article 13" were no longer accurate: that article now provided for two periods. The words in question had therefore been replaced, in paragraph 1, by the words "within the period applicable pursuant to article 13", which covered both of the possibilities envisaged in article 13.

72. At a more substantive level, the Drafting Committee had noted that the text as adopted on first reading was silent with regard to the consequences of failure by the notified State to respond to the notification. The Drafting Committee had felt that it was necessary to take some account of the possible hardships caused to the notifying State and to provide an incentive for the notified State to reply to the notification so as to encourage that State to seek solutions to problems of conflicting uses consistent with equitable and optimal utilization of watercourses and to protect the interests of the notifying State. It had therefore included in article 16 a paragraph 2 which provided that any claim to compensation by a notified State which had failed to reply within the periods prescribed by article 13 might be offset by the costs incurred by the notifying State for actions undertaken after the lapse of such periods which would not have been undertaken if the notified State had reacted in a timely fashion. Accordingly, the tardy reaction of the notified State would result in the amount to which it was entitled by way of compensation for any damage it had suffered being reduced by the amount of any costs incurred by the notifying State due to the lack of a timely response. Paragraph 2 of the article should be read jointly with paragraph 1, which meant that the notifying State was not relieved of its obligations under articles 5 and 7 or of its obligation to act in good faith in accordance with the terms of the notification. The commentary would explain the difference between the right to offset and the right to counterclaim.

73. The Drafting Committee had not dealt in the text of the article with the remote possibility that two notified watercourse States might fail to reply to the notification. The commentary would, however, make it clear that, in such a case, the claims of the States concerned would be reduced on a *pro rata* basis.

ARTICLE 17 (Consultations and negotiations concerning planned measures)

74. In order to make it clear that consultations did not necessarily have to evolve into full-fledged negotiations, the Drafting Committee recommended that, in paragraph 1 of the article, the words "if necessary" should be added before the word "negotiations". The reference to "consultations and negotiations", in paragraphs 2 and 3, should be interpreted accordingly.

ARTICLE 18 (Procedures in the absence of notification)

75. The Drafting Committee had noted that the words "for such belief", at the end of paragraph 1 of the text adopted on first reading, were somewhat odd in the context and difficult to render in other languages. It had therefore decided to replace the words "the reasons for such belief" by the words "its reasons" which, of course, referred to the serious reasons the watercourse State might have to believe that planned measures would have adverse effects upon it. Also, in paragraph 1, the word "appreciable" had been replaced by the word "significant". Paragraphs 2 and 3 remained unchanged. The words "consultations and negotiations" were to be interpreted along the lines indicated in paragraph 1 of article 17.

ARTICLE 19 (Urgent implementation of planned measures)

76. The text of the article as adopted on first reading had been left unchanged. The commentary would, however, specify that the words "or other equally important interests", in paragraph 1, encompassed security concerns.

PART FOUR (Protection, preservation and management)

77. Part four had originally been entitled "Protection and preservation". The Drafting Committee had, however, felt that former articles 26 (Management), 27 (Regulation) and 28 (Installations), which, on first reading, had been included in part six (Miscellaneous provisions) of the draft articles were too important to be relegated, as it were, to "miscellaneous provisions". It had therefore agreed to include them in part four bearing in mind that, in modern thinking, management was an integral part of protection and preservation. The title of part four had been modified accordingly and former articles 26, 27 and 28 had been renumbered as articles 24, 25 and 26.

ARTICLE 20 (Protection and preservation of ecosystems)

78. The text adopted on first reading had not been changed.

## ARTICLE 21 (Prevention, reduction and control of pollution)

79. The Drafting Committee had agreed that it was unnecessary to add the word "energy" in paragraph 3, as proposed by the Special Rapporteur, but had decided that the commentary should make it clear that the word "substances", which appeared in that paragraph, encompassed energy. Since the word "pollution" appeared only in article 21, the Drafting Committee had not thought it appropriate to move the definition of that word, as set forth in paragraph 1, to article 2 (Use of terms). Again, the word "appreciable", in paragraph 2, had been replaced by the word "significant".

## ARTICLE 22 (Introduction of alien or new species)

## ARTICLE 23 (Protection and preservation of the marine environment)

80. The only change made to the wording of articles 22 and 23 was the replacement, in article 22, of the word "appreciable" by the word "significant".

## ARTICLE 24 (former article 26) (Management)

81. The text of the article corresponded to that of article 26 as adopted on first reading. Several members had, however, noted that there was a difference between paragraph 2 of article 5, under which management had to be conducted in an equitable and reasonable manner, and paragraph 2 of article 26, which provided for the criteria of sustainable development and rational and optimal utilization, protection and control of the watercourses. It had therefore been decided that the commentary should indicate that the criteria in subparagraphs 2 (a) and 2 (b) of article 24 were to be applied in the overall context of article 5.

## ARTICLE 25 (former article 27) (Regulation)

82. The only changes made to the wording of former article 27 were of an editorial nature. In paragraph 2, the words "Unless they have otherwise agreed" had been replaced by the words "Unless otherwise agreed", which was the wording used in article 13. The other drafting change related to the French version of paragraph 3, where, for the sake of consistency with article 2, the words *on entend par "régularisation"* had been replaced by the words *le terme "régularisation" s'entend de*.

## ARTICLE 26 (former article 28) (Installations)

83. In paragraph 2, the word "appreciable" had been replaced by the word "significant". In the French text, the Drafting Committee had also decided to replace the phrase *qui est sérieusement fondé à croire* by the phrase *qui a de sérieuses raisons de croire*, which, in its view, was a better rendering of the English wording "which has serious reason to believe", better conveyed the intention of the text and had already been used in paragraph 1 of article 18.

## PART FIVE (Harmful conditions and emergency situations)

## ARTICLE 27 (former article 24) (Prevention and mitigation of harmful conditions)

84. The text of former article 24, as adopted on first reading, remained unchanged.

## ARTICLE 28 (former article 25) (Emergency situations)

85. The Drafting Committee had recommended only a minor editorial change in paragraph 1, namely, the replacement of the words "as for example in the case of industrial accidents" by the words "such as in the case of industrial accidents". In response to those members who had queried the meaning of the words "competent international organizations", which appeared in paragraphs 2, 3 and 4, it had been decided that the commentary would explain that the word "competent" meant "empowered to respond".

## PART SIX (Miscellaneous provisions)

## ARTICLE 29 (International watercourses and installations in time of armed conflict)

86. As former articles 26, 27 and 28 of part six had become, respectively, articles 24, 25 and 26 of part four, the first article in part six was now article 29 (International watercourses and installations in time of armed conflict), the text of which had been left unchanged.

## ARTICLE 30 (Indirect procedures)

87. Article 30 had also been left unchanged, even though some members of the Drafting Committee found it unnecessary.

## ARTICLE 31 (Data and information vital to national defence or security)

88. The text adopted on first reading remained unchanged.

## ARTICLE 32 (Non-Discrimination)

89. There was a corrigendum to the article (A/CN.4/L.492/Corr.1) providing for the addition, after the word "nationality", of the words "or residence", which had been omitted by error. There were, however, also other significant changes as compared with the wording adopted on first reading. The scope of the article was now confined to cases involving transboundary harm because it was in relation to such cases that the obligation not to discriminate was of real significance. At the same time, the new version of the article was broader in scope than the previous one in that it excluded not only discrimination based on nationality or residence, but also discrimination based on the place where the injury occurred. The new text thus sought to ensure that any person, whatever his nationality or residence, who had suffered significant transboundary harm or who was exposed to a serious risk of such harm as a result of activities related to an international watercourse should, regardless of where the harm had occurred or might occur, receive the same treatment as that afforded by the

country of origin to its nationals in the case of domestic harm.

90. The opening clause, reading “Unless the watercourse States concerned have agreed otherwise”, preserved the freedom of the watercourse States to agree on different arrangements such as resort to diplomatic channels. The words “for the protection of the interests of persons, natural or juridical, who have suffered” had been inserted to make it clear that States could freely agree to discriminate and that the purpose of an inter-State agreement should always be the protection of the interests of the victims or potential victims of harm.

91. An important element which was unchanged was the expression “in accordance with its legal system”, which made it clear that there was no intention to confer on persons outside the jurisdiction of the watercourse States where a judicial or other remedy was sought or compensation claimed more extensive rights than those enjoyed by nationals.

92. One member of the Drafting Committee had found the article as a whole unacceptable on the ground that the draft articles dealt with relations between States and should not extend into the field of actions by natural or legal persons under domestic law. In his opinion, the article dealt inadequately and possibly in a misleading way with the complex problem of private remedies in the context of international law.

#### ARTICLE 33 (Settlement of disputes)

93. The Special Rapporteur, in his second report, had proposed an article on the settlement of disputes, since he felt strongly that a provision on the issue was especially important for the better functioning of a convention of that kind. In general, the Commission shared that view, but it considered that the proposed dispute settlement mechanism should be simple and realistic and should not depart from the overall tone of the draft which was based on consent and cooperation among riparian States. It was with that in mind that the Drafting Committee proposed article 33.

94. The article consisted of a main (introductory) clause and three subparagraphs which set forth three successive modalities for settlement.

95. The main clause defined the subject-matter of the dispute which could relate to a question of fact or to the interpretation or application of the present articles. The opening phrase, reading “In the absence of an applicable agreement between the watercourse States concerned”, meant, of course, that the articles would apply only if the watercourse States did not already have an agreement that provided for the settlement of any disputes between them and any such agreement would prevail over the provisions of the article.

96. The mechanisms for dispute settlement set forth in paragraphs (a), (b) and (c) were intended to come into operation sequentially.

97. Paragraph (a) provided for what should normally be done when a dispute arose between watercourse States. Such States should expeditiously enter into con-

sultations and negotiations with a view to arriving at an equitable solution of the dispute. They were encouraged to make use, as appropriate, of any joint watercourse institutions that they might have established. Experience had shown that such joint institutions were most effective in resolving disputes between watercourse States and that was why they had been mentioned. However, watercourse States were not obliged to use those institutions and that was the purport of the words “as appropriate”.

98. Subparagraph (b) provided for two other mechanisms in case the parties failed to resolve their dispute through consultations and negotiations: a fact-finding commission, which could be established at the request of any of the parties to the dispute, and resort to mediation and conciliation if the parties so agreed. In the view of the Drafting Committee, many disputes which arose in respect of the utilization of watercourses were disputes over the facts. Clarification of the facts, therefore, could facilitate the parties’ settlement of their dispute more expeditiously and more efficiently. In the view of the Drafting Committee, even if the recommendations made by a mediation or conciliation commission were not binding on the parties, they could provide them with a very useful neutral view on questions both of fact and of law and thus make them more amenable to settlement.

99. One important difference between the two mechanisms for the settlement of disputes contemplated in the paragraph was that the fact-finding commission could be established at the request of any of the watercourse States party to a dispute, whereas resort to mediation and conciliation could be effected only with their consent. Indeed, all the mechanisms for dispute settlement provided for under the article, with the exception of the establishment of a fact-finding commission, came into operation only upon consent by all the watercourse States parties to a dispute.

100. Subparagraph (b) introduced a temporal criterion. In the view of the Drafting Committee, parties should be given some time to continue consultations and negotiations before the second set of dispute settlement mechanisms came into operation; six months from the date of the request for consultations and negotiations seemed a reasonable time. The parties were not forced to stop their consultations and negotiations after six months and to resort to the mechanisms provided for in subparagraph (b): the words “at any time after six months” were intended to convey that understanding.

101. Subparagraphs (b) (i) to (b) (vi) set out the procedure for the establishment of a fact-finding commission in the absence of an agreement between the parties. The words “Unless otherwise agreed”, at the beginning of subparagraph (i), were designed to guarantee the freedom of the watercourse States parties to a dispute to follow a procedure other than that provided for under that subparagraph.

102. The fact-finding commission established under subparagraph (b) was composed of three members, one member nominated by each of the States concerned and a third member, who did not have the nationality of

either of those States, chosen by the nominated members to serve as chairman.

103. If the members nominated by the watercourse States were unable to agree on a chairman within four months of the request for the establishment of the commission, any of the watercourse States party to the dispute could request the Secretary-General of the United Nations to appoint the chairman. If one of the parties failed to nominate a member within four months of the initial request pursuant to subparagraph (b), any other party could request the Secretary-General of the United Nations to appoint a person who must not have the nationality of any of the States concerned and who would constitute a single member commission.

104. The fact-finding commission determined its own procedure. The States concerned had the obligation to provide the commission with such information as it might require and, if requested, to permit the commission to have access to their respective territories and to inspect any facilities, plant, equipment, construction or natural feature relevant to the purpose of its inquiry.

105. The fact-finding commission would adopt its report by a majority vote unless it was a single member commission and would submit the report to the States concerned setting forth its findings and the reasons therefor and such recommendations as it deemed appropriate.

106. The expenses of the commission would be borne equally by the States concerned, unless they agreed on other ways of sharing expenses.

107. Subparagraph (c) of article 33 provided for another form of dispute settlement, namely, by a binding decision of a third party which could be a permanent or ad hoc tribunal or ICJ. That form of settlement was also based on the consent of the watercourse States parties to a dispute, which could, by agreement, be expressed prior to the dispute and also after a dispute had arisen.

108. The Drafting Committee had anticipated that there might be situations in which there were more than two watercourse States parties to a dispute and where some of them would not agree to submit the dispute to a tribunal or to ICJ. The rights of the other States could not, of course, be affected. That point would be explained in the commentary.

109. Like subparagraph (b), subparagraph (c) introduced a temporal criterion. The dispute settlement mechanisms for which it provided could be invoked only if, after 12 months from the initial request for a fact-finding commission, mediation or conciliation or, if a fact-finding, mediation or conciliation commission had been established, 6 months after receipt of a report from such commission, whichever was the later, the parties had been unable to settle the dispute.

110. The title of the article reflected its content.

DRAFT RESOLUTION PROPOSED BY THE  
DRAFTING COMMITTEE

111. Mr. BOWETT (Chairman of the Drafting Committee), having completed his introduction to the draft

articles proposed by the Drafting Committee, now wished to turn to the issue of groundwater not related to an international watercourse.

112. The Commission had requested the Drafting Committee to consider how that issue might be related to the topic under consideration. The Drafting Committee had discussed the various possibilities and had come to the conclusion that the Commission could not, in the context of its work on international watercourses, ignore water resources that were of vital importance to many States. Nor, however, could it rely on sufficient practice to work out draft articles that would be on a par with those devoted to international watercourses. It had therefore opted for a draft resolution which was currently before the Commission (A/CN.4/492/Add.1). The text was self-explanatory and he would therefore confine himself to recommending its adoption by the Commission. It should, however, be noted that operative paragraph 4 had given rise to reservations and that one member had objected to the draft resolution as a whole. In the view of that member, at the present stage the Commission should merely envisage the possibility of similarities between the principles elaborated in relation to international watercourses and those that might prove to be applicable to confined groundwaters and that it should do so in the light of an in-depth study based on information provided by Governments.

113. The CHAIRMAN thanked the Chairman and the members of the Drafting Committee and the Special Rapporteur for preparing and submitting the draft articles, which would be debated at the Commission's next plenary meeting.

114. Mr. AL-KHASAWNEH said that he had one comment to make immediately. The Chairman of the Drafting Committee had stated that some articles had been moved to part four of the draft as they were too important to be "relegated" to the miscellaneous provisions. The articles which appeared under the heading "Miscellaneous provisions" were, however, not of inferior standing and were no less important than those that appeared in other parts of the draft.

*The meeting rose at 12.10 p.m.*

## 2354th MEETING

*Wednesday, 22 June 1994, at 10.15 a.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

*Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, 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. Szekely, Mr. Thiam, Mr. To-*

muschat, 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,<sup>1</sup> 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]

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

1. The CHAIRMAN said that the Commission would consider, article by article, the draft articles on the law of the non-navigational uses of international watercourses adopted by the Drafting Committee on second reading (A/CN.4/L.492 and Corr.1 and 3), as well as the draft resolution on confined groundwater contained in document A/CN.4/L.492/Add.1.

2. An informal version of the commentaries to most of the articles had been made available to the members. In accordance with established practice, the official version would be circulated as soon as possible and acted upon in the framework of the Commission's consideration of its report to the General Assembly.

3. Mr. BOWETT (Chairman of the Drafting Committee) said Mr. Al-Khasawneh had commented that transferring the articles entitled "Management", "Regulation" and "Installations", formerly articles 26, 27 and 28, from part six (Miscellaneous provisions) to part four (Protection, preservation and management) of the draft gave the impression that the other articles in part six were of lesser importance. While members of the Drafting Committee had described the three articles in question as important, he doubted strongly that they had meant to accord less importance to the remaining articles. The rationale for transferring the three articles was that they were central to the utilization of watercourses and consequently did not belong in part six.

4. Mr. AL-KHASAWNEH asked whether it would be appropriate to make some general comments on the draft articles as a whole at that stage.

5. Following a brief discussion in which Mr. CALERO RODRIGUES, Mr. ROSENSTOCK (Special Rapporteur), Mr. IDRIS, Mr. GÜNEY, Mr. THIAM and Mr. AL-KHASAWNEH took part, the CHAIRMAN said the consensus seemed to be that members wished to begin by considering the draft articles one by one. They would then turn their attention to the draft as a whole, at which time they would have an opportunity to make general comments.

ARTICLE 1 (Scope of the present articles)

*Article 1 was adopted.*

ARTICLE 2 (Use of terms)

6. The CHAIRMAN said that article 2 was identical to that adopted on first reading<sup>2</sup> except that the word "normally" had been added to the definition of the term "watercourse" and the words "surface and underground waters" had been replaced by "surface waters and groundwaters".

7. Mr. PAMBOU-TCHIVOUNDA said that article 2 was not satisfactory because no attempt had been made to incorporate the concept of utilization of an international watercourse, which was one of the key concepts of the draft. While he would not oppose the adoption of article 2 in its present form, some definition of utilization, either in the article itself or in the commentary, would prove a valuable addition to the draft.

8. Mr. GÜNEY said that the term "watercourse", which was traditionally limited to surface waters, was poorly defined. In article 2, subparagraph (b), the term was so broad in scope that it was close to the concepts of drainage basins and watercourse systems that had been definitively rejected by the Commission at the start. Furthermore, as it stood, article 2 might give rise to difficulties of application. The term "groundwaters" should be deleted. On that basis and on the understanding that the word "normally", as contained in subparagraph (b), did not enlarge the scope of the definition in question, he would not oppose the adoption of the article.

9. Mr. KABATSI said that Mr. Pambou-Tchivounda's concern might be dispelled by the commentary to article 1, paragraph 1, which specified that the term "uses" covered all uses of an international watercourse other than navigational uses. It was appropriate, moreover, to have a very broad definition because technological and scientific advances might lead to other uses in the future. A precise definition of utilization might limit the scope unnecessarily.

10. Mr. AL-KHASAWNEH said that including the word "normally" in article 2, subparagraph (b) would only lead to uncertainty, something that was particularly dangerous in an article on the use of terms. The alternative was to make it clear in the commentary that the only exception to the standard definition of "watercourse", as contained in subparagraph (b), was the case in which a watercourse flowed into a delta and that the definition did not apply to cases of two parallel rivers which might be connected by groundwater.

11. Inclusion of the word "normally" would broaden the scope of the draft articles to such an extent that a smaller country's entire territory might be covered. That would make the draft less acceptable to States.

12. Mr. SZEKELY said that, in earlier discussions on the matter, some members had objected strongly to the expression "common terminus" on the grounds that it was inaccurate in hydrological terms. In introducing the report of the Drafting Committee, the Committee's Chairman had explained that the word "normally" had been added to article 2 specifically to avoid hydrological

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>2</sup> For the draft articles provisionally adopted by the Commission on first reading, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

inaccuracy by covering cases where surface waters and groundwaters constituting an international watercourse did not flow into a common terminus, cases which did not include deltas alone. The commentary would explain clearly the instances in which the word "normally" did not apply. The article would not, therefore, create any uncertainty.

13. Mr. IDRIS said that he shared Mr. Al-Khasawneh's views regarding the word "normally". Moreover, he did not consider the expression "common terminus" to be inaccurate from the hydrological standpoint, but rather that the assertion of inaccuracy could not be proved. In any event, the expression had an important legal impact. In a spirit of compromise, the Commission might wish to adopt article 2 as it stood and clarify matters in the commentary.

14. Mr. AL-KHASAWNEH said that he would have to vote against article 2 in its present form. The explanation offered by Mr. Szekely was unacceptable. Scientific accuracy, if it could even be achieved, was not the deciding factor in the situation. If the word "normally" had the effect of expanding the scope of the draft articles in a way never envisaged by the Commission, he would have to oppose the adoption of the article.

15. Mr. ROSENSTOCK (Special Rapporteur) said that the words "flowing into a common terminus" had been added at the forty-third session in 1991, at the time of the first reading, in order to exclude from the scope of the draft a case in which two rivers were connected by an artificial canal. That point would be reinforced in the commentary. The commentary would also make it clear why the word "normally" was needed. Without it, major river systems would be excluded from the scope of the articles, producing a situation of absurdity.

16. With regard to Mr. Al-Khasawneh's concerns, he would point out that, if the treatment, handling or development of waters affected a particular river system, then the articles would apply; if they did not affect a particular river system, the articles would not apply. The purpose of including the word "normally" was not to enlarge the scope of the draft articles but to preserve the scope as originally envisaged, while at the same time continuing to exclude cases of rivers connected by a canal.

17. Mr. AL-KHASAWNEH said that he was not satisfied with the Special Rapporteur's explanation. The groundwaters criterion was not one which the Commission had used in the past. The whole question of watercourses connected by groundwaters should be dealt with in greater detail.

18. Mr. VILLAGRÁN KRAMER suggested that Mr. Al-Khasawneh should submit an amendment so that the Commission could vote on it.

19. Mr. ROSENSTOCK (Special Rapporteur) read out paragraph 5 of commentary to article 2.<sup>3</sup> He had said nothing at the present meeting which was inconsistent with that paragraph. He suggested that the Commission should not allow draft articles to pile up on the shelf and should proceed to a decision on article 2.

20. The CHAIRMAN said that there was no question of shelving draft articles indefinitely. Perhaps the Commission should revert to article 2 after members who experienced difficulties with it had studied the passage of the commentary cited by the Special Rapporteur. He further suggested that the Commission should request Mr. Al-Khasawneh, Mr. Calero Rodrigues, Mr. Szekely, the Special Rapporteur and the Chairman of the Drafting Committee to act as friends of the Chairman and meet informally to find a solution to the problem.

*It was so agreed.*

*The meeting was suspended at 11 a.m. and resumed at 11.10 a.m.*

21. Mr. ROSENSTOCK (Special Rapporteur), reporting on the informal consultations, said it had been agreed that article 2 could be accepted with one minor change to the commentary so as to make it clear that watercourses such as the Danube and the Rhine would not form one large system but would retain their existence as two separate systems.

*Article 2 was adopted on that understanding.*

#### ARTICLE 3 (Watercourse agreements)

*Article 3 was adopted.*

#### ARTICLE 4 (Parties to watercourse agreements)

*Article 4 was adopted.*

#### ARTICLE 5 (Equitable and reasonable utilization and participation)

22. Mr. GÜNEY said that, in view of the twofold obligation on States contained in paragraph 1, paragraph 2 was quite superfluous and should therefore be deleted so as to produce an article of a general character. The same applied to the words "and participation" in the title of the article.

23. The Drafting Group had decided not to reopen the discussion which had taken place on article 5 on first reading. He would abide by that decision, provided his views were reflected in the summary record of the meeting.

24. Mr. TOMUSCHAT said that, during the discussion of the Special Rapporteur's second report (A/CN.4/462), he had opposed the use of the term "optimal utilization" in paragraph 1 (2336th meeting). The present formulation appeared to impose an obligation on States to work to achieve optimal utilization with a view to squeezing the last drop of use out of a watercourse. The term "sustainable development" would be more appropriate, since it included the notion of long-term utilization. He proposed that "optimal" should be replaced by "sustainable"; alternatively, the phrase should read "optimal and sustainable utilization".

25. Mr. ROSENSTOCK (Special Rapporteur) said that Mr. Tomuschat's proposal would destroy the balance of the article. It must be remembered that paragraph 1 added the qualification "consistent with adequate protection of the watercourse" and that article 24 referred to "planning the sustainable development of an interna-

<sup>3</sup> Yearbook . . . 1991, vol. II (Part Two), pp. 70-71.

tional watercourse'. The proposed change to article 5 would create an imbalance to the detriment of the economic development of watercourses.

26. Mr. YANKOV said that he supported Mr. Tomuschat's proposal. He appreciated the Special Rapporteur's reasoning, but could not see how inclusion of "sustainable" would destroy the balance of the article. "Optimal utilization" did not reflect the new approach taken by States to the use of natural resources. At the United Nations Conference on Environment and Development, "sustainable development" had been a key expression in the texts on the use of natural resources.

27. Mr. CALERO RODRIGUES said that he supported the Special Rapporteur. Mr. Tomuschat was wrong in thinking that "optimal utilization" meant use of the last drop of water. Paragraph 1 did link utilization to adequate protection. Furthermore, although the term "sustainable development" was in wide use at present, it might not necessarily be of universal application in the future. It was not even clear what the term actually covered. In any event, the draft commentary already made the situation perfectly clear.

28. Generally speaking, whenever an amendment was proposed the Commission should vote on it. If the amendment was not carried, all members should accept the majority view. He suggested that a vote should be taken to discover whether there was a majority in favour of Mr. Tomuschat's proposal.

29. The CHAIRMAN said that it would be preferable not to take a vote at the present stage, in the hope that a consensus would emerge.

30. Mr. Sreenivasa RAO said members who supported Mr. Tomuschat's position could be assured that the concept of sustainable development was intended to guide the activities of States as far as possible. But, as had been correctly pointed out, the concept was evolving, and in any event it applied essentially to the use of renewable natural resources. Water was not exactly a renewable resource and was not sustainable in the same sense as fisheries resources.

31. The present version of article 5 was the result of lengthy discussions, and it would be wrong to change it now. He agreed with the Special Rapporteur that the text struck the correct balance between utilization and protection and he urged Mr. Tomuschat not to press his amendment. Sustainable development was generally a matter for individual States acting with regard to their domestic resources, whereas the draft articles were concerned with the management of a shared resource. The question of sustainability became relevant to the draft articles only if it affected such sharing. The aim was not to prescribe domestic arrangements for States. Moreover, if the proposed amendment was adopted, it would be hard to secure a consensus on article 5 in the General Assembly and elsewhere.

32. Mr. IDRIS said that he appreciated the points made by the Special Rapporteur and Mr. Sreenivasa Rao and thought that the text should not be changed. The two concepts were quite different in their implications, and in any event it was difficult to reflect the concept of sustainable development in a complicated legal text. If

Mr. Tomuschat pressed for his amendment, it would be better to add "and sustainable" to the present formulation. The situation could be made clear in the commentary.

33. Mr. FOMBA said that there was, in fact, no fundamental contradiction between the two concepts. Sustainable development was implicit in the notion of optimal utilization subject to adequate protection. If the adequate protection requirement was met, the watercourse could be utilized on a sustainable basis. There was no real need for an express mention of sustainability in the text, which should remain unchanged.

34. Mr. BOWETT (Chairman of the Drafting Committee) said that "optimal utilization" did not mean "maximum utilization".

35. Mr. HE said that article 5 was clear: its core meaning was that watercourses should be utilized in an equitable and reasonable manner leading to the higher goal of optimal utilization. He endorsed the point made by Mr. Bowett and thought that the requirement of optimal utilization subject to adequate protection implied the notion of sustainable development. Accordingly there was no need to include a reference to sustainability. If other members of the Commission insisted, however, the point could be covered in the commentary.

36. Mr. THIAM said he agreed that the text should remain unchanged and an explanation given in the commentary.

37. Mr. SZEKELY said Mr. Tomuschat's concern was that the present wording gave the impression of inviting, prompting or obliging States to make optimal use of watercourses in the sense of maximum use—to the detriment of the conservation of the resource. The commentary should clearly state that that was not the case.

38. Mr. TOMUSCHAT said that, if it was the general view in the Commission that optimal utilization encompassed sustainable development, that could be explained in the commentary. There was, however, another point on which he had perhaps not made himself quite clear. Article 5 as now worded seemed to impose an obligation on States to develop an international watercourse, but that was not the only option open to them. Another option would be to leave the international watercourse in its natural state. The commentary should also explain, therefore, that States were under no strict obligation to develop an international watercourse. It was particularly important not to restrict the freedom of States in any way. Provided that those points were reflected in the commentary, he would be satisfied.

39. Mr. YANKOV said it was plain that the matter should be dealt with in the commentary in the interests of arriving at a consensus. Reference should also be made in the commentary to the chapter in Agenda 21<sup>4</sup> dealing with water resources. He had taken note of Mr. Bowett's comment, but the basic issue was that the optimal utilization required at the present time might not

<sup>4</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: Resolutions adopted by the Conference, resolution 1, annex II.

be the optimal utilization required in the future. In the past, the optimal use of resources such as energy and water had in fact proved not to be the most reasonable in terms of what would be required in the future. The new trend in contemporary environmental law was to look at the whole matter in a fresh light: a more environmentally-oriented approach was therefore needed.

40. Mr. BARBOZA said that the commentary to the article<sup>5</sup> was quite explicit. The relevant part of paragraph (3) of that commentary read:

Attaining optimum utilization and benefits does not mean achieving the 'maximum' use, the most technologically efficient use, or the most monetarily valuable use. Nor does it imply that the State capable of making the most efficient use of a watercourse—whether economically, in terms of avoiding waste, or in any other sense—should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of, each.<sup>6</sup>

Some wording along those lines, with the incorporation of a reference to the idea of sustainable development, might perhaps meet the points raised by Mr. Tomuschat and Mr. Yankov.

41. Mr. IDRIS said it appeared Mr. Tomuschat considered that "optimal" implied "sustainable" utilization. He could not agree, nor did he think that that was the opinion of the Commission. Sustainable development could, however, be referred to in the commentary to interpret the sense of the article.

42. The CHAIRMAN said that, if he heard no objections he would take it that the Commission wished to adopt article 5, on the understanding that a reference to sustainable development would be made in the commentary.

*Article 5 was adopted on that understanding.*

#### ARTICLE 6 (Factors relevant to equitable and reasonable utilization)

43. Mr. GÜNEY, referring to paragraph 1 (c), said that it would be preferable to use well-established terminology. He therefore suggested that the wording of the subparagraph should be amended to read "the population dependent on the waters", to bring it into line with the wording of article V of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966.<sup>7</sup> There had been no objection in the Drafting Committee to incorporating such an idea in the article.

44. Mr. IDRIS and Mr. Sreenivasa RAO supported the suggestion.

45. Mr. ROSENSTOCK (Special Rapporteur) said that one alternative would be to reflect the thought expressed in his revised commentary to the article (2353rd meeting, para. 53), which spoke of both the size of the population dependent on the watercourse and the degree or extent of their dependency. The other would be to revert

to the language used in the Helsinki Rules, as suggested by Mr. Güney; in that case, the word "basin", which appeared in the Rules, would have to be replaced by "watercourse". Either alternative would be acceptable as long as the commentary reflected the notion of the importance both of the size of the population dependent on the watercourse and of the degree or extent of their dependency.

46. Mr. GÜNEY said he could accept that wording.

47. Mr. SZEKELY said that, as he had already stated in the Drafting Committee, it would be a mistake to place the emphasis on the population rather than on the degree of dependence of the population on the waters of a watercourse. He would not raise any formal objection to the proposed wording, but he found it regrettable.

48. The CHAIRMAN suggested, in the light of comments by some members, that paragraph 1 (c) of the article should be amended to read: "the population dependent on the watercourse in each watercourse State".

*It was so agreed.*

49. Mr. AL-KHASAWNEH said that he would suggest that paragraph 1 (e) should be changed to read: "the special importance of recognized uses" or "the special importance of existing uses", and that a new subparagraph (f) should be added reading "potential uses of watercourses". The idea behind the suggestion was to give existing uses a certain degree of importance, without, however, conferring upon the State whose uses were recognized the power to veto possible new uses. Such a change would make for a fairer solution and would enhance the prospects of the articles being accepted by States. The draft had to strike a delicate balance between the interests of upper riparian States and lower riparian States, in other words, between the need for development and the protection the law afforded to existing and recognized uses.

50. Mr. VILLAGRÁN KRAMER said that Mr. Al-Khasawneh's suggestion prompted a very strong reaction in him, for to place the emphasis on existing uses was tantamount to condemning three quarters of the third world to underdevelopment. As lawyers, the members of the Commission could not be tied down to existing uses alone. Potential uses were a vital matter throughout the American continent and he for one could not ignore the future of the population in the part of the world from which he came and whose right it was to introduce new uses of watercourses.

51. Mr. SZEKELY said he too was opposed to any change in the article. The views expressed by Mr. Villagrán Kramer had been discussed exhaustively in the Drafting Committee. To discriminate in favour of one of the factors involved would be tantamount to disqualifying the others. Article 6 stated that utilization of an international watercourse in an equitable and reasonable manner required taking into account all relevant factors and circumstances. That did not mean it was then necessary to decide whether any one of the categories in subparagraphs (a) to (g) was more important than the others. To embark on that course would be to destroy the

<sup>5</sup> Initially adopted as article 6. For the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31-36.

<sup>6</sup> *Ibid.*, p. 32.

<sup>7</sup> ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

balance of article 6, and he therefore could not support the proposal.

52. Mr. AL-KHASAWNEH, in response to a question by the CHAIRMAN, said he was aware that the Drafting Committee had debated the matter in detail, but pointed out that, at the time, he had reserved his right to raise the question. His proposal to highlight the importance of existing uses must be read in the context of the article as a whole, which provided some leeway, since it specified the factors that had to be taken into account. Consequently, it would not lead to the dramatic consequences that some of his colleagues foresaw. It was true that the Commission had always sought not to give preference to any particular views. Nevertheless, as drafting had progressed, the need had been felt to give certain uses some prominence. In article 10, for example, special regard for the requirements of vital human needs had been highlighted. To highlight the importance of existing and recognized uses—albeit not to the extent that he would have liked—would not disturb the equilibrium of the draft. He was not asking for a vote. However, in view of the manner in which proposals were considered, he wished to reserve his position on the draft once consideration of it had been concluded.

53. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to adopt article 6 on that understanding.

*Article 6 was adopted on that understanding.*

#### ARTICLE 7 (Obligation not to cause significant harm)

54. Mr. BARBOZA said he wished to place on record his interpretation of article 7. As he saw it, paragraphs 1 and 2 of the article referred to two different primary obligations which bore no relation to one another. The obligation under paragraph 1 was autonomous: it could easily be the subject of a different and separate article from the obligation under paragraph 2. The obligation set out in paragraph 1 was an obligation of due diligence. He therefore saw two consequences. First, it was a hard obligation, not by any manner of means a soft one. Secondly, being a due diligence obligation, it was not an obligation of result. That meant that a result—namely, significant damage—was not necessary in order to constitute a breach of that obligation. The State was obliged only to make an effort to prevent the occurrence of significant harm; if that effort was not made, the obligation was breached, even before any result had occurred. The effort must fit the technical and scientific standards commonly accepted by the States; that, in a nutshell, was the content of a due diligence obligation, according to Pisillo-Mazzeschi.<sup>8</sup> Again, the breach of such obligation carried all the consequences of international law, namely: (a) cessation of the act or omission causing the harm if it was a continuous act; (b) restitution in kind, namely, return to the *status quo ante*; (c) if pertinent, compensation; and (d) satisfaction and guarantees of non-repetition.

<sup>8</sup> "Forms of international responsibility for environmental harm", *International Responsibility for Environmental Harm*, F. Francioni and T. Scovazzi, eds. (London, Graham and Trotman, 1991), pp. 15-36.

55. The obligation in paragraph 2 was no longer one of due diligence. It arose when there had been significant harm despite the exercise of due diligence by the State of origin. Apparently that obligation was in the nature of liability, and moreover, of *sine delicto* liability. There was no breach of obligation, since due diligence had been complied with.

56. What were the consequences of significant harm? Paragraph 2 brought a procedural consequence: consultations with the affected State. But that was only procedural. What were the substantive consequences of harm? The State of origin had to prove the extent to which the use was equitable and reasonable. The burden of proof lay with that State, as the Chairman of the Drafting Committee had said (2353rd meeting) and as was apparent from the text, namely, such use had proved equitable and reasonable. If that State had not proved it, then no due diligence would be accredited and one fell back on the case of paragraph 1: breach of an obligation of due diligence.

57. If the State of origin proved the extent of its due diligence, the use must be adjusted (subparagraph (b)) in such a manner that the harm would be eliminated or mitigated, and, where appropriate, the question of compensation would arise. He submitted as his interpretation that "where appropriate" could have no meaning other than "whenever there had been a compensable damage". Lastly, if no satisfactory agreement was reached, the dispute should be settled in the ways prescribed in the corresponding part of the draft.

58. Mr. TOMUSCHAT said it had always been his position that the obligation under article 7 was a due diligence obligation. However, the words "has proved" in paragraph 2 (a) were somewhat awkward, and paragraph 2 (a) would read better if they were replaced by "may be considered". It was not only a question of proof. The first question was whether such use was equitable and reasonable; only then did the question arise whether and how that could be proved. It was possible that the Drafting Committee had at some stage wished to give some indications as to the burden of proof, and had therefore resorted to the word "proved". In his view, however, it would be more consistent with the general idea underlying the provision to use the words "has been" or "may be considered".

59. Again, the obligation to consult with the State suffering the harm was imposed on the wrongdoing State. The Commission should also be concerned with the rights of the State suffering the harm. Hence it should be explicitly specified, either in the text or in the commentary, that, in addition to that obligation, the State suffering the harm was entitled to demand consultations.

60. Mr. ROSENSTOCK (Special Rapporteur) said he saw no problem concerning the proposal to specify that the party to whom the duty was owed might ask for that duty to be complied with. As to the wording of paragraph 2 (a), subject to the approval of the Chairman of the Drafting Committee, who had drafted the words in question, he saw no great difference in using either of the two formulations and would be prepared to consider whichever wording attracted the widest support.

61. Mr. BOWETT (Chairman of the Drafting Committee), said it was his personal view that paragraph 2 dealt with a situation where there had been due diligence and where there was therefore no breach. It dealt with a situation where a scheme of utilization, having been initially adopted and approved as meeting the factors covering equitable and reasonable use, subsequently produced significant harm even though due diligence had been exercised. In other words, the difference concerned the point in time at which the judgement as to equitable and reasonable use was made. A judgement was made when the scheme was approved; subsequently, in the light of experience of operating the scheme, the extent of its being equitable and reasonable had to be reassessed. That temporal difference, reflected in the tense of the verb "has proved", was not reflected in the tense of the words "may be considered".

62. The CHAIRMAN asked whether the English word "proved" was being used in the sense of "turned out to be", or did it mean that somebody had to prove in a court the extent to which such use was equitable and reasonable?

63. Mr. BOWETT (Chairman of the Drafting Committee) confirmed that the sense was "has turned out to be". The concept of proof was not involved.

64. Mr. VILLAGRÁN KRAMER said that the clarification was constructive. The obligation to exercise due diligence was imposed only with regard to possible harm to watercourses. In his view, it must reflect the concern of all lawyers and States to preserve the wider ecosystem in which the watercourse was situated. The felling of trees in some countries inflicted incredible damage, not just in the hydrographic basin in question, but worldwide. The obligation to exercise due diligence must be extended to include the need to safeguard ecosystems.

65. Mr. TOMUSCHAT said the words "has proved" implied that, at least to some extent, the use had in fact been equitable and reasonable. But that assumption might itself be controversial: in a given situation, the only certain fact might be that harm had indeed been caused. The best wording for paragraph 2 (a) would thus be the formulation "... has been equitable and reasonable".

66. Mr. BOWETT (Chairman of the Drafting Committee) said that he could accept the wording proposed by Mr. Tomuschat.

67. Mr. BARBOZA said that he too could accept the amendment proposed by Mr. Tomuschat but would insist that the statement made by the Chairman of the Drafting Committee (2353rd meeting), namely that the burden of proof lay with the State that had caused the harm, should be reflected in the commentary.

68. Mr. Sreenivasa RAO said that the thrust of the paragraph would remain the same, regardless of a change in the tense of the verb. The Chairman of the Drafting Committee had rightly pointed out that, on balance, once harm was caused, the use to which the watercourse had been put would be reviewed. The thinking on that question had always been that, if the use was a priori reasonable and equitable, even when significant harm resulted, it could continue without further change other

than compensation for the harm. But the new wording of the article, developed as a compromise, included an additional obligation imposed on States: if such use had proved harmful, then they must consult on the question of ad hoc adjustments.

69. Mr. SZEKELY said that he too could accept Mr. Tomuschat's proposal, subject to the proviso already stated by Mr. Barboza.

70. Mr. GÜNEY said that he had a marked preference for retention of the words *s'est avérée* in the French version of paragraph 2 (a).

71. Mr. ROSENSTOCK (Special Rapporteur) said that the words "has been" were a more complex way of conveying what could be conveyed by the word "is". Paragraph 2 envisaged a situation in which use had occurred and harm had occurred: the question was whether such use was now equitable and reasonable. The easiest solution would be to use the simple verb "is".

72. The CHAIRMAN said that, if he heard no objections, he would take it that members agreed to a wording of paragraph 2 (a) reading: "the extent to which such use is equitable and reasonable taking into account the factors listed in article 6".

*It was so agreed.*

73. Mr. de SARAM said he wished to stress at the outset that his remarks were not intended to upset an emerging consensus regarding the general principles set out in article 7. However, he could not help but note that, in its fundamental concept, the article differed from the one adopted on first reading, which it would have been better to retain. It was a matter of importance as the field was a fast developing one. Conventions were being prepared in other spheres, dealing with situations where legitimate use within a State's jurisdiction caused damage outside of that jurisdiction. The article adopted by the Commission on first reading—to which there had been 20 pages of careful commentary—had represented one point of view. The concerns rightly raised by the Special Rapporteur at the present session had led to the adoption of a different point of view.

74. His own concern was that nothing the Commission did in the context of watercourses should in any way affect, either positively or negatively, the important discussion that would take place on the topic of liability next year. Indeed, his personal preference would have been for the article to be omitted, leaving it to the rules of State responsibility to determine, should harm be caused and the riparian States fail to agree, how damage should be compensated. He did not see how article 7, paragraph 1, laying down the due diligence standard, which he understood to be the standard generally applicable in the field of State responsibility, coupled with the obligation contained in paragraph 2 to consult on damage took matters much further than would have been the case if the question had been resolved as a matter of State responsibility. Moreover, he was concerned that, in the event of catastrophic damage, one should not let the loss lie where it fell. The Commission was aware that discussions were currently in progress on mechanisms outside rules of liability, regarding the manner in which such compensation should be provided for. His own

point of view was that it should be left very much to the riparian States to consult and to cooperate. The Chairman of the Drafting Committee, in his introduction (2353rd meeting), had said that the philosophy underpinning the draft was actually the obligation to consult and cooperate. For those reasons, he would have much preferred the article to be omitted.

75. The CHAIRMAN asked whether Mr. de Saram's preference would have been to omit the article *in toto*.

76. Mr. de SARAM said that his concern related to due diligence as against strict liability or the obligation not to cause harm.

77. Mr. SZEKELY, referring to Mr. Villagrán Kramer's observations about the spatial scope of the harm, said he did not think that there need be any cause for concern in that regard. The harm referred to in article 7 was not just harm to the international watercourse. It could be seen from paragraph 1 that the obligation not to cause significant harm related, not just to watercourses, but to other watercourse States.

78. Further to a query by Mr. AL-KHASAWNEH, the CHAIRMAN said that consideration of article 7 would be continued at the next meeting.

*The meeting rose at 1 p.m.*

## 2355th MEETING

*Thursday, 23 June 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, 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. 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,<sup>1</sup> 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]

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

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the draft articles proposed by the Drafting Committee.

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

ARTICLE 7 (Obligation not to cause significant harm)  
(*concluded*)

2. Mr. BOWETT (Chairman of the Drafting Committee) said that Mr. de Saram's remarks (2354th meeting) gave him the impression that his explanations with regard to article 7 had not been very clear. He would thus like to provide further clarification. Everyone agreed that, where a watercourse State envisaged a project for new uses of a watercourse, such a project must first of all be equitable and reasonable, as provided under article 5. However, and that was the point of article 7, paragraph 1, the State that was responsible for the project had to exercise due diligence in its planning, construction and utilization. Article 7, paragraph 2, provided for the situation in which, despite the exercise of due diligence by that State, significant harm had been caused to another watercourse State. In that case, the State in charge of the project must first, as provided in subparagraph (a), ascertain whether the project was in fact compatible with equitable and reasonable use of the watercourse and, as provided in subparagraph (b), see whether it might be possible to make adjustments to the project which would prevent harm from being caused. That idea of monitoring or supervision reflected current practice. Nevertheless, if significant harm was still being caused after adjustments had been made, the question of the compensation of the injured State must be considered.

3. Mr. AL-KHASAWNEH said that the new wording of article 7 gave rise to some problems, which he would summarize.

4. First, the harm referred to in the article was not just any type of harm, but significant harm, in other words, harm which would be almost impossible to repair. The best solution in such situations was surely prevention and that was why he had preferred and continued to prefer the text adopted on first reading.<sup>2</sup>

5. Secondly, among the reasons given for making major changes in the initial text was the need to take account of the discussions on that matter in the Sixth Committee and in the Commission itself. As he recalled, when Mr. Schwebel had been the Special Rapporteur on the topic, he had sought to subordinate the duty not to cause "appreciable harm", as it had been called then, to the duty of equitable utilization.<sup>3</sup> It was on the basis of the debate that had taken place in the Sixth Committee in the early 1980s that his successor, Mr. Evensen, had changed the wording in such a way that the duty not to cause appreciable harm had become the cornerstone of the draft. When Mr. MacCaffrey had become Special Rapporteur, he had initially sought to return to the wording chosen by Judge Schwebel, but had had to give up that attempt in view of the reactions of the Commission and the Sixth Committee. The draft article submitted on first reading had thus been the result of much reflection and to those who objected to it as a compromise solution, he would reply that the same could be said for all the texts and that completely different conclusions could

<sup>2</sup> For the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

<sup>3</sup> *Yearbook . . . 1982*, vol. II (Part One), p. 65, document A/CN.4/348.

be drawn from the debates in the Sixth Committee and those in the Commission, and that did not augur well for widespread acceptance of the draft by States.

6. Thirdly, with regard to the substance of the article, the threshold defined by the word "significant" was a high threshold. The draft as it had emerged on first reading had been the weakest possible interpretation of the maxim *sic utere tuo ut alienum non laedas*; replacing a simple and straightforward prohibition by the obligation to exercise due diligence further weakened the text and had the effect, in his view, of tipping the balance too much in favour of new uses which were based on the vaguely defined concept of equitable utilization. The delicate balance which had to be struck between the interests of upper and lower riparian States, between old and new uses of a watercourse and between the need for development and the equally important need to preserve existing ecosystems would be disturbed if significant harm, as opposed to "minimal" or "intermediate" harm, was allowed to be caused to a watercourse. The example of harm caused to a small group of fishermen cited by the Chairman of the Drafting Committee in his introduction (2353rd meeting, paras. 58 *et seq.*) was unconvincing. What would happen if work intended to benefit the population of a State gave rise to irreversible damage to the entire population or large segments of the population of another State? Should the first State be permitted to undertake such a project?

7. Fourthly, the obligation to exercise due diligence had the disadvantage that the "diligence" exercised by the State which was making new use of a watercourse could be verified only after the event, once the harm had been done. If the harm was "significant", it was highly likely that it would be irreversible. That obligation would have made more sense if it had been required for all levels of harm, including minimal harm. In fact, in interpreting article 7 *a contrario*, it might be said that due diligence was owed only in the case of significant harm. The provision was therefore too permissive and could lead to inequitable results. The problem was compounded by the fact that the injured State would not have ready access to information enabling it to determine whether the State which had caused the harm had fulfilled its obligation of due diligence. In such situations, the burden of proof should fall—and there were some examples of that solution in the nuclear field—on the State which was contemplating the new use because, otherwise, the door would be left open to abuses in the name of development.

8. Fifthly, the new wording of article 7 might have implications for other topics on the Commission's agenda, as Mr. Barboza and Mr. de Saram had pointed out (2354th meeting). The obligation as formulated was an obligation of conduct, but, if significant harm did occur, the responsibility was responsibility *sine delicto*. At the same time, it should be borne in mind that the utilization of watercourses must be seen in the context of environmental interdependence. Like the forces of nature, rivers crossed national borders oblivious to the political sovereignty of States. If the rules of State responsibility continued to govern the effects of natural phenomena, there was no reason why the solution contemplated in article 7 should be an exception to that regime. In that area, a

State was always under an obligation of due diligence and it must refrain from any action that might cause significant harm to another State or it would be subject to the rules of State responsibility.

9. Sixthly, article 7, paragraph 2, had the disadvantage of presenting the situation from a bilateral point of view. If a State accepted that a planned use of a watercourse would result in significant harm to it, something that was already undesirable in itself, that did not solve the problem of the pollution or deterioration in water quality that might follow for other States. Bearing in mind that all watercourses flowed into the sea, protecting them was a matter of community interest of concern to all States and such protection could be ensured only by a full-fledged obligation of preservation.

10. Lastly, since the obligation of due diligence was supposedly universally applicable, very few demands were being made on the State contemplating the measure: that State had simply to enter into consultations on the question whether the planned use was equitable, on ad hoc adjustments to the project and, where appropriate, on the question of compensation. However, the article did not specify what would happen if the consultations were inconclusive. It was particularly hypocritical to state that the question of compensation would be considered "where appropriate". Since *restitutio in integrum* was in principle precluded, it seemed that the only remedy available was in fact compensation. If that possibility were further limited by adding the words "where appropriate", the text would become even more unbalanced.

11. Having completed his comments, he said that, out of respect for the Commission's tradition of adopting draft articles by consensus, he would not object to the adoption of article 7, provided that his views were fully reflected in the summary record.

12. Mr. Sreenivasa RAO said that, as a member of the Drafting Committee, he was aware that the obligation not to cause harm was an unclear notion and that its full implications could not be measured until the event had taken place. He would have preferred to delete article 7 and stay with the notion of "equitable and reasonable utilization" introduced in article 5. That doctrine seemed to him to be fair and balanced and to cover fully the duty not to cause harm. In response to the question of the point at which foreseeable harm became "unacceptable", it had proved very difficult to define a threshold and an attempt had been made to refer to custom, which had led to the introduction of the notion of "significant harm". That notion was not a fixed one and had to be assessed according to the circumstances of each case. However, the articles under consideration were going to become a framework convention and were not intended to settle concrete problems. The Commission must move on in its work and submit the draft articles to the Sixth Committee. It was trying, with that in view, to find balanced compromise solutions from which wrong conclusions should not be drawn.

13. Mr. CALERO RODRIGUES said that, as a member of the Drafting Committee, he had accepted the proposed text, which he thought offered a satisfactory compromise solution; however, having heard

Mr. Al-Khasawneh's comments, he too now had some doubts. He wondered whether article 7 did not in fact give States the right to cause harm, provided that they entered into consultation. What would happen if the harm in question was catastrophic? The responsibility of the State would not be at issue. Was there not a need to draft a new article to cover that situation?

14. Mr. GÜNEY said that, like Mr. Sreenivasa Rao, he would have preferred the deletion of article 7 since he was unhappy with the wording, but he had gone along with the opinion of the majority of the members of the Drafting Committee.

15. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission were ready to adopt article 7, on the understanding that the views of Messrs Al-Khasawneh, Sreenivasa Rao, Calero Rodrigues and Güney would be duly reflected in the summary record.

*It was so decided.*

*Article 7 was adopted.*

#### ARTICLES 8 TO 16

*Articles 8 to 16 were adopted.*

#### ARTICLE 17 (Consultations and negotiations concerning planned measures)

16. Mr. AL-KHASAWNEH asked why the term "if necessary" had been inserted in paragraph 1. Did it mean that a State could refuse apparently necessary negotiations? In that connection, there was an imbalance between article 17 concerning planned measures and article 4 dealing with watercourse agreements, which might also cover planned measures.

17. Article 4 entitled a State which might be affected by the implementation of a watercourse agreement to the right not only to participate in the negotiations, but also to become a party to the agreement; that constituted an exception to the freedom of choice of the parties to a treaty. In contrast, in article 17, the only obligation was to enter into consultations which might perhaps never result in negotiations. He was surprised that the question of the link between articles 4 and 17 had never been raised in the Drafting Committee. He requested clarification on that apparent inconsistency.

18. Mr. BOWETT (Chairman of the Drafting Committee) said that the term "if necessary" meant that negotiations, which implied more structured discussions than consultations, would not be necessary in all instances and would not automatically follow the consultations.

19. Mr. ROSENSTOCK (Special Rapporteur) said that the difference of meaning between consultations and negotiations was tiny. The assumption of the Drafting Committee was that, in some cases, consultations might be sufficient to satisfy the concern of the State making the communication and to settle the problems at that level. It was intended that the commentary would make it clear that a State did not have the right to refuse to

engage in negotiations, but that it was not bound to engage in such negotiations if they were pointless.

20. Mr. VILLAGRÁN KRAMER said that article 4 did not impose on a State the obligation to become a party to an agreement and that, in the Drafting Committee, the links between the various articles had been a constant concern which had resurfaced at every meeting.

*Article 17 was adopted.*

#### ARTICLES 18 TO 21

*Articles 18 to 21 were adopted.*

#### ARTICLE 22 (Introduction of alien or new species)

21. Mr. de SARAM, comparing the phrase "shall take all measures necessary" with the corresponding phrases in articles 26 ("shall ... employ their best efforts") and 27 ("shall ... take all appropriate measures"), said that the variation of terminology ought to be explained in the commentary.

22. Mr. ROSENSTOCK (Special Rapporteur) said that the members of the Drafting Committee had thought that each of the phrases suited the specific situation dealt with in the corresponding article.

*Article 22 was adopted.*

#### ARTICLES 23 TO 26

*Articles 23 to 26 were adopted.*

#### TITLE OF PART FOUR

*The title of part four was adopted.*

#### ARTICLES 27 TO 31

*Articles 27 to 31 were adopted.*

#### ARTICLE 32 (Non-discrimination)

23. Mr. TOMUSCHAT proposed that, to make the text clearer and underline that the access to judicial or other procedures did not depend on the existence of significant harm, a comma should be placed after the word "procedures" in the article.

24. Mr. Sreenivasa RAO reiterated his reservations about the article, which had no place in a framework convention concerned mainly with cooperation between States. The problem of the possible recourse available in law to individuals in a State other than the one of which they were nationals was far too complex to be dealt with in such a concise, even misleading, manner. That being the case, he noted that the article provided access to judicial or other procedures for foreigners on an equal footing with the nationals of a State and not on a preferential basis.

*Article 32 was adopted.*

## ARTICLE 33 (Settlement of disputes)

25. Mr. ARANGIO-RUIZ said that the language of the last lines of subparagraph (c), which read:

“... any of them may, subject to the agreement of the States concerned, submit the dispute to a permanent or ad hoc tribunal or to the International Court of Justice”

was not consistent with what was currently found in arbitration clauses. Moreover, its meaning was obscure in that the phrase “any of them may ... submit” suggested the idea of a unilateral application, whereas the phrase “subject to the agreement of the States concerned” suggested referral by way of a compromise.

26. Mr. BOWETT (Chairman of the Drafting Committee) said that the point raised was important and requested the Special Rapporteur to explain what he understood by the phrase “subject to the agreement of the States concerned”. Either it referred to a watercourse agreement as envisaged in article 4, which might itself provide, for example, for referral to the court by way of a compromise, or it referred to a particular agreement among the States concerned in the context of a given dispute.

27. Mr. ROSENSTOCK (Special Rapporteur) said that he had intended the phrase to cover several possible cases: a special or ad hoc agreement, an agreement within the framework of a watercourse agreement, the case in which the States concerned were parties to an agreement for the peaceful settlement of disputes covering, *inter alia*, that type of problem, or the case in which the States concerned had individually accepted the jurisdiction of ICJ. He could explain that intention in the commentary.

28. Mr. TOMUSCHAT said that the presentation would be improved if the semicolons at the end of each subparagraph were replaced by full stops. Subparagraph (b) contained an ambiguity due to the repetition of the phrase “the States concerned”. The reference in both cases was to the same States and it would be clearer to replace the second mention of “the States concerned” by “them”.

29. In subparagraph (c) the phrase “any of them may ... submit the dispute” wrongly suggested the idea of a unilateral application. Only the notion of “agreement” should be retained in the subparagraph.

30. Mr. ARANGIO-RUIZ said that the main concern, when examining a provision like subparagraph (c), which contained an arbitration clause, was not to lose sight of the fundamental difference between arbitration, on the one hand, and judicial settlement, on the other.

31. Arbitration was essentially consensual by nature, since the arbitral body could be created only by agreement and with the specific object of submitting a particular dispute to it.

32. On the other hand, a case could be brought, under certain conditions, before ICJ by unilateral application, as the Court was a permanent body. Subparagraph (c) could therefore be reworded to provide that each of the

States concerned could propose that the dispute should be referred by agreement to arbitration and that, in the absence of agreement, any party could bring a case before ICJ by unilateral application.

33. Mr. YANKOV said that that point, which had been fully discussed in the Drafting Committee, raised a problem that was one not of drafting, but of conceptual approach. The basic idea of the draft was that, in the context of a framework agreement which laid down general guidelines only, there must always be an agreement between the parties.

34. Mr. ROSENSTOCK (Special Rapporteur) said he recognized that drafting changes could doubtless be made to subparagraph (c). A problem of substance would, however, arise if the effect of the changes in its wording was to provide that any State party to the draft treaty would be deemed to have accepted the jurisdiction of ICJ. It should also be noted that the concept of the compulsory jurisdiction of ICJ had not been supported in the Drafting Committee.

35. Mr. ARANGIO-RUIZ said that the question of the compulsory jurisdiction of ICJ would in any event arise only in the highly unlikely case that the parties did not succeed either in settling the dispute through conciliation or in establishing an arbitral tribunal. The question of substance was, however, a matter for the Special Rapporteur. His main concern was with the wording of the last part of subparagraph (c), which seemed to him to be odd and virtually unacceptable coming from international lawyers. The words “any of them may, subject to the agreement of the States concerned, submit the dispute” in effect established a unilateral right, as it were, to refer the case to a court and, moreover, presupposed the prior existence of an ad hoc court, and that was a contradiction in terms.

36. Mr. AL-KHASAWNEH said that he agreed with Mr. Arangio-Ruiz on the substantive question of the compulsory jurisdiction of ICJ.

37. Mr. BOWETT (Chairman of the Drafting Committee) said that, as far as substance was concerned, the only compulsory provisions related to fact-finding—mediation and conciliation being optional. He did not see how provision for the compulsory jurisdiction of ICJ could be included in the paragraph. Mr. Arangio-Ruiz was, however, right about the wording of subparagraph (c) and it would be better to say simply “if ... the States concerned have been unable to settle the dispute, they may by agreement submit ...”.

38. After a discussion in which Mr. BOWETT, Mr. TOMUSCHAT, Mr. ARANGIO-RUIZ, Mr. ROSENSTOCK (Special Rapporteur) and Mr. YANKOV took part, the CHAIRMAN suggested that the Commission should resume consideration of article 33, as amended in the following manner: in subparagraph (b), the words “if agreed upon by the States concerned” should be replaced by the words “if agreed upon by them” and, in subparagraph (c), the words “any of them ... or to the International Court of Justice” should be replaced by the words “they may by agreement submit the dispute to arbitration or judicial settlement”.

39. Mr. ARANGIO-RUIZ said he could not resist the temptation of proposing that the wording of subparagraph (c) should be made even more clearly redundant by stating that “the States may or may not by agreement ...”. Letting jokes aside, he saw no point in stating, in a Convention, that the contracting States were free to agree, or not to agree, to resort to arbitration. Of course they were anyway.

40. Mr. AL-KHASAWNEH said he wished once again to stress that, in his view, some form or other of compulsory third-party settlement was essential in the draft articles. In general, those States which agreed to become parties to a treaty should agree that their conduct with respect to the interpretation and application of that treaty could be the subject of a third-party procedure for the settlement of disputes. In the more specific context of the topic under consideration, substantive obligations, namely, the obligation of equitable utilization and the obligation to exercise due diligence in order not to cause significant harm, were by nature elastic and subject to many different interpretations and therefore involved an inherent risk of dispute.

41. He also noted a difference of approach, in that little account was taken of political realism in article 4, which derogated from the general principle of the freedom of choice of the parties to a treaty, as compared to the place which that self-same political realism was accorded in article 33 and for the sake of which the idea of third-party compulsory settlement had been rejected. The Commission should, if only out of professional conscientiousness, foster the development of international law and the establishment of the rule of law in the international community and should not yield unduly before the political realism that the delegations in the Sixth Committee would no doubt propound, as it was their task to do.

42. Mr. VILLAGRÁN KRAMER said that the wording of article 33 as amended did not introduce any new idea or criterion that might be of guidance to States. The Commission had simply marked out a huge area of *laissez-faire, laissez-passer*. In subparagraph (c), for instance, it would be better to say “They must by agreement”, and not “They may by agreement”. The Commission did not share that view, of course, but Mr. Al-Khasawneh had been right to urge the Commission to ensure that the draft which was placed before the General Assembly invited it to forge ahead and to establish a clearer and more distinct obligation to settle disputes by the means provided for in the Charter of the United Nations.

43. Mr. KUSUMA-ATMADJA said that the first version of article 33 at least had the merit of providing for the possibility of referring disputes to ICJ and such referral would in any event always be on a voluntary basis. None the less, the new wording was certainly acceptable to more of the Commission’s members.

44. Mr. Sreenivasa RAO said that he welcomed the clarification introduced in the draft article and would have no difficulty in participating in a consensus in favour of the new text. He would, however, have preferred to place the emphasis on the basic principles and on the free choice of dispute settlement procedures. In

particular, the fact-finding commission of several members, provided for in article 33, might prove to be costly and even prejudicial to speedy and peaceful dispute settlement if one or more of its members disagreed with its findings, something that would be contrary to the desired objective. On the other hand, if the choice of a fact-finding commission was freely made by the parties, it could be extremely useful.

45. In drawing up a framework convention, the Commission did not have to go into the details of the dispute settlement procedures which were normally dealt with in other instruments. The Commission should abide by State practice and encourage those States which had not concluded an agreement on a particular watercourse to do so, which presupposed that it would provide them with a reasonable draft that could be finalized when the time came. The problem with regard to the utilization of watercourses was one of lack of agreement, but, when there was an agreement, it always embodied dispute settlement provisions.

46. The CHAIRMAN suggested that the Commission should adopt article 33 as amended on the understanding that all the views expressed would be duly reflected in the summary record of the meeting.

*Article 33, as amended, was adopted.*

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

47. The CHAIRMAN invited the Commission to continue its consideration of the draft resolution on unrelated confined groundwater proposed by the Drafting Committee (A/CN.4/L.492/Add.1).

48. Mr. TOMUSCHAT said that, as the question had not been examined in sufficient depth, he wished to reserve his position.

49. Mr. ROSENSTOCK (Special Rapporteur) explained that, at the request of the Commission, he had submitted a study at the current session on the question of the feasibility of including confined groundwaters in the draft articles.<sup>4</sup> The discussion to which that study had given rise showed that there were three broad trends of opinion: that the draft articles as a whole should be expressly extended to cover confined groundwaters; that confined groundwaters should not be included within the scope of the draft articles; and that a provision should be incorporated in the draft articles providing that the principles embodied in them would apply *mutatis mutandis* to confined groundwaters. The Drafting Committee had been invited to reconcile those views and, after careful reflection, had agreed on the resolution now before the Commission.

50. Mr. AL-KHASAWNEH said that he agreed with Mr. Tomuschat’s view.

51. Mr. SZEKELY said he thought that the text under consideration, which was explicit and well-balanced,

\* Resumed from the 2353rd meeting.

<sup>4</sup> This study was not issued as an official document of the Commission.

was the best compromise it had been possible to find on an extremely delicate matter.

52. Mr. Sreenivasa RAO said that the draft resolution was acceptable, although he would have preferred the question of confined groundwater to have been the subject of a more detailed study.

53. Mr. THIAM, drawing attention to the fact that he was one of those who had wanted the question of confined groundwater to be the subject of a separate study, noted with satisfaction that the draft resolution did not rule out that possibility at a subsequent stage.

54. On the assumption that the words "principles contained", in paragraph 1, in fact referred to the general principles referred to in article 5 (Equitable and reasonable utilization and participation), he wondered whether it would not be desirable explicitly to state that that was the case. With that proviso, he supported the draft resolution.

55. Mr. BARBOZA said that, while sharing the doubts which had been expressed by some members of the Commission and which chiefly reflected a lack of experience, he found the draft resolution useful, since it now provided for the protection of confined groundwater, to which the principles contained in the draft articles would be applied as necessary in a specific legal framework.

56. Mr. KUSUMA-ATMADJA said that he could accept the text submitted because the regime agreed for surface water and related groundwater was not explicitly extended to confined groundwater, about which little was known, and because its principles were supposed to be applicable to confined groundwater only "where appropriate". Sharing to some extent the views expressed by Mr. Tomuschat and Mr. Al-Khasawneh, he sought assurances that the draft resolution did not rule out the possibility of conducting a more detailed study of confined groundwater, which, given its importance, might merit particular attention or even a particular regime at a later stage. In that regard, he considered that the measures envisaged in the draft resolution were only interim measures.

57. The CHAIRMAN said it was his understanding that the text under consideration did not rule out the possibility of conducting a more detailed study on the question of confined groundwater. It simply reflected the current level of knowledge of the members of the Commission on the question, which led them to think that the agreed principles might be applicable to confined groundwater.

58. Mr. VILLAGRÁN KRAMER noted that the proposed draft resolution offered a useful frame of reference to States for the management of confined transboundary groundwater, to which the obligations, inter alia, not to pollute, not to cause harm, and to exercise due diligence in joint and equitable utilization could be applied.

59. He supported Mr. Thiam's proposal that paragraph 1 should specify that the "principles contained" were the general principles contained in article 5 of the draft articles. He hoped that the Special Rapporteur

would be able to redraft the text of that paragraph to that effect without affecting its substance.

60. Mr. YANKOV said he recognized that, with the possible exception of the Special Rapporteur, the members of the Commission were not very well versed in the question of confined groundwater, but it was not fair to say that little attention had been devoted to it: it was the subject of three long paragraphs in the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session (A/CN.4/457, paras. 394-396) and of an annex containing a wealth of miscellaneous information, appended to the second report of the Special Rapporteur (A/CN.4/462).

61. That being said, he would have preferred to have the applicable general principles listed in paragraph 1 of the draft resolution, particularly since there was no reference to the principle of equitable and reasonable utilization and participation; to the principles of cooperation and regular exchange of data and information—which did not seem to be useful; or to the principle of protection and conservation. However, in a spirit of compromise, he endorsed the current wording of that paragraph.

62. In response to those who had drawn attention to the unusual nature of the text under consideration, he pointed out that it consisted of recommendations and that, as such, it should be included in the report of the Commission on its work at the current session.

63. Lastly, he proposed that the draft resolution should be adopted by consensus.

64. Mr. ROBINSON said that he wondered whether the words "principles contained", which appeared in paragraph 1, referred only to the general principles contained in part two—in which case that should be specifically stated—or to the whole of the draft articles—in which case the draft resolution was acceptable. Paragraph 1 might be more acceptable if it simply reflected the idea that States could envisage applying to confined transboundary groundwater the principles listed in the draft articles.

65. Mr. TOMUSCHAT, referring to the question of the lack of clarity in the text, which Mr. Robinson's question, for example, had just highlighted, said that the words "may be applied" in paragraph 1 could be interpreted as meaning "are applicable" rather than "may or may not be applicable". It would thus be better to say that States could envisage applying those principles to confined transboundary groundwater.

66. Secondly, the question arose whether the words "principles contained" in paragraph 1 referred only to the principles contained in part two or also to part three (Planned measures), which could also be regarded as containing a principle in the sense that watercourse States wishing to undertake major works must notify other watercourse States likely to suffer adverse effects as a result.

67. Thirdly, it was important to bear in mind the major and essential difference between renewable and non-renewable confined groundwater, which should not be

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*<sup>5</sup> and *Corfu Channel*<sup>6</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

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,<sup>1</sup> 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

<sup>1</sup> 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,<sup>2</sup> 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 prejudice 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 prejudice. 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-

<sup>2</sup> 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 trans-boundary 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. MAHIU 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. MAHIU 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 diffi-

cult 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<sup>3</sup> (continued)\* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>4</sup> A/CN.4/460,<sup>5</sup> 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<sup>6</sup> 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.

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

<sup>4</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>5</sup> *Ibid.*

<sup>6</sup> *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 reinforcement 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.<sup>7</sup> 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-

<sup>7</sup> 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 judgments 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<sup>1</sup> (*continued*)\* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>2</sup> A/CN.4/460,<sup>3</sup> 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: *Souhaitant 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

\* Resumed from the 2350th meeting.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

did not accurately reflect the concept of complementarity between the court and national criminal justice systems. They might give the wrong impression that it was a question either of cases which national systems did not have the competence to resolve, cases which could not be completed for some reason or cases in which domestic remedies had been exhausted. He therefore proposed that the words in question should be replaced by the following formulation taken from paragraph 2 of the commentary to article 1: "in circumstances where other trial procedures may not be available or may be ineffective".

5. The draft statute ascribed importance to its preamble, a point made many times in the commentary; that was particularly true of article 35, which made the discretionary power of the court not to exercise its jurisdiction dependent on the court's assessment of the purposes of the statute set out in the preamble. That raised two questions. First, was it certain that the preamble identified in a sufficiently clear manner the purposes which the court must take into account when exercising its discretion not to hear a case pursuant to article 35? Secondly, in any event, should a matter as important as the purposes of the court be left to the preamble? Should it not be dealt with instead in an article of the statute itself drafted in clearer terms than the preamble? Of course, for the purposes of interpretation, the preamble formed part of the content of a treaty and was therefore not unimportant. Traditionally, however, the preamble was used to set the tone and historical context of a treaty. He would not insist on the point, but thought that the function of article 35 warranted a separate provision identifying the purposes of the court.

6. With regard to article 2 (Relationship of the Court to the United Nations), he agreed that the registrar must obtain the approval of the States parties for the purposes of an agreement establishing a relationship between the court and the United Nations, but it was not entirely clear that such approval would be obtained. That being the case and aware that the problems associated with financing and the United Nations budget would certainly have an impact on the court, he was reluctant to support the idea of establishing a relationship between the two institutions. He therefore proposed the deletion of the words "and providing, *inter alia*, for the exercise by the United Nations of the powers and functions referred to in this Statute" on the grounds that they were unnecessary and, more fundamentally, it was for the States parties to agree with the United Nations on the content of the agreement in question, and their approval should not be anticipated.

7. On article 3 (Seat of the court), he had the same comments concerning the approval of the States parties as he had made on article 2. He had some reservation as to the appropriateness of assigning responsibility to the Secretary-General of the United Nations for the conclusion of an agreement with the host State on behalf of the States parties, but that reservation depended on the stage at which the agreement was concluded. The host State agreement should deal with the various matters usual in such cases, but additionally with other matters, such as prison facilities in the host State.

8. In connection with article 6 (Qualification and election of judges), he had been among those who had argued that the court should consist of persons with both criminal trial and international law expertise: criminal trial expertise was needed, most importantly for assessing evidence; expertise in international law was needed for dealing with the many international law issues which arose during a trial, although the number of such issues would now be significantly reduced by the wise decision of the Working Group to have a specific enumeration of the crimes under international law over which the court would have jurisdiction. Thus, the court would not have the difficult task of determining whether a particular offence was a crime under international law. But it would have other international law issues to resolve: in particular, article 33 (Applicable law) provided that the court should apply, *inter alia*, the rules and principles of general international law. Paragraph (1) of the commentary to article 6 made it clear that, for the court to discharge its functions effectively, the correct balance must be struck between expertise in criminal law and criminal justice, on the one hand, and expertise in international law, on the other. But if that was so, how was that objective compatible with a system in which a judge could have much criminal trial experience, but none in international law, or vice versa? The work of a judge in court was a composite whole consisting of a variety of functions calling for a variety of skills. And that held good for the planned court. How would a judge with criminal trial experience, but no experience in international law, arrive at a correct decision if he was not able to make a judgement as to what constituted under general international law a crime against humanity in terms of article 20 (Jurisdiction of the Court in respect of specified crimes)? And, conversely, how would a judge with experience in international law, but no criminal trial experience, be able to assess and weigh evidence which was on the face of it contradictory and inconsistent? The system envisaged by the Working Group seemed to be based on the principle that a judge might very well be experienced in only one field and that the judges would have to rely on each other. The system might yield judges possessing both types of expertise. But it was also likely to yield judges possessing only one to the exclusion of the other. It had to be recognized that not many people had expertise in both areas. Article 6 could be improved so as to avoid what was tantamount to inviting States, with the system of list A and list B, to nominate persons having expertise in one area, but not in the other. He therefore proposed the deletion of subparagraphs (a) and (b) of paragraph 1 and the inclusion in paragraphs 2 and 4 of a provision to the effect that, in nominating and electing judges, the States parties should bear in mind that, in addition to the requirements of paragraph 1, judges should have criminal trial experience and recognized competence in international law. It would then be possible to reformulate the provision of the draft statute concerning the division between list A and list B by making it a kind of directive to guide the court, for example, when establishing a trial chamber, and to ensure that it had a satisfactory blend of judges with the two qualities and, so far as possible, a majority of judges with criminal trial experience. Alternatively, it might be made clear in the commentary that, when nominating and electing judges, the States parties should bear in mind that judges also

needed to have recognized competence in criminal trial and in international law. However, if subparagraphs (a) and (b) of paragraph 1 were retained, he wondered why the requirement was for “recognized competence in international law”, but only “criminal trial experience”. The level of expertise should be the same in both areas: the requirement should therefore be either for recognized competence in criminal trial and in international law or for experience in criminal trial and in international law. He also suggested that in the English version the end of paragraph 5 should read “. . . any case the hearing of which he has commenced to hear”.

9. Turning to article 10 (Independence of the judges), he said that he assumed that it was not the intention in paragraph 2 to preclude a judge who was working only part-time in the court from continuing as an employee in his country’s public service or civil service in the case of services based on the Westminster model: in that system, a civil servant worked with and for politicians who were members of the executive branch, but was not himself a politician; he was expected to continue to work in the civil service even after a change of government and must therefore carry out his duties impartially and objectively. Why could such a civil servant not be appointed as a judge of the court? In its present wording, paragraph 2 seemed to exclude that possibility, for the civil servant would be considered to be a member of the executive. And the commentary to article 10 did not offer any clarification. He proposed that the second sentence of paragraph (2) of the commentary to article 10 should be amended to read:

“The reference to the executive branch is not intended to cover persons who do not perform ordinary executive functions of government but have an independent role or office or who are employees in the public service of their country and do not perform political functions.”

10. With regard to article 12 (The Procuracy) he was not sure what was meant in paragraph 4 by the phrase “on a stand-by basis”.

11. As to article 15 (Loss of office), the relationship between paragraphs 1 and 2 was not clear. The phrase “who is found guilty of misconduct or a serious breach of this Statute”, in paragraph 1, almost suggested a procedure akin to a trial. However, it appeared from paragraph 2 that the decision to remove the Prosecutor from office would be taken by a majority vote of States parties—hardly a trial process—and that, in the case of a judge, it would be taken by a two-thirds majority of the judges. Paragraph (2) of the commentary indicated that the rules would provide for due process protection for the judge or officer. But the question was whether paragraph 1 of article 15 called for a separate procedure from that provided for in paragraph 2 or whether, as he believed, loss of office was determined by the States parties to the statute and the judges on the basis of paragraph 2. He would therefore propose that the introductory phrase of paragraph 2 should be reworded to read: “A determination as to loss of office on any of the grounds or for any of the reasons set out in paragraph 1 shall be decided by secret ballot.” He further proposed that, in paragraph 1, the words “found guilty of miscon-

duct or a serious breach” should be replaced by the words “found to have committed misconduct or a serious breach”, since the voting procedure by States parties could hardly lead to a finding of guilt. He also had some doubts about the need for paragraph 3, which was, in his view, certainly applicable to judges, who should not participate in the decisions concerning other judges of the court. He wondered, however, whether the same was true in the case of other officers of the court, who should be fully entitled to participate in the proceedings, since the rules would in any event provide for due process.

12. So far as article 16 (Privileges and immunities) was concerned, he wondered whether there were any compelling reasons for conferring diplomatic privileges and immunities on the staff of the Procuracy, which included persons who were only clerks, while the staff of the Registry would have only functional privileges and immunities. It was worth noting in that connection that article 30, paragraph 3, of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991<sup>4</sup> placed the staff of the Prosecutor and of the Registry on the same footing.

13. Article 19 (Rules of the Court) raised the difficult question whether the rules of the court made by the judges should include the rules of evidence to be applied in a case by the court. Article 44 (Evidence) prescribed two rules of evidence, one relating to judicial notice of facts of common knowledge and the other to the reception of evidence obtained by illegal conduct. There were no other rules of evidence. Article 19 provided that the rules of evidence would be drawn up by the judges. He had no definite view on the matter, but that was not because he believed that those rules should be drawn up by the States parties and reflected in the statute. Rather, he doubted whether they could or should be drawn up by the court because they differed significantly from the rules of procedure the judges would have to lay down, and rightly so, and because they came very close to substantive law. Under article 33, the court would apply the rules and principles of general international law, which must encompass rules of evidence, and it would have to extract from those rules and principles applicable rules of evidence in the same way that it would extract other substantive rules relating to international criminal law, which admittedly, was not very well developed. While he had a flexible attitude to the matter, he could not help wondering whether it was prudent to include the article.

14. Mr. CALERO RODRIGUES said that he had just a few comments to make on parts one and two and on the draft statute as a whole. He was sorry, however, that the Commission absolutely had to submit a draft statute to the General Assembly at its forthcoming session, since the Working Group had not had time to improve the draft.

15. Referring to the preamble, he agreed with Mr. Robinson regarding the phrase “in cases which those systems cannot resolve”, which did not convey the

<sup>4</sup> Hereinafter referred to as the “International Tribunal”. For the statute, see document S/25704, annex.

desired intent. While he could accept Mr. Robinson's proposed version, he considered that it would suffice simply to delete that phrase. As to article 2 (Relationship of the Court to the United Nations), which had been debated at length in the Working Group, in his view, it represented a compromise between the position of those who wanted to establish a full United Nations body, with the inclusion of a provision to that effect in the Charter of the United Nations, and the position of those who considered that it was in any event necessary to establish a relationship between the United Nations and the court to ensure that the court was an instrument of the international community and not of a few States. He would have preferred the Commission as a whole to make it clear that, for the court to be effective, it would have to be attached to the United Nations through an amendment to the Charter. He regretted that the commentary to article 2 was so short. He also regretted that the informal paper prepared by the secretariat of the Working Group (ILC(XLVI)/ICC/WP.2, annex), which set out, very objectively, several possibilities in that connection and would provide a useful element of information for those at State level who would have to decide the matter, had not been appended to the commentary. In his view, the formula used, whereby the Registrar would be empowered with the approval of the States parties, to enter into an agreement or agreements establishing an appropriate relationship between the court and the United Nations, was vague and did not allow the court itself an opportunity to give its opinion because the Registrar would act only on the instruction of States parties or with their approval. Like Mr. Robinson, he doubted that the headquarters agreement could be concluded by the Secretary-General of the United Nations and the host State for, once again, that would deprive the court of the possibility of making its views known. He trusted that the court would be given a more active role in the matter.

16. He had three comments to make on part two concerning the composition and administration of the court.

17. First, he found it strange that article 5 (Composition of the Court) made no mention of the judges. The question of the election of judges was dealt with only in article 6, paragraph 3, although they would undeniably form an integral part of the court from the outset, as they would have the task, under article 19, of preparing the rules of the court. It therefore should have been stated expressly in article 5 that the court was composed of 18 judges.

18. Secondly, with regard to the choice of judges, he agreed with Mr. Robinson about the drawbacks of the system of lists A and B. No doubt, the Working Group had wanted to ensure, by means of that complicated system, which was also reflected in the composition of the chambers, that the judges had the highest qualifications in both criminal and international law. But the solution adopted might in the end run counter to the desired objective: even if the decisions of the chambers were collective, could a judge with wide experience in one field, but none in the other, really work efficiently?

19. One minor point concerned the system of alternate judges, which, as contemplated in article 9 (Chambers), paragraph 7, would not, in his view be effective. A close

calculation showed that, of the 18 judges elected, only 17 would be available, since one would have to assume the duties of President. Six others would sit on the appeals chamber. If two trial chambers sat simultaneously, that would leave only one of the 11 remaining judges to carry out the duties of alternate judge. In the circumstances, there seemed little point to paragraph 7 and it could be deleted without difficulty.

20. Mr. YAMADA said that, thanks to the written comments of Governments and to the discussions in the Working Group, the draft statute now before the plenary meeting reflected the significant progress made as compared with the version considered at the previous session. He would therefore once again stress the need to complete work on the draft statute by the end of the current session so that the final report could be submitted to the General Assembly at its forty-ninth session.

21. He had four comments to make on the preamble and on parts one and two of the revised draft statute.

22. First, he welcomed the insertion of the third paragraph of the preamble, which stated clearly that the court was intended to be complementary to existing national criminal justice systems. That was a balanced approach, in his view, and should help the court to become an organ which was accepted as universally as possible by sovereign States.

23. Secondly, he was in favour of the establishment of the court by a treaty rather than by a resolution of the United Nations, on the understanding that an appropriate relationship would be established with the United Nations by a separate agreement. Some members would obviously have preferred the court to be made a judicial organ of the United Nations, the Charter of the United Nations being amended accordingly. However, the treaty solution had the advantage of implying a firm commitment to the court by each State party, and that was necessary for the proper functioning and stability of the court. It would not prevent the international criminal court from enjoying a status and authority comparable to those of ICJ.

24. Thirdly, although he would have preferred the court to be given a permanent character in order to ensure its stability and independence, he recognized the need for a reasonable balance between the cost and the benefit. In that sense, the current formula whereby the court would meet when necessary to consider a case referred to it afforded a flexible and well-balanced solution which had his support.

25. Fourthly, with regard to the composition and administration of the court, the most important point was to ensure the independence and impartiality of the judges and the Procuracy. From that standpoint, he could approve the revised draft articles as a whole and, in particular, article 15, paragraph 2 (a), which provided that loss of office, in the case of the Prosecutor, would be decided by a majority of States parties and not by the court, as had been the case in the previous version. Also, in order to maintain the truly international character of the Procuracy, he would favour the inclusion in article 12 of a provision stipulating that the Prosecutor and

Deputy Prosecutors could not be nationals of the same State.

26. Mr. THIAM, speaking as a member of the Working Group, said that he, of course, accepted the draft statute. He regretted, however, that the drafting proposals made by the French-speaking members concerning the French version of the statute had not been taken into account. To give but one example, he had asked that the phrase in the second preambular paragraph, reading *cette cour est destinée à n'avoir compétence que* should be amended, as it was particularly infelicitous and also far too weak in that it gave the impression that the Commission was defending itself in advance against any criticisms from States which might fear that their jurisdiction was being ousted. He had also noted certain other instances of awkward drafting in the French version of the proposed articles.

27. His only remark on substance related to the appointment of judges. The system of lists A and B was highly questionable, for two reasons. In the first place, it was pointless for the judges to be too specialized at the outset, since they would have ample time to acquire on-the-job training; secondly, the inevitable consequence of such a system would be to make access to the court very difficult for judges from the third world who would not have had the opportunity to acquire the necessary knowledge in their own country to become specialists in criminal law or international law. Such "discrimination" would be wholly out of keeping with the very concept of an international court.

28. As to the relationship with the United Nations, he regretted that the opinion which he had represented—a minority opinion, admittedly, but none the less one that was very strongly held—and which favoured an amendment to the Charter of the United Nations had not been reflected at least in the commentary. Assuming that it was not conceivable at present for the court to be made an organ of the United Nations, that should be the ultimate aim even if it meant an amendment to the Charter. In any event, there would probably be an opportunity to amend the Charter for many other reasons, and the present instance was no less honourable than the others. In his view, along with ICJ, which was an organ of the United Nations, it would be advisable to have an international criminal court which would likewise be an organ of the United Nations, and he did not see why there would be any inequality of treatment as between the two international courts.

29. The CHAIRMAN said that he would ask the secretariat to make the necessary corrections in the French version of the draft statute, in consultation with Mr. Thiam.

30. Mr. PAMBOU-TCHIVOUNDA joined with the previous speakers in praising the spirit of openness that had guided the Working Group at the current session. But, while it was true that the current revised draft statute represented a definite improvement on the text submitted the previous year, it was also true that it might be improved still further in both form and substance.

31. With regard to substance, his remarks would focus on articles 8, 12 and 13 concerning the presidency,

Procuracy and Registry of the court, all of which had a collegiate structure. He feared that there might be a "telescoping" of those three organs once they had begun to function. As an example he cited article 8, paragraph 4, which stated that "pre-trial and other procedural functions . . . may be exercised by the Presidency in any case where a chamber of the court is not seized of the matter". The question arose, first, in what respect those pre-trial functions were specific and differed from the investigatory functions habitually exercised by the Procuracy; and, secondly, why mention was made of the chambers of the court, in view of the fact that no provision of article 9 stated that the chambers were investigatory bodies or organs. As to the functions of the Registry, the least that could be said was that they were not very clearly defined in article 13. It was necessary to refer to the commentary in order to find some indication of those functions.

32. With regard to form, he had some criticisms to make, particularly concerning articles 15 and 16. He took exception to the use of the words "the person" at the start of article 15, paragraph 3, to refer to a judge. That wording was hardly compatible with the dignity of the function in question and, in his view, it would have been preferable in that paragraph to repeat the words "a judge or other officer of the court" used at the beginning of paragraph 1. Lastly, in article 16, paragraph 3, was it really necessary to specify that "counsel, experts and witnesses before the court shall enjoy the privileges and immunities necessary to the independent exercise of their duties"? That seemed to go without saying and, unless there had been particular reasons for adding those words, he would prefer them to be deleted.

33. Mr. ROSENSTOCK said that he was basically in favour of the text submitted, although he believed that some of the drafting amendments proposed by Mr. Robinson deserved consideration. However, he totally disagreed with the view expressed by Mr. Calero Rodrigues concerning paragraph 7 of article 9, for that paragraph had a fundamental role to play. Specifically, it was important because of the structure of article 45 (Quorum and judgement), in which there was the possibility of a verdict being rendered without the presence of all of the fact-finders throughout the procedure. That was something which could happen and which should not necessarily invalidate a long, complex and expensive trial, but it should be avoided if at all possible. That, then, was the office of article 9, paragraph 7, which must therefore be retained and possibly even strengthened, although at the same time it must be recognized that there might be circumstances in which the court might be unable to apply it, *inter alia*, those referred to by Mr. Calero Rodrigues. That was no doubt the reason why that paragraph did not constitute a peremptory provision.

34. Article 6 was an extremely ingenious, albeit somewhat complex, provision designed to produce a court fully fitted to accomplish its task. Experience suggested that it was difficult even to lay down general criteria. If one went beyond general criteria, requiring of each judge experience and knowledge in both criminal law and international law, as would be ideal, that would be tantamount to preventing a large number of States from putting forward candidates. Article 6 was the solution

closest to the ideal balance between the two types of expertise, since, at the trial level, preeminence was given to criminal law experts, while, at the appellate level, it was experience in international law that was preeminent.

35. Mr. PELLET expressed his admiration for the considerable progress made by the members of the Working Group, its Chairman and the Special Rapporteur. Nevertheless, he continued to have very serious doubts and reservations about some provisions of the draft.

36. Concerning part one, he thought it regrettable that the Working Group had again closed the door to all the possibilities left open at the preceding session with regard to the establishment of the court, since it now envisaged the establishment of the court only by treaty or, not without reservations, by an amendment to the Charter of the United Nations.

37. With regard to the latter course, those reservations were probably realistic, given the political difficulties and technical legal problems that would be encountered if any attempt were made to revise the Charter. Nevertheless, as the fiftieth anniversary of the establishment of the United Nations approached, the revision of the Charter was on the agenda and, if the court could be established as the principal judicial organ of the United Nations in criminal matters, that would be an excellent solution. It was thus regrettable that the Working Group seemed to regard that solution only as a very remote eventuality.

38. The fact remained that, although the Commission was restricting its ambitions, two courses were possible. The first was the establishment of the court by a resolution of the General Assembly. That would be sufficient to legitimize it, but it might be possible to associate the Security Council with that resolution, with a view to increasing the effectiveness of the court and disarming some important political opposition. The second possible course was to establish the court by means of a treaty. That was the choice of the Working Group, a choice that it justified in an extremely summary—not to say cavalier—manner in paragraph (2) of the commentary to article 2. In particular, he did not understand why it would be “undesirable” to establish the court by a resolution of the General Assembly.

39. The Working Group’s choice was very specifically reflected in several provisions of the draft and, in particular, in article 2, which provided solely for the conclusion of an agreement between the court and the United Nations. In the first place, that choice was, in his view, intrinsically debatable for positive reasons, since it denoted a curious philosophy. In the commentaries to part three, the Working Group rightly pointed out that the establishment of an international criminal court was intended to make it possible to try the most serious international crimes, those that affected the international community as a whole. Yet that objective would surely be much better ensured if the court was established by a resolution of the General Assembly, which was the most appropriate representative of that community, than if it was established by a treaty which might be ratified by about 60 States. There was no guarantee that those States would be representative of the international community as a whole and it was likely that they would not include

those States that did the most to jeopardize the interests of the international community as a whole, those whose nationals most deserved to be brought to trial.

40. The Working Group’s choice concerning the means of establishing the court was also debatable for negative reasons, namely, the resultant lack of internal coherence in the draft. As an example, he cited paragraph 2 of article 3, which in effect provided that the Secretary-General could conclude a treaty on behalf of a body other than the United Nations. Much more serious was the case of article 23 (Action by the Security Council), for it was hard to conceive of the Security Council, which was to all intents and purposes the representative of the universal community of States, handing matters over to a body established by a small group of “virtuous” States.

41. Concluding his comments on part one, he said that, if the Working Group were to retain such a restrictive draft, even after some “fine tuning”, he would be unable to support it, particularly with regard to article 2, article 3, paragraph 2, and a number of other provisions of part three which he would discuss at the appropriate time.

42. With regard to part two on the composition and administration of the court, he drew attention to a few less important problems.

43. With reference to article 6, he considered that the draft was not as complicated as some claimed and that furthermore it made it possible to maintain a happy balance between the necessary competence of criminal trial experts and experts in international law.

44. Concerning article 12, he would have preferred the functions of investigation and prosecution to have been kept separate, thereby strengthening the guarantees accorded both to those accused and to the victims, but he did not wish to make that an issue of principle. Paragraph 2 was an improvement on the previous draft, in that it provided for some degree of collegiality between the Prosecutor and Deputy Prosecutors, and that was preferable to a sum of individuals where the prosecution of international crimes was concerned. The precedent of the Nürnberg Tribunal could be invoked in support of that collegiality. Paragraph 4 was incomprehensible in both French and English and the commentary thereto provided little in the way of clarification.

45. As for article 13, on the Registry, he was surprised at the provision in paragraph 2 for a five-year term of office or such shorter term as may be decided on.

46. Concerning article 16, he wondered why the Vienna Convention on Diplomatic Relations had been preferred to the Convention on the Privileges and Immunities of the United Nations.

47. With reference to article 17 (Allowances and expenses), he saw no justification for the provision of an annual allowance to the President. It would be preferable to apply the same system to the President as was provided for the judges, depending whether they exercised their functions on a part-time or a full-time basis.

48. Mr. THIAM, speaking as a member of the Working Group, said that he wished to revert to some points on which he had already expressed his disagreement in the Working Group.

49. With regard to article 6, care must be taken not to create a watertight division between different disciplines. Citing the example of ICJ which essentially applied international law, he pointed out that neither of the two judges who had successively been appointed by Senegal had been an expert in international law. Yet both had acquired that expertise.

50. It was only to be expected that there should be distinctions between different disciplines in academic life, but matters were different in the outside world.

51. On article 12, he recalled that, in the Working Group, he had insisted on the need to distinguish between the exercise of the functions of investigation and prosecution, with the essential role of the Prosecutor being to prosecute, whereas the investigation must be entrusted to another judge. Of course, he understood the financial concern that had resulted in no provision being made to establish a specific investigatory organ, but it was regrettable that concerns of that kind should operate to the detriment of the fundamental principles of law.

52. Mr. ARANGIO-RUIZ said that it would not be desirable to reopen the debate on the means of establishing the international criminal court at the current stage of the process. However, since the question had been raised, he wished to reaffirm his support for the Working Group's choice of a treaty as the proper way of establishing an international criminal court. The establishment of an international criminal court by a resolution, whether a resolution of the General Assembly or of the Security Council, or indeed of both bodies, would not be in accordance with international law. Only its establishment by a treaty would constitute a valid procedure. Admittedly, it would give rise to difficulties, the main one being that not all States Members of the United Nations would necessarily be parties to it, but, to begin with, that difficulty was not insurmountable and, furthermore, whatever the extent of the difficulty, the solution was not to be found in the establishment of the court by a resolution of a United Nations body. A treaty was needed.

53. Mr. Sreenivasa RAO said that the draft statute could certainly be improved with regard to its form and even to some points of substance. As a member of the Working Group, he had always endorsed the idea of a permanent court which, while certainly costly, would be a better way of providing the international community with an independent and objective system of criminal justice. The members of the Commission who were not part of the Working Group could draw attention to any matters that might have escaped the Group's notice, but on the whole, in view of the variety of possible options, the text on which the Working Group had finally agreed was the best that could have been achieved within the time-limits set by the Commission. Compared to the statute of the International Tribunal, the text was even innovative, for example, with regard to the composition of the court (arts. 5 and 6). If the Commission spent one more year on the draft statute, doubts or disagreements

would still exist. The best course would therefore be to endorse what had been achieved and submit it to Member States so that they could comment on the fundamental problems to which the text gave rise, in particular the question of the relationship between the court and the United Nations. The Working Group had not considered itself competent to decide on that issue and it was thus up to the Member States to do so.

54. Mr. VILLAGRÁN KRAMER said that a distinction should be made between differing viewpoints and drafting problems. As far as the latter were concerned, the observations of the members of the Commission might receive closer attention if they were submitted in writing. As to substance, the distinction between criminal justice and international law actually reflected the problem of balance in the composition of the court. In that connection, account should be taken of the comments by Mr. Robinson and Mr. Thiam but there might well be persons with broad experience in both criminal law and international law and the court might be composed of judges with broad experience in the first field without necessarily being experts in the second, and vice versa.

55. With regard to the relationship of the court to the United Nations, article 2 stipulated that the registrar could enter into agreements establishing that relationship and article 3 provided that the Secretary-General could conclude an agreement with the host State governing the relationship between that State and the court. The exact nature of the relationship was not at all clear from those two provisions. As to whether or not the Security Council could bring cases before the court, the point was that a body that had the power to do more could always do less. The Council could, of course, not exercise judicial functions, but, under Chapter VII of the Charter of the United Nations, it could determine whether there had been an act of aggression, whether an international crime had been committed and whether the perpetrators of that crime should be punished. It would therefore not be going beyond its powers if it brought cases before the court. The matter had been discussed at length by the Working Group and the provisions agreed on in that connection represented the common denominator of the views expressed.

56. Mr. de SARAM said that he generally agreed with the revised draft statute, which was clearly a very great improvement over the text considered at the preceding session. The members of the Working Group and, in particular, its Chairman, who had definitely done more than had been asked of him, were to be congratulated on their efforts. In any event, the draft statute would be reviewed and "fine tuned" by the Working Group in the light of the observations made in plenary and in the Working Group itself.

57. With regard to the substantive issue of whether the court should be established by resolution or by treaty, he was almost entirely in agreement with Mr. Arangio-Ruiz. In the ideal situation where general political will existed and the necessary funds were available, the best course would be to amend the Charter. At the present stage, however, neither of those two conditions had been met. Noteworthy in that connection was the fact that,

according to the Advisory Committee on Administrative and Budgetary Questions (ACABQ), operating costs for the International Tribunal would amount to US\$ 32 million per biennium, and that gave some idea of the amounts involved. Moreover, as envisaged by the Working Group, the statute would be annexed to a treaty concluded between States parties establishing the court. Such a treaty would enter into force only after a large number of States, from all regions of the world, had acceded to it. The 60 ratifications or accessions which had been required for the United Nations Convention on the Law of the Sea were too low in number for the statute.

58. In respect of the other substantive questions raised during the debate, the preamble should in fact be an article dealing with the objectives of the court and the future treaty should have its own preamble. With regard to articles 2 and 3, it would be best to omit any reference to the registrar or the Secretary-General and simply to indicate that agreements would be concluded. In terms of the composition of the court, he agreed entirely with Mr. Calero Rodrigues that reference should be made to the judges at the start and that the articles of part two should be reorganized. The provisions of article 6 were somewhat complicated, but not without reason. The Working Group had given much thought to the question of a fair balance between the criterion of criminal trial experience and that of competence in international law and the wording it had chosen seemed the most appropriate.

59. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that nearly all the observations made during the debate could be readily taken into account by the Working Group. Several observations by Mr. Robinson, in particular, could be incorporated into the various articles. Like Mr. de Saram, he personally was of the view that the preamble should actually be an article of the statute. It would likewise be necessary to clarify the question of who would conclude the agreements referred to in articles 2 and 3. Some points could nevertheless be clarified immediately.

60. Mr. Pambou-Tchivounda had asked whether article 8, paragraph 4, gave the court prosecutorial functions. That was not the case because the provision in question referred to those articles of the statute that required that the court as a whole should achieve certain purposes. In any case involving prosecutorial functions, the Procuracy or the Prosecutor was always mentioned explicitly. Under articles 24, 33, 35 and 43, for instance, the court had certain functions and obligations which would be exercised by the presidency until a chamber had been established. The point had been to avoid repetition in the text and nothing sinister had been intended. The problem of alternate judges, raised by Mr. Rosenstock, in article 9, paragraph 7, could in fact become highly relevant in practice, since trials for serious crimes could continue for many months. There was nothing to prevent a judge sitting in one chamber from acting as an alternate judge in another as long as the hearings were coordinated. That provision was important and should be retained.

61. In respect of the Procuracy, he agreed fully with those who maintained that the Prosecutor and the Deputy Prosecutor must not be nationals of the same State. It would also be appropriate to replace the expression "on a stand-by basis" with more precise wording. The Working Group had given careful thought to the distinction between investigation and prosecution that existed under certain legal systems. All things considered, it had decided not to retain that distinction, for two reasons. First, all the matters brought before the court would have already been investigated and the complaint would be accompanied by all the elements that the complainant State could bring to bear. Secondly, as a first attempt was being made to establish a permanent criminal court, the Working Group had preferred to set up as flexible a mechanism as possible with as few functionaries as could be compatible with due process. Mr. Robinson's comments on article 15 and those by Mr. Pambou-Tchivounda on paragraph 3 of that same article were completely justified. The wording of article 16, paragraph 3, was based on that of the Charter of the United Nations. Lastly, the question of the annual allowance for the President should be re-examined.

62. Two issues of principle had emerged from the debate. The first concerned the relationship between the court and the United Nations. The views expressed by Mr. Thiam on that matter represented the best possible solution for many members of the Commission and it was to be hoped that those views would be accurately reflected in the commentaries. Mention of them had already been made in the preliminary note to the draft commentaries and, in more detail, in paragraphs (1) to (5) of the draft commentary to article 2. With regard to the exercise by the organs of the United Nations of the powers referred to in the statute of the court, notwithstanding the problem of the drafting of article 3, the Working Group had used the precedent of the agreement between IAEA and the United Nations, wherein the latter exercised its powers on behalf of the former even though all the members of one were not necessarily members of the other. Like Mr. Calero Rodrigues, he would have preferred the useful and objective document prepared by the secretariat (ILC(XLVI)/ICC/WP.2) to be annexed to the report of the Working Group, but one of its members had objected strongly.

63. The Working Group had been of the view that the court should have the power to operate in conjunction with the United Nations, but it had not been in favour of establishing the court by means of a resolution. Many members had considered that it would be undesirable for the court to be established as a result of decisions taken by the executive branch of the countries voting for the resolution in question. The advantage of a treaty was that it could not enter into force until constitutional requirements had been met, whatever the constitutional system concerned. Moreover, either resolutions were recommendations to States, which would not be satisfactory in the case of the court, or they were binding, in which case the relationship between the State which was the addressee of the resolution and the United Nations would come under Chapter VII of the Charter, which would rarely be the case. The Working Group was entirely willing to give greater attention in the commentary to the views of those advocating the establishment

of the court exclusively through a resolution, but that did not change the fact that opposition to that solution had also been expressed in the Sixth Committee, where not one of the Member States expressing their views had been in favour. The guiding principle of the proposed statute was to set up a more solid constitutional foundation than an ad hoc tribunal. The other relevant point in that connection was that the subordination of the court to the Security Council or to the General Assembly would allow those two organs to dismantle at any time the court they had established, and that was highly undesirable for a criminal justice system.

64. The second question of principle concerned the qualification of judges. The provisions adopted in that respect in article 6 were perhaps complex, but certainly not excessively so. Their purpose was to reassure the many Member States which had expressed very strong reservations in the Sixth Committee about the idea of a criminal court functioning without a substantial contribution from judges having experience of the administration of criminal justice. In that respect, he agreed entirely with Mr. Pellet.

*The meeting rose at 5.50 p.m.*

## 2358th MEETING

*Tuesday, 28 June 1994, at 10.10 a.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

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

### Cooperation with other bodies (*continued*)\*

[Agenda item 8]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN welcomed Mr. Siqueiros, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

2. Mr. SIQUEIROS (Observer for the Inter-American Juridical Committee) said that the attendance of an observer from the Inter-American Juridical Committee (IAJC) at the Commission's session was in keeping with a pleasant tradition which, together with the regular vis-

its made by a representative from the Commission to IAJC headquarters at Rio de Janeiro, Brazil, promoted ties of understanding between the two bodies. Thus it was that Mr. Calero Rodrigues' recent visit had provided IAJC with an opportunity to learn about the many drafts and new topics under consideration. He himself had also gained a deeper insight, thanks to the guidance and advice of his compatriot, Mr. Szekely, into the Commission's agenda and its methods for dealing with the various issues referred to it. He congratulated the Commission on its accomplishments and expressed the hope that its work would be crowned with success.

3. One of the duties of IAJC under its statute was to enter into cooperation with national and international bodies and organizations engaged in the development and codification of international law and in the study, teaching and dissemination of, and research into, legal matters of international interest. In August 1993, IAJC had sponsored a meeting with legal advisers from Ministries of Foreign Affairs throughout the region. The purpose of the meeting had been to stimulate an exchange of views on topical international legal issues of interest to the Foreign Ministries of the countries of the American continent. It had proved to be a fruitful initiative, for the meeting of diplomatic advisers and members of IAJC had provided a forum for the identification of issues of crucial concern at the regional and universal levels. The discussions on representative democracy in the context of the inter-American system, human rights violations by unofficial groups, drug trafficking and terrorism, all of which posed a threat to security throughout the continent, deserved special mention.

4. The history of IAJC dated back to the Third International Conference of American States, held in 1906, which had set up a special Commission of jurists.<sup>1</sup> During the first stage of its activities, from 1912 to 1939, the Committee had approved 12 drafts on public international law as well as what was to become the Bustamante Code.<sup>2</sup> The second phase had commenced in 1942 when it had assumed institutional form, taking the name by which it was now known, with headquarters in what at the time had been the capital of Brazil. Later on, with the adoption, within the framework of OAS, of the Protocol of Buenos Aires and with the reform of its constituent instrument, the Inter-American Council of Jurists had been dissolved and its main functions had passed to IAJC, which had thus been elevated to the status of a principal organ of OAS. Its basic duties were to act as an advisory body for legal matters, to promote the progressive development and codification of international law, to study the legal issues involved in the integration of developing countries in the continent and, where appropriate, to consider the possibility of standardizing their legislation.

5. As to the legal dimensions of integration, IAJC already had the benefit of comparative studies of the various subregional systems concerning methods for the settlement of disputes. The studies analysed the pro-

<sup>1</sup> See *The International Conferences of American States, 1889-1928*, New York, Carnegie Endowment for International Peace, 1931.

<sup>2</sup> Official name of the Code of Private International Law contained in the Convention on Private International Law.

\* Resumed from the 2350th meeting.

cedures available under community law as compared with those adopted in free-trade areas. They also covered bilateral and trilateral schemes operating within the context of the Latin American Integration Association (LAIA) or those intended for use in the event of accession to the North American Free Trade Treaty (NAFTA).

6. Another important task was to update the provisions of an environmental law for the Americas. Work already undertaken by IAJC had been reviewed in the light of instruments on the environment and sustainable development approved by the United Nations. Over the past two years, resolutions had been adopted on liability under environmental law and on the possibility of updating the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, of 1940. IAJC also complied with the requirements of the General Assembly as set forth in the Inter-American Action Programme for the Preservation of the Environment.

7. As for encouragement and mutual protection of foreign investment, IAJC had decided, in the light of reports from its members, that it would be appropriate to study the general bases or a set of basic principles for proper regulation of stock markets. It involved a scrutiny of the regulations required to create a climate of confidence for capital flows from abroad into the stock exchanges of developing economies. Such regulations might be reflected in a model law, the harmonization of domestic laws or simply by publicizing such basic principles as transparency, auditing, prevention of insider trading, and dispute settlement methods. The work on international trade law included papers on international insolvency and the bankruptcy of multinationals.

8. One event which had brought OAS, and IAJC in particular, much satisfaction was the success of the Organization of American States Fifth Inter-American Specialized Conference on Private International Law, held in Mexico in 1994. Two important conventions had been adopted at the Conference, one on international contract law and the other on the civil and criminal law aspects of international trafficking in young persons. Both instruments had been based on technical documents prepared by IAJC.

9. The IAJC work programme continued to include topics relating to information law, improvements in the administration of justice, democracy in the inter-American system and the legal aspects of foreign debt. IAJC had decided to drop from its work programme the topic of the establishment of an inter-American criminal court until such time as the member Governments of OAS had reacted more positively and had provided IAJC with guidance on the criteria to be adopted.

10. It was apparent that the work of IAJC in the regional context and of the Commission in the universal context were similar and that, in some respects, they converged. There might be differences of approach, but the points on which they agreed in their endeavour to codify and progressively develop international law were more important. Economic interdependence and the increasing trend towards globalization also had an obvious legal element. The problems in international law were common to all regions of the world, involving as

they did such topics as State responsibility, crimes against the peace and security of mankind, and international watercourses.

11. In keeping with the terms of article 26, paragraph 4, of its statute, the Commission had established and now maintained cooperation with committees and commissions in the inter-American, Asian/African, European and Arab regions. That cooperation would undoubtedly promote the objectives set by the United Nations in declaring the 1990s the United Nations Decade of International Law.<sup>3</sup>

12. Mr. CALERO RODRIGUES said that he had had the honour to represent the Commission at the recent meeting of IAJC and had been able to exchange views with the Committee's members and to see for himself how interested they were in the Commission's work. He had taken the opportunity to suggest that the Commission's reports should be forwarded to members of IAJC, something he understood had now been done. Mr. Siqueiros might perhaps also wish to arrange for members of the Commission to receive the reports of IAJC, for the more the Commission knew about the work of regional organizations the better. He was confident that the two bodies would continue to work and to cooperate in the future. He thanked Mr. Siqueiros for the welcome he had received in Brazil and also for the statement to the Commission.

13. The CHAIRMAN, also thanking Mr. Siqueiros for his statement, said he agreed with the suggestion that there should be an exchange of reports between the two bodies, which would greatly assist the Commission in its task. The Commission had always set much store by the special relationship it enjoyed with regional bodies such as IAJC, since that relationship was invaluable in helping to acquaint the Commission with the work of codification under way elsewhere. On behalf of his colleagues, he expressed the hope that the mutually advantageous cooperation between IAJC and the Commission would continue in the future.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>4</sup> (continued) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>5</sup> A/CN.4/460,<sup>6</sup> 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)**

14. The CHAIRMAN invited the Commission to continue its consideration of the draft statute for an international criminal court, beginning with part three which

<sup>3</sup> Proclaimed by the General Assembly in its resolution 44/23.

<sup>4</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

<sup>5</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>6</sup> *Ibid.*

was entitled "Jurisdiction of the Court" (A/CN.4/L.491).

15. Mr. ROBINSON said that the approach adopted to the jurisdiction of the court had helped to resolve many of the problems identified by certain members of the Commission and also in the Sixth Committee, and the Working Group on a draft statute for an international criminal court was to be congratulated in particular on moving away from the artificial distinction between treaties that defined crimes as international crimes and treaties that merely provided for the suppression of undesirable conduct that constituted crimes under national law. In establishing a body such as the international criminal court, care should be taken to create a jurisdictional basis that was as uncomplicated as possible, and to avoid unnecessary refinements. It was regrettable, therefore, that the Working Group had established yet another requirement that was equally unwarranted.

16. Subject to the proposal he wished to make with respect to article 21 (Preconditions to the exercise of jurisdiction), he fully endorsed the Working Group's decision to refer expressly, in article 20 (Crimes within the jurisdiction of the Court), to the crimes under international law over which the court had jurisdiction; he also agreed with the four crimes listed, namely, genocide, aggression, grave breaches of the laws of war, and crimes against humanity. He strongly believed, however, that apartheid as defined in the International Convention on the Suppression and Punishment of the Crime of Apartheid should also be included in the list, even if the list was not intended to be exhaustive. Admittedly, apartheid appeared in the annex to the statute as a crime to which article 20, paragraph 2, applied and over which the court therefore had jurisdiction. But he considered on both juridical and policy grounds that, if there was to be a list of crimes under general international law over which the court had jurisdiction—and he had doubts about the utility of such a list—then apartheid should be in it.

17. To explain first the juridical grounds for his view, he would point out that all the arguments adduced in paragraph (5) of the commentary to article 21 (ILC(XLVI)/ICC/WP.3), with regard to the Convention on the Prevention and Punishment of the Crime of Genocide applied with equal, and in some cases with greater, force to the International Convention on the Suppression and Punishment of the Crime of Apartheid. The commentary stated, for instance, that unlike the treaties listed in the annex, the Convention on the Prevention and Punishment of the Crime of Genocide is not based on the principle *aut dedere aut judicare*, but on the principle of territoriality. Article VI provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent court of the State in which the act was committed. But the International Convention on the Suppression and Punishment of the Crime of Apartheid was not based on the *aut dedere aut judicare* principle either, nor was it based on the principle of territoriality alone. In point of fact, article V of that Convention actually provided for a wider basis of jurisdiction than did the Convention on the Prevention and Punishment of the Crime of Genocide, since it extended jurisdiction not only to the territorial State,

namely, the State in which the act was committed, but to any State that had acquired jurisdiction over the person, which was an indication of the seriousness with which the framers of the International Convention on the Suppression and Punishment of the Crime of Apartheid viewed the crime of apartheid.

18. Paragraph (5) of the commentary to article 21 then stated:

"However, as a counterpart to the non-inclusion of the principle of universality in the [Genocide] Convention, article VI also provides for the trial of persons by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid contained the self-same clause, since it provided, alternatively, for trial by an international penal tribunal having jurisdiction with respect to those States that had accepted its jurisdiction. The next sentence of paragraph (5) of the commentary to article 21 read:

"This can be read as an authority by States parties to the Convention who are also parties to the Statute to allow the Court to exercise jurisdiction over an accused who has been transferred to the Court by any State."

That would apply equally to the International Convention on the Suppression and Punishment of the Crime of Apartheid, subject to the qualification that the transferring State must have accepted the jurisdiction of the international penal tribunal. Apartheid, furthermore, was generally regarded as a crime against humanity and indeed was declared so to be in article I of the Convention. It could therefore be argued, notwithstanding the explanations given in the commentary and despite the inclusion of the Convention in the list contained in the annex to the draft statute, that the court could have jurisdiction over apartheid as a crime against humanity under article 20, paragraph 1 (*d*). It was also worth noting that the numerical support for the two Conventions was roughly the same, there being 95 States parties to the International Convention on the Suppression and Punishment of the Crime of Apartheid and 108 States parties to the Convention on the Prevention and Punishment of the Crime of Genocide.

19. As to the more important issue of the policy grounds for his objection to the omission of apartheid from article 20, paragraph 1, both apartheid and genocide were quite simply heinous crimes. That being so, although the list was said not to be exhaustive, any list of crimes drawn up by the Commission—a body required by the United Nations to engage in the codification and progressive development of international law—specifically for the purposes of the jurisdiction of an international criminal court was bound to be taken seriously and to have a prejudicial effect on the status of any crimes omitted from it. The omission of apartheid from article 20, paragraph 1, and the overemphasis on genocide, as reflected in a so-called inherent jurisdiction of the court, would leave the Commission open to a charge of adopting a short-sighted response to current events. The fact that the apartheid regime in South Africa had

been dismantled and that there was at present ethnic violence in a part of Europe and of Africa was no reason to highlight genocide to the exclusion of apartheid, both of which were equally repugnant by civilized standards. Apartheid might well rear its ugly head again in parts of the world other than South Africa. That was why the International Convention on the Suppression and Punishment of the Crime of Apartheid, in its definition of apartheid, did not confine the crime to events in South Africa but spoke of policies and practices of segregation similar to those in southern Africa.

20. The international community's appreciation, made some 45 years ago, of acts of genocide as constituting crimes under general international law that warranted the severest treatment and punishment was still relevant. He submitted that 50 years later, the characterization of apartheid as a crime under general international law for the purposes of the jurisdiction of an international criminal court, and the Commission's attitude to that crime at the present time, would still be relevant. Indeed, the characterization of a crime by the Commission and the United Nations in terms of the jurisdiction of an international criminal court carried more weight than the general characterization of a crime under international law. It was precisely because of the importance of the work of the Commission, and because of its prestige and influence, that he had the greatest difficulty in accepting an approach from the Commission and its Working Group that would reflect anything less than an appreciation that apartheid ranked among the most abhorrent crimes for the purposes of the jurisdiction of an international criminal court.

21. Concerning article 21, he supported the general approach to preconditions for the exercise of the court's jurisdiction, with one exception. The general rule for such exercise was that a complaint was brought pursuant to article 25 (Complaint), paragraph 2, and that the jurisdiction of the court in respect of the crime was accepted by the State which had custody of the suspect and by the State on whose territory the crime had been committed. That precondition for the exercise of the court's jurisdiction was acceptable, but it should be applied in respect of all of the crimes under article 20, paragraphs 1 and 2. In effect, he could find no warrant for the distinction between genocide and all the other crimes. The only distinction called for was that made between crimes under general international law listed in article 20, paragraph 1, and the crimes under "suppression" conventions under article 20, paragraph 2. In that regard, he accepted the distinction between the two sets of crimes drawn in article 20, paragraph 2, where the conduct alleged under the "suppression" conventions must constitute exceptionally serious crimes of international concern. That should be the only distinction made between the two sets of crimes for jurisdictional purposes. He could find no justification for the singling out of genocide and the conferral of a so-called inherent jurisdiction on the court in respect of that crime. He understood inherent jurisdiction to mean that a State party to the statute was able to lodge a complaint of genocide, notwithstanding the fact that it had not accepted the court's jurisdiction over that crime in the circumstances set out in article 21. If the jurisdiction of the court in respect of genocide did not need to be accepted in order for a State party to lodge a complaint,

why was that facility not extended to the other crimes listed in article 20, paragraph 1, which, like genocide, were also acknowledged to be crimes under general international law? In his submission, to thus distinguish between genocide and other crimes under general international law listed in article 20, paragraph 1, on the one hand, and between genocide and the crimes under "suppression" conventions on the other, was an unnecessary refinement.

22. He would reiterate that apartheid should not be treated differently from genocide. In his opinion, international criminal law had not reached a level of development at which it was permissible to speak of an inherent jurisdiction in the particular sense that an international criminal court would have jurisdiction in respect of a complaint of genocide lodged by a State party to the statute that had not accepted the jurisdiction of the court in respect of the crime of genocide. It was a concept of inherent jurisdiction that smacked of a progressive development of the law which was not warranted at the present time. In any event, it went beyond what was envisaged in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, a provision which was generally similar to article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, and which allowed for the trial of persons "by such international criminal penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". The latter part of that phrase should be emphasized, because it plainly referred to States accepting the jurisdiction of the tribunal in respect of the crime of genocide or apartheid. It would of course be permissible to provide for exercise of jurisdiction over genocide on the basis of a complaint by a State that had not accepted the court's jurisdiction over that crime, either if such a course was supported by the generality of State practice and *opinio juris*, though he did not believe that to be the case; or if it was felt that that was an area ripe for progressive development of the law. Again, he did not believe that to be the case, particularly in view of the fact that crimes against humanity—aggression and grave breaches of the laws of war, which admittedly were crimes under general international law—were not similarly treated. He therefore proposed the deletion of article 21, paragraph 1 (a), and article 25, paragraph 1, and consequentially of article 51 (Cooperation and judicial assistance), paragraph 3 (a) and article 53 (Transfer of an accused to the Court), paragraph 2 (a) (i).

23. Reverting to the question whether there was any validity in the separation of the crimes under general international law listed in article 20, paragraph 1, and those listed under article 20, paragraph 2, he wondered whether it was really necessary to have two lists, bearing in mind that there were only two points of distinction between the two paragraphs. The first was that article 20, paragraph 1 (a), ascribed a so-called inherent jurisdiction to the court in respect of genocide, though it should be noted that that special feature did not apply to the other crimes listed in either of the two paragraphs. The second point of distinction was that article 20, paragraph 2, required that conduct alleged under the "suppression" conventions should constitute exceptionally serious crimes of international concern. Those distinctions apart,

there was no difference between the crimes as far as the jurisdiction of the court was concerned. Paragraph (3) of the commentary to article 20 stated, in particular, that it was not the function of the statute authoritatively to codify crimes under general international law. What, then, was the purpose of maintaining a separate list and paragraph for crimes under general international law? Indeed, the commentary also stated that the conditions for the existence and exercise of jurisdiction under paragraphs 1 and 2 were essentially the same, with the exception of genocide. The truth was that, despite the disclaimer in the commentary, the Working Group did in fact appear to be making a statement about crimes under general international law, and to be giving pre-eminence to some crimes over others—a sort of pedagogical exercise. It should be remembered that the Working Group had accepted the criticism of the Sixth Committee that a mere reference to crimes under general international law was too vague, and it had in any event decided to enumerate specifically crimes under general international law. So again the question arose, what was the purpose of the separate listing of crimes under general international law under article 20, paragraph 1? In his view, no purpose was served in terms of identifying different jurisdictional requirements. On the other hand, the non-inclusion of a crime generally acknowledged to be a crime under general international law would, because of the influence and prestige of the Commission, and notwithstanding assertions to the contrary in the commentary, have a prejudicial effect on the perception of that crime by the international community. The likely prejudicial effect of listing those four crimes as crimes under general international law for purposes of the court's jurisdiction far outweighed any value the listing might have. The impression would be given that the Commission had a hierarchical conception of crimes under general international law, and that doubt was cast on the status of crimes omitted from the list in article 20, paragraph 1.

24. He therefore proposed that paragraphs 1 and 2 of article 20 should be conflated into one paragraph, to read:

“The Court has jurisdiction in accordance with this Statute in respect of the following crimes:

“(a) the crime of genocide;

“(b) the crime of aggression;

“(c) grave breaches of the laws of war;

“(d) crimes against humanity;

“(e) crimes established under or pursuant to the treaties specified below, which, having regard to the conduct alleged, constitute exceptionally serious crimes.”

A list would then follow of the eight crimes under the “suppression” conventions referred to in the annex. Even if he had not, as earlier, proposed the deletion of the provisions relating to the inherent jurisdiction of the court over genocide, he would still suggest the restructuring of article 20 along the lines proposed.

25. As to article 21, paragraph 2, the correct reference should be to paragraph 1 (b) (i), since that was the para-

graph that applied to the custodial State. Secondly, he noted that, rightly in his view, the paragraph required acceptance of the court's jurisdiction by a State which had already established a right to the surrender of the accused from the custodial State. Article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21), paragraph 4, provided for ad hoc acceptance by that State of the court's jurisdiction. But a question might arise: what if the request for extradition came after the request for arrest and transfer under the statute and before that latter request had been carried out? It would seem that in such a case the acceptance of the court's jurisdiction by that State would also be required. In other words, as long as the request by another State was properly made of the custodial State for the surrender of the accused, the acceptance of the jurisdiction of the court by that State was required, whether the request was made before or after a warrant for the arrest and transfer of the accused had been transmitted to the custodial State pursuant to article 53. It might well be that the words “has agreed to a request from another State” should read “has received a request from another State”, in article 21, paragraph 2, for the right of that other State in an *aut dedere aut judicare* treaty to the surrender of an accused would not ordinarily depend on the agreement with the custodial State. Most usually, it would have an entitlement to such surrender if it had established its jurisdiction over the crime in any one of the three or four circumstances set out in the *aut dedere aut judicare* treaty. Generally speaking, he supported the approach taken in that paragraph. It would inevitably restrict the jurisdiction of the court, but that was unavoidable if the Commission was to respect treaty obligations.

26. His only comment concerning article 21, paragraph 3, was that he thought it was misplaced in that article, which dealt with preconditions for the exercise of the court's jurisdiction. It established an *aut dedere aut judicare* obligation, and would thus perhaps be more appropriately located in article 53, on arrest and transfer.

27. Paragraph 1 of article 23 (Action by the Security Council) seemed to be cleverly drafted so as to mask the issue as to whether the Security Council was afforded a right to refer a case to the court. In the context of Article 39 of the Charter of the United Nations, the words “so determines” would suggest a determination by the Council that there was a threat to the peace, a breach of the peace or an act of aggression. The other possible interpretation was that the court would have jurisdiction in cases where the Council so determined. In either case, he disagreed with that provision. The court's jurisdiction should in all cases be triggered by a complaint from a State under article 21. It was not the business of the Council to bring a case before the court, either directly or indirectly. If there was a threat to the peace, a breach of the peace or an act of aggression, and a crime under the statute appeared to have been committed, a State would lodge a complaint in the circumstances set out in article 21, and the court would be subject to the constraints and limitations outlined in paragraphs 2 and 3 of article 23.

28. Much thought was currently being given to restructuring the United Nations. A crucial element in that restructuring was the relationship between the Security Council and the General Assembly. There was an urgent

need to ensure a better balance between those two core organs. The restructuring exercise would not be assisted by provisions that directly or indirectly purported to give new powers to the Council. In that connection he noted the observation by one member of the Commission that a power to refer a case to the court could not be ascribed to the Council in that way. He therefore proposed that article 23 should be entitled "Threat to or breach of the peace or act of aggression", and that paragraph 1 should be deleted.

29. Paragraph (9) of the commentary to article 23 stated that any power the Security Council might have pursuant to Article 103 of the Charter could be exercised in any event. Without wishing to provoke a polemical debate, he felt obliged to point out that Article 103 had a qualification that was often overlooked: it did not establish the prevalence of Charter obligations over all other obligations; it established such a prevalence only over treaty obligations. Obligations under general international law remained untouched by Article 103.

30. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) thanked Mr. Robinson for his detailed and helpful comments. He regretted the fact that Mr. Robinson had not been present in the Working Group, since his presence there would have enabled proper account to be taken of those comments at the appropriate time. Mr. Robinson had raised almost all the pertinent issues concerning part three of the draft statute. However, except with regard to the location of article 21, paragraph 3, and possibly the question of the title of article 23, he had to say that he disagreed with Mr. Robinson on every issue.

31. On the question of crimes under general international law, he did not think that Mr. Robinson's redrafting of article 20 solved the problem, since in any event the Commission would be listing certain crimes as crimes under general international law, whatever names those crimes were given in the text. He therefore did not agree that the consequences Mr. Robinson feared would ensue, since there were certainly crimes under general international law not contained in paragraph 1, as was made clear in the commentary. He could not stress too strongly that such an exercise had never previously been undertaken, and that great caution was therefore required. The Working Group had selected the four crimes on which consensus had been reached regarding inclusion in a list of crimes under general international law. No consensus had been obtained for the inclusion of other crimes, including the crime of apartheid. Apartheid had been excluded for that reason, not because it was not a crime under general international law. The distinction was also important in terms of the operation of the *nullum crimen sine lege* principle. That principle operated in relation to crimes under general international law, by reference to general international law. It operated in relation to crimes under the treaties listed in the annex by reference to quite separate considerations, and properly so. Under the *nullum crimen sine lege* principle, that distinction would have to be drawn and the statute would therefore contain a distinction between crimes under general international law and crimes pursuant to the unified list of treaties, whatever course was adopted. It was

therefore not a good idea to conflate the two paragraphs of article 20.

32. As to paragraph 1, he noted that Mr. Robinson agreed with its content, except in the matter of the crime of apartheid. The first point to be made was that some acts of apartheid were crimes against humanity. In his opinion, some acts of apartheid also involved the crime of genocide: acts committed pursuant to a policy of apartheid could constitute genocide as defined, for example, if they were aimed at the extermination of a racial group. Those acts were included, as could, and perhaps should, be made clear in the commentary. The question was whether to include apartheid in paragraph 1 as a crime under general international law *eo nomine*. The Working Group had decided against doing so, for three reasons. First, the International Convention on the Suppression and Punishment of the Crime of Apartheid had been included in the annex to article 20 and was therefore not excluded from the statute. Secondly, although it had been widely ratified, the Convention had not been ratified by any member of the Western Group of States. In his view, for a crime to be considered as a crime under general international law, there had to be a general international consensus in that respect and that was not the case at present. He was not suggesting that the agreement of that particular group was of special significance, merely that in that case it showed that there was no general international acceptance of the crime. Thirdly, and most importantly, apartheid, as defined in the relevant Convention, had just ceased to exist in fact. It was up to the new Government of South Africa to decide on any action to be taken with respect to those who had committed the crime of apartheid. If the international community were to create a jurisdiction over apartheid as a crime under general international law, as distinct from a crime under the Convention, it would in effect be taking a position on what should happen to those who had practised apartheid. He would only be prepared to do so with the strong support of the present Government of South Africa. For all those reasons, it would be unwise to include apartheid in paragraph 1 of article 20.

33. Mr. Robinson had complained that the statute contained a certain amount of progressive development of the law. That was understating the case: the entire statute could be classified as progressive development. In fact, the Commission's task was to draft a statute which would then be the basis for discussion by States. It had, therefore, to envisage defensible categories of jurisdiction. In his opinion, there ought to be a category of inherent jurisdiction, as a matter for subsequent discussion. If the Commission took the position that there should be no inherent jurisdiction, or no inherent jurisdiction without the backing of the Security Council, then it would in effect be precluding such a possibility, and providing a powerful argument for those opposing real progress in that area.

34. The case for an inherent jurisdiction, if it could be made at all, was particularly strong with respect to genocide. Among what were described as the "crimes of crimes", genocide was the worst of all. Moreover, it was a crime that was still being committed. Under the Convention on the Prevention and Punishment of the Crime of Genocide, jurisdiction was based on territoriality, yet

genocide was usually practised by or with the complicity of the Government of the very State on whose territory it was committed. If the Commission failed to take advantage of the authority granted in article VI of the Convention, it would create impunity for those committing genocide while they were in power.

35. The entire statute was a compromise between two approaches which might be termed minimalist and maximalist. The statute did, at least in the case of the crime of genocide, acknowledge the idea of a universal jurisdiction. It was up to States to take that idea further, if they chose to do so.

36. With reference to article 21, he would point out that, prior to the acceptance of an extradition request, it was primarily for the custodial State to decide whether to take action. It was reasonable to give the decision-making power to the custodial State, as opposed to the requesting State. Otherwise, a requesting State which had no viable prospect of actually obtaining custody of a suspect could impose its veto after the fact by the simple device of making an extradition request. For those reasons, the Working Group had rejected the broader formulation that had been proposed for paragraph 2.

37. Mr. THIAM, speaking as a member of the Working Group, said that he had been in favour of including apartheid in the list contained in paragraph 1 of article 20. However, the opposing view had prevailed, namely that it was sufficient to mention the International Convention on the Suppression and Punishment of the Crime of Apartheid in the annex. In that connection, it might be asked whether that Convention, which the Western Group of States had failed to ratify, even belonged in the annex. The Western Group had objected to the form, not the substance, of the Convention, in particular to its express reference to apartheid as practised in southern Africa. There was universal agreement that apartheid belonged to the category of crimes that were unacceptable to the conscience of mankind. Apartheid was as odious a crime as genocide and, in fact, the two were closely related.

38. He would continue to maintain that apartheid should be added to the list of crimes in paragraph 1 of article 20. Moreover, apartheid would most certainly have a place in the Code of Crimes against the Peace and Security of Mankind. The Commission could not include apartheid in one list and exclude it from another.

39. Mr. HE said he wished to pay tribute to the Working Group for the remarkable results it had achieved in a short period of time, thereby demonstrating that the Commission could indeed be efficient when it worked in a well-organized and dynamic manner. By and large, he concurred with the compromise solutions arrived at by the Working Group on the draft statute.

40. With regard to part two of the draft statute, there was a contradiction between article 12 (The Procuracy), paragraph 6, and article 15 (Loss of office), paragraph 2. Under article 15, decisions with regard to loss of office would, in the case of the Prosecutor, be decided by a majority of States parties. Yet, under article 12, the presidency was authorized to decide with regard to the disqualification of the Prosecutor. To remove any ambiguity, the words "and shall decide in case of doubt as to

the disqualification of the Prosecutor or Deputy Prosecutor" should be deleted from paragraph 6 of article 12.

41. As to part three of the draft statute, and more particularly article 21, paragraph 1 (a), he had reservations about the need to provide a separate arrangement for the crime of genocide, as opposed to all other cases. The commentary pointed out that the court should have inherent jurisdiction over the crime of genocide. However, treating genocide as a separate case under article 21 might give rise to difficulties. For instance, not every State party to the Convention on the Prevention and Punishment of the Crime of Genocide would necessarily be a party to the statute. Furthermore, three types of States might be involved in a particular case: the State lodging the complaint; the State in which the genocide had been committed; and the State in which the accused was present. Even if States in each category were parties to the statute, they might not necessarily accept the court's jurisdiction in a particular case.

42. Article VI of the Convention stipulated that persons charged with genocide should be tried by the competent court of the State in which the act had been committed; it also provided for the trial of persons by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". He did not see the need to make a distinction between genocide and all other cases and therefore endorsed Mr. Robinson's proposal to delete paragraph 1 (a).

43. Article 23 was a crucial provision of the draft statute. Unfortunately, the words "so determines", in paragraph 1, were unclear. One might well ask what exactly was to be determined by the Security Council. According to the commentary, article 23 was not intended in any way to increase the powers of the Council as defined in the Charter of the United Nations, but to make available to the Council the jurisdictional mechanism created by the statute. Thus it was to be understood that referring cases to the Council would allow the court to exercise jurisdiction over situations to which Chapter VII of the Charter applied, so that the Prosecutor could go on to investigate and indict the individuals concerned.

44. Another question that might arise was whether the court, in exercising its jurisdiction, should take into account the preconditions set forth in article 21. As a result of action by the Security Council under article 23, the jurisdiction of the court would become compulsory in some sense, and the preconditions could be disregarded. Such an arrangement might encourage States not to cooperate and might prevent the court from playing its proper role, as demonstrated in the case 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,<sup>7</sup> where very little progress had been made thus far. In view of the real situation in the international community, it would be more appropriate for the court to operate on the basis of voluntary acceptance of its jurisdiction; such an approach was in conformity with the objectives set out in the preamble of

<sup>7</sup> See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

the draft statute, namely that the court was intended to complement national criminal jurisdictions. He therefore proposed that the word "Notwithstanding" in paragraph 1 of article 23 should be replaced by "Subject to".

45. Mr. MAHIU said that he wished to pay tribute to the excellent work of the Working Group, which had managed to find compromise solutions to a number of delicate and difficult questions.

46. Unfortunately, article 2 left the matter of the relationship of the court to the United Nations somewhat unresolved. He was among those who favoured a very close relationship, one which would involve technical procedures and would undoubtedly have a political side to it. He was not, therefore, entirely satisfied with the idea, set out in article 2, of the Registrar being designated to enter into agreements establishing an appropriate relationship between the court and the United Nations. That task might more appropriately fall to the President of the court.

47. As far as part two of the draft statute was concerned, he had some reservations about paragraph 1 of article 11 (Excusing and disqualification of judges), for he was not sure whether it was appropriate that the presidency should be able to excuse any judge from the exercise of a function under the statute. Again, he was not convinced of the need to distinguish, as did paragraph 2 of article 15, between the Prosecutor and the other officers of the court in regard to loss of office. According to the commentary, the distinction was necessary because the Prosecutor was elected by States parties. However, other officers of the court, in particular the judges, were also elected by States parties.

48. With regard to part three, and more particularly article 20, he agreed that the court's jurisdiction should be limited to a certain number of crimes, yet it was regrettable that apartheid had not been included in the list contained in paragraph 1. The concrete situation that had given rise to the International Convention on the Suppression and Punishment of the Crime of Apartheid had, of course, been resolved and he could only welcome with the utmost satisfaction the new South Africa that had recently emerged. Nevertheless, in so far as it had a preventive function, the statute should include a reference to apartheid so that such a system could never be established again.

49. There seemed to be a contradiction between article 20, paragraph 2, and the annex. Paragraph 2 spoke of crimes established under or pursuant to the treaties specified in the annex which constituted exceptionally serious crimes of international concern. Yet, in the annex itself, reference was made to "grave breaches" rather than to exceptionally serious crimes. He wondered whether the inconsistency was a matter of substance or of form.

50. Article 21 was a key article and the Working Group had made an excellent effort to solve the problems in the earlier version. While he appreciated the need for a pragmatic approach, he none the less thought that the article might become a stumbling block to the application of the whole system established in the draft statute. The statute might in fact be neutralized by the

attempt to leave some degree of competence to national courts. Regrettably, he had no solution to propose.

51. The draft commentary placed a restrictive interpretation on article 22, paragraph 4, concerning the possibility of intervention by the court at the request of a State which was not a party to the statute. Such intervention would appear to be permitted only in a specific case and not with regard to a given crime. For example, if a State not a party to the statute requested intervention with respect to a crime against humanity, the court would be intervening not in connection with crimes against humanity as such but with a specific instance of a crime of that kind. The court's jurisdiction should be more open with respect to States which, for one reason or another, had not acceded to the statute.

52. He experienced serious difficulties with the interpretation of article 23, on action by the Security Council. A reading of the draft commentary indicated that a compromise had been sought in the Working Group, but in his opinion a compromise position had not been reached. Two situations must be distinguished. Firstly, the court could not intervene unless an act of aggression had been determined by the Council, although it was open to discussion whether the Council was the sole organ competent to identify acts of aggression. Secondly, what could the court do once the act of aggression had been so determined? Paragraph 2 seemed to provide that a complaint of aggression might then be brought before the court, but paragraph 3 neutralized that possibility. Therefore, the court could do nothing unless the Council determined that an act of aggression had taken place and unless it authorized the court to act in the case.

53. With reference to part five of the draft statute, he had some doubts about the meaning of the words "to the extent applicable" in article 33 (Applicable law), subparagraph (c). Again, the commentary did not clarify matters. The phrase "having regard to the purposes of this Statute set out in the preamble" in the main paragraph of article 35 (Discretion of the Court not to exercise its jurisdiction) might also give rise to problems. It gave the impression that the preamble had become a sort of direct source of criminal law. That might be a welcome advance, but it was not in fact clear that the preamble could take precedence over articles of the statute itself. The wording of article 39 (Principle of legality (*nullum crimen sine lege*)), subparagraph (a), was vague and might even be unintelligible. Once more the draft commentary said nothing to clarify the situation. One solution might be to replace the term "in question" by "at the time of the facts". That would make it possible to identify the principle of non-retroactivity underlying the principle of legality introduced in the article.

54. In connection with part six, he noted that article 49 (Proceedings on appeal), paragraph 2, distinguished between appeals brought by the convicted person (subparagraph (a)) and appeals brought by the Prosecutor (subparagraph (b)). Subparagraph (b) appeared to be concerned with acquittal; if so, the fact should be stated clearly. The present wording created confusion as to whether in circumstances when the Prosecutor brought an appeal other than for acquittal a new trial would be ordered or paragraph 2 (a) would come into play and the appeals chamber could either reverse or amend the deci-

sion. Lastly, in article 51, the notion of cooperation and judicial assistance should be stated more strongly. In paragraph 1, "States parties shall use their best efforts to cooperate" should be replaced by "States parties shall cooperate".

55. Mr. FOMBA said that he had made his modest contribution to the work of the Working Group and broadly shared its conclusions. However, on the central issue of the jurisdiction of the court his preference was not for selective participation but rather for automatic participation based on a direct link between acceding to the statute and acceptance of the jurisdiction of the court. Such an approach would certainly be more internationalist, but the Working Group had chosen the possible over the desirable in producing a text which would be acceptable to States.

56. He strongly supported Mr. Robinson's proposal that the crime of apartheid should be included in the list of crimes in article 20. Although the apartheid regime had ended, there was no sure guarantee that apartheid would not resurface. In any event, the list could be revised at some future time and the crime of apartheid deleted if deletion was justified.

57. Mr. CALERO RODRIGUES said that part three was the essential component of the draft statute and the text represented an improvement with respect both to the crimes falling under the court's jurisdiction and to the States which must accept jurisdiction in order for the court to exercise it. However, he still believed that the court should always have jurisdiction *ex officio*.

58. He welcomed the listing of the crimes in article 20, even though the distinction made in former articles 22 and 26 between crimes under general international law and crimes under treaties had been maintained. It was indeed useful to state that only exceptional serious crimes of international concern were subject to the court's jurisdiction, and it must be remembered that article 35 provided for the discretion of the court not to exercise jurisdiction. Nevertheless, the phrase "crimes established under or pursuant to the treaties", in paragraph 2, was not satisfactory because it did not give a correct idea of the relationship between the jurisdiction of the court and the international instruments mentioned in the annex. Paragraph 1 was not intended to include a full list of crimes under general international law, but the problem remained that even a good list must necessarily be couched in vague terms. For example, although the concept of "crimes against humanity" was clear, no definition of the kind which would be required in criminal law yet existed. While the crime of aggression had been defined by the General Assembly, the definition applied only to States and not to acts of individuals, which was what the statute was intended to punish. Furthermore, the term "grave breaches of the laws of war" was at least ambiguous because it could be confused with the similar term used in the Geneva Conventions for the protection of war victims.

59. The Working Group had wisely decided not to enter into questions of substantive law. However, as he had always maintained, it was impossible to disassociate procedural from substantive law in the present case. The problem remained that there was no adequate substantive

law to be applied by the court and therefore it was impossible to draft a good statute. The solution lay of course in the draft Code of Crimes Against the Peace and Security of Mankind, and it was obvious that the Code and the court should go together. Any State unwilling to accept the Code of Crimes Against the Peace and Security of Mankind should not accept the court. The problem had arisen at the time of the establishment of ICJ and some 75 years later the Commission found itself faced with the same difficult situation. It was unfortunate that the Commission had decided to take a path which he could not follow. Perhaps in time other members of the Commission and even some States would become convinced of the simple truth which he was stating.

60. The text of article 22 also represented an improvement over the previous text, which had required the acceptance of too many States. He still believed that any State becoming a party to the statute should at the same time accept the court's jurisdiction. Even an "opting out" declaration would have been a compromise. Now, the provision for States to "opt in" undermined the seriousness of the statute because it allowed a State to become a party without necessarily incurring any legal obligation whatsoever.

61. It was a good thing that the acceptance of the State in which the crime had been committed could be waived in two instances: (a) when action was taken on the initiative of the Security Council, and (b) when a complaint of genocide was brought under article 25, paragraph 1, by a State party to the Convention on the Prevention and Punishment of the Crime of Genocide. Any State could bring a complaint of genocide, as a crime under general international law, but subject to the requirements of article 21. Parties to the Convention did not have to meet those requirements. It was a good arrangement, but should be more clearly expressed in the statute.

62. The requirement of acceptance by the custodial State as a precondition to the exercise of jurisdiction (art. 21) was reasonable, but acceptance by the State where the crime had been committed was more problematic. It might be possible to rely on the provisions relative to the Security Council and the Convention on the Prevention and Punishment of the Crime of Genocide, but it might happen that a veto by the State in question would mean the end of the possibility of bringing a criminal to trial before the court. Perhaps more attention should be given to the requirement. For his own part, he would be prepared to waive it entirely.

63. The provision contained in article 23, paragraph 2, was a reasonable one, as was the provision contained in paragraph 1 that the Security Council had the possibility of bringing a case before the court. However, he shared Mr. He's unease with the words "if the Security Council . . . so determines". The statute should not be saying that the Security Council had the power to determine that the court had jurisdiction. Some alternative form of language must be found. He had very serious doubts about paragraph 3, which had apparently been modelled on the Charter of the United Nations provision concerning the relationship between the General Assembly and the Security Council, according to which the Assembly could not discuss a matter that was before the Council. However, the present case was different: in a situation

falling within the exclusive competence of the Council there might be indications that a crime under the statute had been committed, and in those circumstances the court should have the right to act.

*The meeting rose at 1.05 p.m.*

## 2359th MEETING

*Wednesday, 29 June 1994, at 10.10 a.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

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

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>2</sup> A/CN.4/460,<sup>3</sup> 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 Commission to resume its consideration of part three of the draft statute for an international criminal court, which was entitled "Jurisdiction of the Court" (A/CN.4/L.491).

2. Mr. KABATSI said that the revised draft statute was on the whole acceptable to him, but, like any product of a compromise, it was open to criticism. With regard to article 20 (Jurisdiction of the Court in respect of specified crimes), the wording of the first sentence of paragraph 1 could be interpreted to mean that the court could only be seized of the crimes listed in that paragraph. As ambiguity of that kind was to be avoided in the statute of an international criminal court, it would be advisable to make it clearer that the list of crimes was purely indicative. Furthermore, the crime of apartheid was admittedly covered by article 20, under paragraph 2 of the article; and the Working Group on a draft statute for an international criminal court, which had perhaps been too influenced by the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Viola-

tions of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,<sup>4</sup> had apparently not given sufficient thought to the possibility of including it in the crimes listed in paragraph 1. The long-awaited disappearance of apartheid in South Africa had perhaps also contributed to that omission, but it should not be forgotten that the crime of apartheid was one of the most horrible, that it could always resurface and that similar practices did exist elsewhere. Since many members of the Commission shared that view, the crime of apartheid should be included, in a spirit of compromise, as article 20, paragraph 1, subparagraph (e).

3. As to article 21 (Preconditions to the exercise of jurisdiction), he would have preferred the court to have a broader inherent jurisdiction. Genocide was, of course, the most horrendous crime and deserved special treatment on that account, but the court's inherent jurisdiction should be extended to practically all the crimes listed in article 20, paragraph 1, and to crimes against humanity in particular. The restrictions imposed by article 21 were, in his view, inappropriate for a court for which the international community had been waiting for so long. With regard to article 23 (Action by the Security Council), he would have been happier if any intervention by the Security Council could have been avoided. A limited involvement was none the less acceptable, under Chapter VII of the Charter of the United Nations, but paragraph 3 of the article amplified the Council's powers unduly. Even if it decided that a situation of aggression did exist and determined that certain persons should face trial, the right of veto could still have a blocking effect when it came to the decision to refer a case to the court. He therefore strongly advised that paragraph 3 should be deleted.

4. Mr. PELLET said he was surprised to find that the most fervent advocates of the creation of the court were endeavouring to divest its statute of substance. Although he was one of those who had certain reservations, with regard to the draft as a whole, he was trying to salvage what he could. His basic proposition was that the establishment of the court by treaty was open to criticism because it would turn the court into a club of righteous States when it was mankind as a whole that was concerned with the crimes in question and the entire international community that was shocked by those who committed such crimes. Apart from two provisions, part three of the revised draft statute accentuated the consensual approach which was a feature of the statute and which, in the case of that particular subject, was a serious defect. Not only would the court in principle be open only to the States parties to its statute, but in addition, only States, as very narrowly defined in article 21, paragraph 1 (b), could bring cases before it—a condition that was further strengthened in paragraph 2 of the same article. Moreover, those States must have adopted the optional clause accepting the jurisdiction of the court (art. 22), the only exception being the one that derived from article 21, paragraph 2, and article 22, paragraph 4, combined. Yet there was one very simple possibility for which, curiously, the statute did not provide, namely, the possibility of a State which had custody of the suspect or

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>4</sup> Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.

on whose territory a crime had been committed wanting the case to be tried by an international criminal court. One could call to mind in that respect the Libyan Arab Jamahiriya, in the Lockerbie case,<sup>5</sup> Mexico, in *United States v. Alvarez-Machain*,<sup>6</sup> or even Panama in connection with *United States v. Noriega*.<sup>7</sup> In all those cases, each of which, incidentally, was different, the draft statute did not provide for the court's basic function as a "safety valve". Why create an international criminal court if, at the same time, everything was being done to ensure that no cases were ever brought before it?

5. For the court to be really useful, it must have jurisdiction in two kinds of situation. The first was one in which it was the wish of the States concerned, either in order to overcome an international crisis, as mentioned earlier, or for reasons of an essentially internal character, for instance, if certain Latin American States wanted, quite legitimately, to have drug traffickers tried before an international body. The draft statute as it stood closed the door on that possibility, unless multilateral conventions provided otherwise. The second situation arose in the case of particularly serious crimes which shocked the international community as a whole and were not punished by the territorial State. Article 20, paragraph 1, did, of course, confer jurisdiction on the court for four categories of crimes, but, in effect, that jurisdiction was immediately taken away by the ensuing articles, under which a voluntary act on the part of States was required—an act, in fact, if not in law, of the very States that were guilty or involved with the guilty parties. Part three, however, contained two positive provisions: article 21, paragraph 1 (a), and article 23, under which the consent of the State behind which guilty parties could shelter was not required. Oddly enough, it was precisely those two provisions that were the subject of the severest criticism, backed up by arguments that were not very sound. In short, his general view was that the court should have jurisdiction, first, automatically and without the special consent of any State, over a small number of crimes that concerned and threatened the international community as a whole, it being understood that certain safeguards were necessary; secondly, over such other international crimes as the States directly concerned might wish, acting either unilaterally or by agreement, to be tried by the court; and, thirdly, pursuant to certain protocols additional to existing multilateral conventions, including those listed in the annex, always provided that the States parties to those conventions acceded to a special protocol concluded to that effect.

6. With regard to article 20, the list in paragraph 1 was satisfactory. In paragraph 1 (c), however, there was no reason to drop the usual expression "laws and customs of war" and to refer simply to the laws of war. The commentaries on that point were not very convincing; international law consisted, of course, of written instruments,

<sup>5</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3.

<sup>6</sup> For a summary, see *International Legal Materials* (Washington, D.C.), vol. XXXI, No. 4 (July 1992), pp. 900 *et seq.*

<sup>7</sup> *Federal Supplement*, vol. 683, United States District Court for the Southern District of Florida (1988), pp. 1373 *et seq.*

but also of custom. A question also arose with regard to the inclusion in the list of apartheid. While he was not indifferent to Mr. Robinson's forceful argument in support of its inclusion (2358th meeting), it would be of advantage only if crimes of apartheid could be prosecuted regardless of the consent of the State and regardless of whether or not the relevant Convention had been ratified. It was also because there must be no link between the suppression of the crime of apartheid and the Convention that there had been no support for the argument put forward by Mr. Crawford (*ibid.*) to explain why apartheid had not been included in the list in article 20, paragraph 1. Moreover, while the most fundamental crimes should, of course, be listed, the right place for the definition of those crimes was not in the statute of the court, but in the Code of Crimes against the Peace and Security of Mankind. So far as article 20, paragraph 2, was concerned, it would be infinitely preferable to provide for the court to have jurisdiction over such other internationally defined crimes as States might refer to it, but, in the case of the second ground of jurisdiction, without the crimes in question necessarily being exceptionally serious. He was thinking of the drug-trafficking problem.

7. With regard to article 21, some members recommended the deletion of paragraph 1 (a), whereas the spirit of that provision should, on the contrary, be extended to all the crimes listed in article 20, paragraph 1. It should be possible to prosecute all those crimes, perhaps with the addition of apartheid, irrespective of any consent by the State, failing which there would be no prosecutions at all. Safeguards were, of course, necessary and they already existed. Under articles 26 (Investigation of alleged crimes) and 27 (Commencement of prosecution), the prosecutor and the presidency had the power not to commence prosecutions or to abandon them. That protection could be augmented by other mechanisms. If the court was created by treaty, complaints could be examined by the authorities of the States parties, which would immediately dismiss any complaints that were obviously unfounded. If, as he hoped, the court was created by a resolution of the General Assembly, its General Committee could act as a "filter". The other part of article 21 should deal with referral of a case to the court unilaterally and by agreement. If that system were accepted, or at any rate proposed as an alternative, there would be no need for article 22.

8. There were two fundamental reasons why, whatever some members of the Commission said to the contrary, article 23 had a place in the draft statute: first, because, in that article, the jurisdiction of the court was not subordinated to the goodwill of the State internationally responsible; and secondly, because it was realistic and met a real need. If such a provision had existed, the Security Council would have been able to discharge its principal responsibility with regard to the maintenance of international peace and security without having had to set up the International Tribunal, for example. If that article was deleted while all those provisions of the draft that commanded full consensus were maintained, the result would be a paradoxical situation in which a totally unusable court would have been established, while at the same time the Security Council would be obliged to

increase the number of ad hoc organs with parallel jurisdiction and also, probably, with genuine efficacy.

9. Certainly, the shortcomings of the Security Council affected article 23: the five permanent members' power of veto sprang to mind. But, under Articles 24 and 25 of the Charter of the United Nations, Member States had conferred a number of responsibilities on the Council, had recognized that, in that context, the Council acted on their behalf and had agreed to accept and carry out its decisions. Such was the current state of affairs and legal position. Certainly, too, as Mr. Calero Rodrigues had pointed out (2358th meeting), there was no legal reason to limit the jurisdiction of the court for the crime of aggression to cases in which the Council had determined the existence of an act of aggression. As ICJ had frequently pointed out, political jurisdiction and judicial jurisdiction were distinct and separate, a fact which, in "pure law", would be an argument for not including that provision, but, unfortunately, that would hardly be realistic. Nevertheless, the Working Group erred on the side of zealotry. There might be some hesitation about paragraph 2 of article 23, but paragraph 3 was undeniably excessive and should be deleted.

10. He was not altogether convinced that that whole exercise was of any real use, but he had endeavoured to make comments and proposals that were both critical and constructive. If the comments made by him and by others, particularly Mr. Calero Rodrigues and Mr. Robinson (*ibid.*), were not taken up in the draft, he very much hoped that they would be faithfully and fully reflected in the commentaries. In fact, he would like the Commission to go further and, with regard to parts one and three of the draft statute, to propose an alternative model. That model would certainly be ambitious and would at first encounter opposition from States, but, unless it was demonstrated to States that some other option was possible, there was a danger of establishing a court that would simply serve as a sop to the conscience.

11. Mr. Sreenivasa RAO said that, although in his capacity as a member of the Working Group he had accepted most of the articles in part three of the draft statute, he wished to make some comments on it, not only because it contained important provisions that defined the basis for the jurisdiction of the court, but also because it had provoked some interesting and incisive comments.

12. If articles 20, 21 and 23 were perceived in the context of an ideal world in which States conducted themselves like well-behaved children in a society endowed with a paternalistic jurisdictional system, with a widely accepted code of conduct and with a smoothly functioning mechanism for implementation, then the suggestions made by Mr. Pellet were defensible. However, realism was called for in a world in which the very idea of an international court in any form—and not just of an international criminal court—was greeted with some circumspection and in which States were prepared to have recourse to such a court only as a last resort. The fact remained that the idea of establishing an international criminal court had recently taken on cogency and urgency and that the Commission, prompted by the General Assembly, had begun to take an interest in it,

although no one had ascertained whether a sufficiently powerful political will existed to bring it to fruition. Against that background, the Working Group had tried to create a small window in the hope of overcoming reservations and winning the widest possible support.

13. He considered that the extension of the jurisdiction of the court to the crime of genocide was a welcome measure in the progressive development of international law. Welcome too was the power that would be accorded to the Security Council to seize the court, pursuant to article 23, paragraph 1, and he accepted that power, subject to an explicit amendment to the Charter of the United Nations and not merely a liberal interpretation of Chapter VII, which would be highly dangerous, not only because the Council could not be both judge and party, but also because a victor could not establish a court—for a victor's justice was a most detestable thing. The Commission must have no scruple in making a recommendation that the Charter should be amended to that effect.

14. The proposal that apartheid should be included in the category of crimes under general international law listed in article 20, paragraph 1, was valid and well-founded. He was not sure that the fusion of subparagraphs (a) and (b) of that paragraph made matters any clearer. In any case, he was satisfied with the basis for the jurisdiction that could be invoked under article 20, paragraph 1 or paragraph 2.

15. With regard to preconditions to the exercise of jurisdiction (art. 21), he had already stated his position on the desirability of the regime of consent that was envisaged. The risk was worth taking, with some minimum conditions imposed so as not to alarm States. After all, it was possible that, once the court had been set up and experience had proved positive, the exercise of its jurisdiction would automatically become broader.

16. The ensuing debate had justified the prudent approach adopted by the Working Group. Subject to the reservations he had expressed concerning article 23, he accepted the proposals of the Working Group and was grateful to its Chairman for taking account of his comments in the commentaries.

17. Mr. TOMUSCHAT said that, having had occasion to express his views as a member of the Working Group, he would confine his remarks to the issues of apartheid—a crime which was not listed in article 20—and genocide.

18. Apartheid was incontestably an abhorrent violation of international law, but the pertinent question was whether apartheid was a crime under international law whose perpetrator incurred criminal responsibility. The members of the Commission must answer that question in their capacity as jurists. The fact was that, in the present case, unlike that of the draft Code of Crimes against the Peace and Security of Mankind, the Commission was not being asked to formulate new rules of criminal law: its task was simply to enumerate the crimes under general international law that were well established. Yet, in point of fact, the International Convention on the Suppression and Punishment of the Crime of Apartheid had not been ratified by any of the States belonging to the Group of Western European and Other States, not

because those States tolerated apartheid, but because the provisions of the Convention were drafted in excessively general terms which would make it possible, for example, to condemn as assistance to the crime of apartheid the establishment of trade relations of any kind with South Africa and because those States considered—and history had vindicated that view—that it was better to promote the equality of all South Africans by other peaceful means.

19. In practice, no person had been found guilty of the crime of apartheid under the Convention, a state of affairs that clearly illustrated the reluctance to apply the Convention, precisely because the view had been taken that the best way of combatting apartheid was to use political means.

20. The debate on the issue of apartheid should not be reopened at the current time and in the current context. The problems of South Africa had been dealt with, even if that did not mean the end of apartheid, which might re-emerge anywhere in the world. In that case, however, the debate should take place in the context of the draft Code of Crimes against the Peace and Security of Mankind.

21. Genocide was undeniably the most horrible and atrocious of crimes under general international law and he found it incomprehensible that anyone could be reproached for placing too much emphasis on it, at the expense of apartheid. The two phenomena could not be compared, for apartheid was not synonymous with death, whereas genocide was the extermination of entire ethnic communities, the supreme negation of civilization and solidarity, and any appropriate measure to combat it was therefore good. For that reason, he unreservedly accepted article 21, paragraph 1 (a), which was rightly based on consensus, and under which the crime of genocide could not be prosecuted without reference to the will of States, which must ratify the statute, thereby accepting the jurisdiction of the court. That was one of the two "openings" in the direction of the international community.

22. The second opening, provided by article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21) was also necessary. In addition, he shared the view expressed by Mr. Pellet, who wished to extend the list of crimes for which the court would have jurisdiction without the need for States to make a specific declaration of acceptance in that regard. The Commission must nevertheless be realistic and find a middle course. The draft statute had to be approved by the General Assembly and must thus command the political support of Member States. The type of jurisdiction that the Working Group had established with regard to the crime of genocide was really the strict minimum. If article 21, paragraph 1 (a) was deleted, there was a danger that the proposed court might cease to have any meaningful purpose. Furthermore, unless it created those two openings, the Commission might be short-circuited, particularly in view of the fact that discussions had begun at the Headquarters of the United Nations on the establishment of a jurisdictional mechanism to prosecute the persons responsible for genocide in Rwanda.

23. He was not entirely convinced of the need for paragraph 3 of article 23, which was too cautious. He agreed with Mr. Calero Rodrigues (2358th meeting) and Mr. Pellet that the best solution would simply be to eliminate it. In contrast, paragraph 1 of article 23 was entirely justified. The Security Council could take all the necessary measures to maintain and re-establish international peace and security and, contrary to what Mr. Sreenivasa Rao had just said, indicating in that paragraph that the Council was empowered to seize the court did not make it a judge: it simply meant that the Council had the power to institute proceedings, it being understood that the procuracy would establish the indictment and that independent judges would hear the case. That was not the same as endorsing victor's justice.

24. He would have preferred a more powerful institution, such as the one advocated by Mr. Pellet. However, had that choice been made, the Commission might be criticized for being overly zealous and the international community might reject the statute. Moreover, in view of its deadlines, the Working Group had not been able to prepare two totally parallel drafts, one based on the hypothesis of establishment by treaty and the other on the hypothesis of establishment by a resolution of the General Assembly or the Security Council. The draft under consideration was a good compromise, even if it contained traces of conservatism and orthodoxy, which arose from the weakness of legislative structures in the international community. In the absence of a better solution, a treaty was, under the present circumstances, the most viable legal instrument to be used in establishing the future international criminal court.

25. Mr. ROSENSTOCK said that taking a cautious view of the powers to be invested in the court would not weaken its capacity to meet the needs of the international community, but would in fact strengthen the likelihood that it would be established and available. An example in that regard was Article 36, paragraph 2, of the Statute of ICJ, which, at the time of its adoption, might have appeared overly cautious to those advocating compulsory jurisdiction, but which had not prevented the Court from making an important contribution, while its jurisdiction was accepted by an ever increasing number of States.

26. In respect of the international criminal court, cases were likely to be brought before it in one of two ways: agreement by all the parties concerned or a determination by the Security Council that the matter should be dealt with by the court.

27. With regard to the issue of apartheid, he agreed entirely with the views of Mr. Crawford (*ibid.*) and Mr. Tomuschat. He had some concerns about paragraph 1 of article 20 because it failed to provide enough guidance as to crimes under customary international law. The earlier draft had been preferable in certain respects. While the commentary helped clarify the situation to some extent, it might have placed more emphasis on Security Council resolution 827 (1993) of 25 May 1993 concerning the establishment of the International Tribunal, in which the Council had endorsed the report of the Secretary-General,<sup>8</sup> which had some important things to

<sup>8</sup> Document S/25704 and Add.1.

say about the state of customary international law. He also agreed with the criticism of paragraph 1 (c): the expression “grave breaches of the laws of war” was a poor choice and should be replaced by “laws and customs of war”.

28. He shared in large measure Mr. Robinson’s view (2358th meeting) that the distinction between genocide and other crimes under general international law might not be necessary. Mr. Crawford’s suggestion (*ibid.*) that an example of *ipso jure* jurisdiction should be provided was appealing, but some mention in the commentary would suffice and was probably less likely to make States apprehensive because even genocide could give rise to abusive litigation on the part of minorities.

29. He also believed that a decision by the Security Council should be an additional precondition with regard to the crimes referred to in article 20, paragraph 1. That was justified by the fact that those crimes involved, by definition, international peace and security and it was therefore important to avoid any abusive litigation so that the international community could give its full support to what was likely to be a complex and difficult process. It had been suggested in that regard that the process might be blocked by virtue of the rule of unanimity in the Council. Whether such concerns were justified or not, it was better to try to overcome the possible risk of blockage rather than to throw out the idea of a screening device altogether.

30. In respect of article 21, it was particularly important to guard against a *succès d’estime*, that is to say to try to establish a logical whole to which States might then refuse to accede. As indicated in the preamble and elsewhere in the text, the goal was not to replace existing systems, but to provide an additional regime.

31. The wording of paragraph 2, while a step in the right direction, was still in need of improvement because it was likely to give rise to hasty decisions and it did not place enough emphasis on the existing system, which it should add to, not replace. It should cover both those situations in which a decision to extradite had been taken and those where a valid request existed.

32. Paragraph 3 of article 23 had been slightly improved and there was no reason to fear that it might give rise to any abuse of process since the provision applied only where the Security Council was acting under Chapter VII of the Charter of the United Nations. He agreed with Mr. Tomuschat that article 23 did not in any way increase the powers of the Council; it merely recognized those powers, which should be enough to avoid creating new ad hoc tribunals.

33. Mr. de SARAM said that he would confine his comments to two essential points: paragraph 1 of article 20, which related to crimes under general international law, and article 23.

34. Generally speaking, although he endorsed the purposes of the two articles, he was not convinced that it was appropriate to include such provisions in the draft statute. As the Chairman of the Working Group had described it, the draft statute was intended to serve an adjectival or procedural purpose. Yet, article 20, para-

graph 1, and article 23 seemed to be going beyond what was necessary in that regard.

35. In respect of article 20, paragraph 1, he recalled that the purpose of article 20 was to define for those States that chose to become parties to the statute the crimes over which the court would have jurisdiction, subject to certain substantive preconditions contained in article 21 and the procedural preconditions contained in article 22. Where a crime was defined in a treaty, as was the case of genocide and breaches of the laws of war, as well as other offences listed in the annex to the statute, the purpose of article 20 was already achieved. What, then, was the point of stipulating, as article 20 did, that the crimes of genocide and breaches of the laws of war were also crimes under general international law? It would seem that States, whether they were party to a treaty or not, would, on becoming parties to the statute, accept the court’s jurisdiction in respect of crimes referred to in the treaties listed in the statute, subject to the substantive and procedural preconditions laid down in articles 21 and 22. There was therefore no reason to indicate in article 20, paragraph 1, that those treaty crimes should also be considered as crimes under general international law.

36. Such an indication was all the more questionable in that it raised other sensitive issues, in particular that of determining at what point treaty rules became an integral part of customary international law. It was difficult to answer such a question in the realistic but modest framework of a draft statute for an international criminal court.

37. Listing aggression among the crimes under general international law inevitably gave rise to the question whether the Definition of Aggression, adopted by the General Assembly in 1974<sup>9</sup> and regarded by some as only a relatively flexible recommendation to the Security Council, could be used as a definition to establish individual criminal responsibility in a court of law, having regard to the precision required by criminal law. He did not think so.

38. In respect of the fourth category of crimes mentioned in article 20, paragraph 1, namely, crimes against humanity, it could also be asked, at the present stage in the development of international law, at what level of magnitude violence against humanity should, in the absence of a treaty regime, be tried at the international level as an international crime. In his view, the category of crimes against humanity was too broad and too vague to qualify those acts as crimes under general international law and it was thus premature, incorrect and unnecessary to refer to it in article 20, paragraph 1.

39. While he was thus in favour of the deletion of article 20, paragraph 1, he did not wish to imply that certain acts of aggression and certain acts in the category of crimes against humanity did not form part of international law. In his view, such questions must be resolved within the framework of the draft Code of Crimes against the Peace and Security of Mankind. The Commission should therefore continue to make every effort to draft a code that would be as widely acceptable as

<sup>9</sup> General Assembly resolution 3314 (XXIX).

possible. At that time, it would have to be decided whether it was justified to exclude apartheid from the list of crimes under international law.

40. It would be preferable to delete article 23 and to recall very clearly in a preambular paragraph the paramountcy of the Charter of the United Nations and the obligations set forth therein and the need to preserve the respective roles of the Security Council and the General Assembly. In that connection, the Commission might be guided by the proviso contained in the Definition of Aggression, which read:

*Bearing in mind* that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations.<sup>10</sup>

41. The assigning of a specific role to the Security Council was a matter which needed to be carefully considered and it should be borne in mind that the provisions of the Charter and the continuous evolution of practice under the Charter was an extraordinarily complex and difficult field. In view of its obvious political dimensions, the matter ought to be seriously considered by the General Assembly in consultation with the Council so that acceptable provisions could be included in the statute.

42. He endorsed the comments made by Mr. Rosenstock on paragraph 2 of article 21 and he firmly supported Mr. Robinson's proposal (2358th meeting) that it should be made clear that when, in the framework of extradition treaties in force, a valid request was received, it should be acted upon.

43. Mr. VILLAGRÁN KRAMER said that he did not wish to reopen a philosophical debate by asking again whether the Commission was in the realm of *lex lata* or of *lex ferenda*. The Commission's mandate was to prepare texts which might sometimes be a simple codification of existing rules and sometimes, when the Commission thought it appropriate, constitute progressive development of international law. But the Commission's efforts must always be aimed at drafting viable proposals which took the realities into account. And quite obviously in the case of the statute of an international criminal court, the Drafting Committee's efforts should be aimed at ensuring that Governments would find the Commission's proposals workable, would accept its premises and, when necessary, would go even further along the indicated road.

44. The text under consideration did, of course, have its faults, but it had the advantage of existing and he invited its detractors, instead of making criticisms, to submit in writing alternative proposals or even a complete counter-draft which could be compared with the present one. The draft statute submitted by the Working Group had solid foundations. Account had been taken, for example, of the work of the International Criminal Law Commission and of the results of the World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights which had taken place from 2 to 5 De-

cember 1992 at the invitation of the International Institute of Higher Studies in Criminal Sciences at Syracuse, Italy and the International Meeting of Experts on the Establishment of an International Criminal Court, which had been held in Vancouver from 22 to 26 March 1993, at the invitation of the International Centre for Criminal Law Reform and Criminal Justice Policy. Account had also been taken of the comments which Member States had submitted to the Security Council through the Secretary-General of the United Nations in connection with the establishment of the International Tribunal, in particular the report of the Committee of French Jurists,<sup>11</sup> in the drafting of which Mr. Pellet had participated and which contained the basic elements of the statute of the International Tribunal. The document before the Commission could thus be regarded as a distillation of the discussions in other forums. That was a great advantage, since the positions stated by Governments had thus been taken into consideration, together with all the comments submitted to the Commission.

45. Having thus defended in a plenary meeting of the Commission the draft articles prepared by the Working Group, which had done excellent work, particularly on the essential issue of jurisdiction, he had a number of specific comments to make.

46. First of all, it would be preferable for the planned international criminal court to be established by treaty and not by a resolution of the General Assembly or the Security Council. For what in practice was the effect of such resolutions? Unfortunately, experience had revealed their limitations. It must be acknowledged that the international community was powerless to resolve, for example, the situations in Rwanda or Haiti, if only owing to the principle of non-interference.

47. His other comments related more specifically to part three of the draft statute. First, with regard to the appropriateness of including apartheid among the crimes listed in article 20, paragraph 1, he recalled the distinction between crimes established under or pursuant to treaties and crimes under general international law. That distinction had already been made in the text of the draft statute annexed to the report of the Commission to the General Assembly on the work of its forty-fifth session.<sup>12</sup> The Assembly, far from finding the distinction baseless, had endorsed its underlying principle. The Commission had refined its approach even further in the present text. It had examined much more realistically the fundamental difference between crimes defined by treaties and crimes which, by their nature, fell under general international law. Where did apartheid stand? There was no doubt that it was a hateful international crime which was unfortunately not limited to South Africa and whose seeds could already be perceived in other regions of the world. It was enough to look at the progress made by fundamentalist movements in some societies. But the nature and gravity of a crime was one thing and the question whether it was a crime under general international law was another. Of course, ICJ had given some guidance in that regard. It had shown that the existence of

<sup>11</sup> Document S/25266.

<sup>12</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

<sup>10</sup> *Ibid.*

certain treaties was evidence of the existence of certain rules of general international law. But were a treaty itself and its degree of acceptance sufficient evidence of the existence of a rule of general international law? ICJ had stated further that some resolutions of the Assembly had the status of rules of general international law. Yet was it known how many States had accepted those rules? He preferred to support the cautious position taken by Mr. Tomuschat and not to be so bold as to assert that apartheid was a crime under general international law which should be included in the list in article 20, paragraph 1.

48. The fact that a crime fell in one category or the other clearly had implications for the jurisdiction of the court. In the Working Group's view, in the case of genocide, the court ought to have "inherent jurisdiction", the perhaps unhappy term used in the commentary. It might have been better to speak of jurisdiction *ipso jure*. It was essential for the principle of the jurisdiction *ipso jure* of the future international criminal court to be defined as clearly as possible and to rest on sound legal foundations. He had put forward the idea, which had not been adopted by the Working Group, that acceptance of the court's jurisdiction might be tacit and result from acts unmistakably demonstrating the willingness of a State which had not expressly accepted the jurisdiction of the court by depositing an instrument to that effect to accept that jurisdiction in a specific case. To allow that possibility might be a way of strengthening the exercise of the jurisdiction of the court. The Working Group ought to consider it.

49. His last comment concerned article 23. The phrase "if the Security Council... so determines" used in paragraph 1 and echoed by the phrase "unless the Security Council so determines" in paragraph 3 was not a very happy one. It was not desirable for the court to exercise its jurisdiction by virtue of a mandate of the Security Council. In order to provide a better guarantee of the necessary independence of the court, it would be preferable to replace those phrases by a more flexible formula such as "at the request of the Security Council". He did not, however, support the suggestion that paragraph 3 should be deleted. The provision was based substantially on the Charter of the United Nations provisions concerning the powers of the Council as the guardian of international peace and security. There was some point in referring to that in the present context.

#### Other business

[Agenda item 10]

50. Mr. Sreenivasa RAO informed the members of the Commission that, in the context of the United Nations Decade of International Law,<sup>13</sup> India was marking in 1994 the centenary of the birth of a distinguished Indian jurist, the late Pramathanath Bandyopadhyay, who had written in particular about the practices and principles of international law which had governed the States of ancient India as between themselves and between them

and States outside the Indian subcontinent. He had made a remarkable contribution to international law, not only by demonstrating that international law did not owe its origins exclusively to Europe, but also by inspiring several generations of students of international law to promote the concept of the rule of law based on equality and justice for all.

51. A copy of Mr. Bandyopadhyay's work<sup>14</sup> would be lodged with the secretariat for the members of the Commission to consult if they wished.

52. The CHAIRMAN said that the work was indeed an important one, for it broadened the often very Eurocentric approach, to the history of international law.

*The meeting rose at 1.05 p.m.*

<sup>14</sup> *International Law and Custom in Ancient India* (New Delhi, Ramanand Vidya Bhavan, 1982).

## 2360th MEETING

*Wednesday, 29 June 1994, at 3.10 p.m.*

*Chairman:* Mr. Vladlen VERESHCHETIN

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

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>2</sup> A/CN.4/460,<sup>3</sup> 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 Commission to resume its consideration of part three of the draft statute for an international criminal court, which was entitled "Jurisdiction of the Court" (A/CN.4/L.491).

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

<sup>2</sup> Reproduced in *Yearbook... 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>13</sup> Proclaimed by the General Assembly in its resolution 44/23.

2. Mr. PAMBOU-TCHIVOUNDA said that the title of article 20 (Jurisdiction of the Court in respect of specified crimes) was inappropriate and should be amended to refer to "acts treated as crimes". He fully agreed with Mr. Robinson (2358th meeting) about the need to include apartheid in the list of crimes contained in the article and was surprised by the failure of the Working Group on a draft statute for an international criminal court to mention the draft Code of Crimes against the Peace and Security of Mankind. Did such silence mean that there was no link at all between the draft statute and the draft Code? Or did it mean that the crimes contained in the Code were to be assimilated to those mentioned in article 20 of the statute? Or was it merely an oversight on the part of the Working Group? Doubtless it was an oversight and, in his opinion, the article should in fact include an express reference to the crimes defined in the Code, either in a separate paragraph or by incorporation in paragraph 1.
3. He was not sure that privileged treatment should be given to the crime of genocide in article 21 (Preconditions to the exercise of jurisdiction), paragraph 1. It would be better to give the same treatment to all the crimes falling within the court's jurisdiction *ratione materiae*. Paragraph 2 posed a problem of construction: once the custodial State had agreed to a request to surrender the accused there seemed to be no reason for the requirement of acceptance by that State of the court's jurisdiction with regard to the crime in question. If the Working Group wanted to make the surrender of the accused dependent on acceptance of jurisdiction, it should make the point clear by rewriting paragraph 2. In any event, he wondered about the functional relationship which would have to be established between acceptance of jurisdiction and surrender of the accused, as that relationship could only operate negatively.
4. The combined effect of paragraphs 2 and 3 of article 21 amounted to a most unusual concession in favour of unilateral voluntarism which would neutralize the system established by the statute, and the Commission would have done all the work for nothing. The implementation of article 21 would challenge the entire body of international treaty law, in particular with regard to the established regimes of interpretation and amendment applicable to the whole of the draft statute. Therefore, the whole structure of article 21 must be thoroughly revised.
5. The title of article 23 (Action by the Security Council) was also inappropriate and should be amended to read "Relations between the Security Council and the Court". As to paragraph 2, he had already stated in the preliminary discussion of the text of the draft statute (2330th meeting) that aggression against a State could hardly be committed by an individual. An individual could commit an act of aggression against a State only when acting as the agent of another State. That raised the question of the criminal responsibility of States and whether they came under the court's jurisdiction *ratione personae*. If they did not, then paragraph 2 should be deleted and the crime of aggression removed from the list contained in article 20.
6. Both the spirit and the letter of article 23 made the functioning of the court subject to possible abuse of the right of veto of the permanent members of the Security Council, and that would mean the end of the court. Consequently, he believed that paragraphs 2 and 3 should be deleted.
7. If the Commission wanted the statute to have real force, it must tackle the essential need to relate part three to the draft Code, which must be made a central criterion for determining the jurisdiction of the court.
8. Mr. GÜNEY said that, although the draft statute did not reflect fully all the points he had raised as a member of the Working Group, he was generally in agreement with the text. With the endeavours of the Working Group and despite the difficulties, the Commission had moved on from a theoretical debate to practical drafting. Its long-standing task had now become more urgent in view of the barbarities committed in local conflicts since 1991, for it was regarded as unacceptable for the guilty parties to go unpunished.
9. Fortunately, the court was to have jurisdiction over exceptionally serious crimes of international concern, which would include systematic acts of terrorism committed by a group or organization against civilians. Undoubtedly, such acts were crimes under general international law and were in fact crimes against humanity. International terrorism, however practised, was an international crime and must be recognized as such. In most cases, terrorism supported by drug trafficking also merited inclusion among the crimes for which the court was to have jurisdiction.
10. He endorsed the comments made by Mr. Pambou-Tchivounda about the title of article 20 and agreed with those members of the Commission who favoured the most practicable modalities for the functioning of the statute. Similarly, he agreed with Mr. Robinson's remarks (2358th meeting) concerning article 21, paragraph 2. The Working Group should look carefully at all the suggestions and requests for changes made by members of the Commission and determine how far they could be acted upon.
11. Mr. YANKOV said he joined in the expressions of appreciation addressed to the Chairman of the Working Group and would also point out that the active participation in the Working Group of the Special Rapporteur, Mr. Thiam, had proved extremely helpful, given the need to harmonize the work on the draft statute and on the draft Code against the Peace and Security of Mankind.
12. It was apparent from the discussion that a number of substantive issues still merited careful consideration. The draft statute under consideration was, however, a significant improvement on the one placed before the Commission at the previous session. Possibly, had the Commission had another year to consider the matter, the draft would have been better still, but the Commission had rightly respected the sense of urgency reflected in the relevant General Assembly resolutions and had accorded priority to the issue.

13. Article 2, on the relationship of the court to the United Nations, was now couched in far more precise terms and made for greater clarity with regard to the grounds for the establishment of the court by treaty. It was hard to conceive of a permanent international criminal court with broad jurisdiction being created by a resolution of the General Assembly, or for that matter of the Security Council, since the jurisdiction and functioning of the court would obviously impose obligations on States. In that connection, he doubted the wisdom of drawing an analogy with 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.<sup>4</sup> In the first place, the International Tribunal was an *ad hoc* body whose jurisdiction was much more limited in time and scope than the jurisdiction of the proposed international criminal court. There were also some reservations about whether it had been proper for the Security Council to establish that body. In any event, it was too early to take the Tribunal as a model, since it had not produced any jurisprudence or practice on which conclusions could be based. In fact, it was not a model but an innovation, and a permanent court should not be founded on innovations of the kind peculiar to United Nations peace-keeping operations. Accordingly, he firmly endorsed the treaty approach.

14. As far as article 20 was concerned, while the enumeration of the crimes set forth in paragraph 1 created no difficulties for him, the article would require further examination, particularly with respect to aggression. It had been said that, in the case of aggression, there was no treaty law and no treaty practice apart from the general provisions of the Charter of the United Nations and, specifically, Article 2 thereof. One point that would require particular scrutiny in the context of the consideration of the draft Code against the peace and security of mankind was whether a distinction should be made between an act of aggression and a war of aggression. On common sense principles alone, it was quite clear that a single act of aggression could not give rise to all the consequences of a war of aggression. In the case of border incidents—which were often characterized as acts of aggression—the full machinery of a court of the kind contemplated should not, therefore, be set in motion.

15. Further consideration should also be given to the question of apartheid and it should be recognized that it had the main elements of a crime under general international law. Not only States but also persons acting on behalf of States could commit the crime of apartheid and could come within the court's jurisdiction *ratione personae*. Admittedly, there was no State practice on the combatting of apartheid as an international crime, and *opinio juris* had not yet crystallized. None the less, apartheid was treated as a crime and punishable as such under the criminal codes of many countries. Sometimes, too, internal law could be evidence of the state of *opinio juris*.

16. The provisions of article 21 on the obligations of the custodial State and of the State on whose territory the act or omission in question occurred were an improve-

ment, yet the article as a whole was one of the weak points in the statute. He appreciated, however, that that was because the article had been based on so-called realistic considerations.

17. The provisions of article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21) concerning reservations represented a compromise—a compromise which, in his view, was a departure from the principle of compulsory jurisdiction. While he had agreed to the provision in the Working Group, he feared that, through reservations, that principle could be nullified. It should not be forgotten that the jurisdiction of ICJ had, until some 15 years ago, been seriously eroded by reservations to Article 36, paragraph 2, of its Statute.

18. Paragraph 3 of article 23 was perhaps superfluous and in any event went too far in the distinction it drew. He looked forward to the time when international organizations would also be subject to judicial supervision of the legality of their decisions. That, however, was something for the future.

19. He would suggest that the draft statute should be regarded as a final compromise and that it should not be considered further in the Drafting Committee. Moreover, the Commission should give priority to the consideration of the draft Code with a view to completing the work on that part of the topic. He for one could not conceive of a viable international criminal court unless there was a clearly drafted applicable law that enjoyed the same international standing as the court itself.

20. Mr. Sreenivasa RAO said he wished to clarify the statement he had made at the previous meeting concerning paragraph 1 of article 23, or action by the Security Council. In his view, the powers given to the Security Council under that paragraph could not be justified. The Council's powers under Chapter VII of the Charter of the United Nations were essentially related, not to serving the cause of the international criminal justice system—as in the case of any other prosecutor—but to dealing with threats to and breaches of the peace and security of mankind. Hence, while it was argued with some logic that the Security Council could use its powers under Chapter VII to refer cases for punishment of criminals who were otherwise responsible for or involved in the breakdown of international peace and security, the power to refer such cases could be related only to the objective of maintaining international peace and security. The purpose of the statute, on the other hand, was essentially to establish and maintain an international criminal justice system, not to maintain peace and security as such.

21. Further, even if the Security Council's powers could be admitted to extend to the field of prosecution of specific criminal cases in the interest of maintenance of international peace and security, such a power as was given under article 23, paragraph 1 was not justifiable, as it would tend to discriminate against States that did not have a veto power.

22. Mr. VILLAGRÁN KRAMER said that a question of criminal procedural law was involved. When administrative, civil or criminal organs had specific powers but the exercise of one power depended on the determination of another, that situation was referred to in Spanish as a

<sup>4</sup> Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

*cuestión prejudicial*, a preliminary issue. In the present case, the court would not be acting on a decision or mandate of the Security Council, but because a specific situation had been procedurally established, delimited or clarified. The Security Council exercised its own powers, and only those powers; and the same was true of the court. Thus the legal problem was that when the Security Council, pursuant to its powers, resolved a specific situation or preliminary issue, the court could then act; but it acted neither by permission, nor on instructions; rather, its action was temporally contingent on the exercise of power by another organ. He drew attention to that point because he had spoken in favour of retaining article 23, paragraph 3. All that was necessary was to modify the wording of paragraph 1, and use the formulation *a instancias del Consejo de Seguridad* (at the request of the Security Council), which, in Spanish at least, made it clear that that organ was exercising its own power.

23. Mr. ROBINSON said that, at the 2358th meeting, the Chairman of the Working Group had indulged in what was fast becoming his favourite pastime of categorization, describing him as a "maximalist". He had then gone on to describe himself as a "minimalist plus one". If that was indeed the case, for his own part he was inclined to describe himself as a "maximalist minus one". But what useful purpose would be served? It merely illustrated the tendency to over-categorization and refinement of which he had complained with regard to some of the articles.

24. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that he would attempt not to categorize any member of the Commission, past, present or future.

25. At first glance, the Commission seemed to be so extraordinarily divided on the question of the court's jurisdiction that it would prove impossible to reach agreement on any meaningful provisions. That preliminary impression needed, however, to be contrasted with the impression left by the debate three sessions ago, at which the Commission had truly been divided on every issue that had arisen.<sup>5</sup> Since then, progress had been made: there were now significant areas of agreement among many members on specific points, with those who wished to go much further, tending to cancel out those who wished to do even less. Although, listening to individual parts of the debate, one might be inclined to despair, an impartial observer listening to the discussion as a whole would understand the process whereby the Working Group had ended up by providing for some cases in which the court could operate without the consent of all States concerned, but within a general framework requiring such consent and also within the existing system of international judicial cooperation.

26. No one suggested that part three was perfect, but, having regard to the range of views within the Commission, it struck a reasonable balance, making concessions to every position taken, and provided what Mr. Pellet had called "windows". As a construction, the court was now compatible with existing constructions in the field of international judicial cooperation. The problem was

that Mr. Pellet conceived of it as one consisting only of windows, whereas others conceived of it as having no windows at all.

27. With regard to article 20, although the view had been expressed, either that the distinction between crimes under general international law and crimes under treaties should be abolished, or alternatively, that there should be no crimes under general international law, the prevailing tendency had been to support retention of that distinction. There were good reasons for so doing. Under the *nullum crimen sine lege* principle, a distinction had to be drawn between crimes under international law as such and crimes under national law, even where the latter might give effect to treaties. The two categories should not be confused.

28. Having regard to the debates in previous years, there had been a remarkable degree of support for the general list contained in article 20, paragraph 1, and apparently no opposition to the principle of the listing. There had been justified criticisms of the form of language used in subparagraph (c). He had already expressed his view on the issue of whether apartheid should be added to paragraph 1. In substance, it was possible to meet the concerns expressed about possible future occurrences of apartheid under the terms of the statute as it was currently drafted. If the crime of apartheid were incorporated into paragraph 1, there was a danger that the peace settlement now being painfully achieved in South Africa might be retrospectively undone.

29. As with every other article, there had of course been criticisms of article 21, but there had been a general acceptance that it represented an improvement on previous versions. Some members had been understandably unhappy about the extent of the authority given to the territorial State under article 20, paragraph 1 (b) (ii). That had simply been a concession to the reality of primary territorial State concern over crimes in the majority of cases. There had been very little support for the idea of additions to that list, for example in relation to the State of nationality.

30. The idea, put forward by Mr. Robinson (2358th meeting), that paragraph 3 should be relocated, seemed to him to be probably correct. In the matter of extradition, there was a case for the view that paragraph 2 should be extended to cope with situations of existing extradition requests duly made by a State, as distinct from subsequent extradition requests. On the other hand, the Working Group had carefully considered that question, and a majority of its members—and, he sensed, other members of the Commission—had favoured the view that, taken with other protection in relation to extradition contained in part seven, sufficient security was provided. In any event—and the remark applied, *mutatis mutandis*, to all articles of the statute—the important point was to ensure that the text contained the various elements which would be a necessary part of a future debate on the statute. The Commission was not codifying a court: that would be a contradiction in terms. It was elaborating a text which would form a draft for discussion by States, and which must contain the necessary elements of that debate.

<sup>5</sup> See *Yearbook* . . . 1991, vol. I, 2207th to 2214th meetings.

31. With reference to article 22, although some members still preferred an “opting-out” system, it seemed that, if there was to be some requirement of acceptance, there was fairly general support for an “opting-in” system on the grounds that it would make for greater flexibility. In his own view, an “opting-out” system would also require an “opting-back-in” system for those States that discovered after the event that they should not have opted out in a given case—a convoluted form of acceptance that would perhaps be less honest (and certainly less direct) than the procedure under article 22 as it now stood.

32. He wished to stress that the statute’s requirements regarding acceptance of jurisdiction did not involve a situation of complete voluntarism on the part of States parties. To suppose as much was a serious mistake, because under article 21, paragraph 3—which no one had opposed—a State which became a party to the statute was obliged to consider whether it should prosecute someone in relation to a crime when it was a party to the treaty which established the crime, once there had been a complaint which was found to have a measure of justification. Thus, in effect there was a multilateral system in which States could be called upon, if they did not accept the jurisdiction of the court, at least to extradite or prosecute. Therefore, no State party could act as a State of asylum in relation to anyone properly charged with an international crime which that State accepted in principle as being a crime. That itself was a significant step forward. It would also extend to crimes under general international law in certain cases—a further advance.

33. As to article 23, it should first be stressed that paragraph 1 did not add to the powers of the Security Council, but recognized that those powers might well exist. To say as much was hardly surprising, having regard to the existence of the International Tribunal. *Pace* Mr. Yankov, the commentary did not go out of its way to praise that Tribunal for being an ad hoc tribunal, although it did pay considerable attention to legal judgements made by the Council as to its jurisdiction *ratione materiae*. Those judgements were of considerable significance, as were various of the procedural aspects of the statute. The dominant view in the Working Group had been that a system should not be created that had the effect of encouraging the Council to set up separate ad hoc tribunals, but that a system should be introduced under the control of States parties, one which, provided the crimes in question fell within the jurisdiction of the court, the Council would be encouraged to use and perhaps would have no effective option but to use, because of the court’s very existence. Any State asked to support a resolution creating an ad hoc tribunal would simply point to the existence of the court created by the statute to which it and other States were parties. Article 23, paragraph 1, was a crucial “window” in the statute. There was controversy as to the extent of the powers of the Council, and all positions on that question were plainly reserved in the commentary. Any precise issues concerning the drafting of article 23, paragraph 1, could of course be reconsidered.

34. By comparison with paragraph 1 of article 23, paragraph 2, had given rise to less concern. It was held, and he had some sympathy with the opinion, that there

was no room for aggression as a crime of individuals under international law, and that paragraph 2 and the reference to an act of aggression under general international law should therefore be deleted. The Working Group had not taken that view, because it had included in article 20, paragraph 1, only those crimes under general international law where there was actual practice, and not merely *opinio juris*, in support of the proposition that they were crimes of individuals. For all of the crimes listed in article 20, paragraph 1—and only for those crimes—there was some actual international practice to back up the assertion that they were crimes under international law: either prosecutions, or action to set up systems with a view to the prosecution of those crimes. The feeling had been that, having regard to the endorsement of the Nürnberg Principles<sup>6</sup> by the General Assembly, and to the general development of international law since that time, and having regard also to the Commission’s provisional decision to retain aggression as a crime in the draft Code of Crimes against the Peace and Security of Mankind aggression could not be omitted from the statute. He would even go so far as to say that, in his view, if aggression were to be omitted from the statute, its inclusion in the draft Code was precluded. He could see no basis for arguing that aggression should be a crime triable only before national courts. If anything, it should be the one crime which would be triable only before an international court. And it must be borne in mind that, with considerable assistance from the Special Rapporteur, every step had been taken to ensure that the draft statute was consistent with the draft Code as now envisaged. In any event, assuming that aggression was retained, there was very little support for the deletion of paragraph 2, and quite widespread support for its being retained.

35. The position regarding paragraph 3 was obviously rather different. The paragraph reflected a certain paramountcy given to the Security Council by the Charter of the United Nations. On the other hand, it could be argued that, if the Council had that paramountcy, it should simply be allowed to exercise it *ab extra*, while if it did not, such a paramountcy should not be created. He personally would fight much less hard to retain paragraph 3 than paragraph 1.

36. He had not been able to deal with every issue arising under part three. It was gratifying to note that no one appeared to be opposed to article 24. As to the other articles, the matters raised should be referred back to the Working Group for consideration. Notwithstanding the vigour and good sense with which the different views had been expressed, it seemed to him that, if the Commission’s task was perceived in terms of creating a discussion draft for States that could lead them to establish a court, then the general balance struck in part three was the best for which the Commission could hope.

37. Mr. de SARAM asked that the principal points made in the plenary debate on part three, which had been

<sup>6</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook* . . . 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook* . . . 1985, vol. II (Part Two), para. 45).

of extreme importance, should be reflected in the report of the Commission, as was the usual practice.

*The meeting rose at 4.25 p.m.*

## 2361st MEETING

*Tuesday, 5 July 1994, at 10.20 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. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Yamada, Mr. Yankov.

### Cooperation with other bodies (concluded)\*

[Agenda item 8]

#### STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE FOR LEGAL COOPERATION

1. The CHAIRMAN welcomed Mr. Hans Nilsson, observer for the European Committee for Legal Cooperation, and invited him to address the Commission.
2. Mr. NILSSON (Observer for the European Committee for Legal Cooperation) thanked the Commission for inviting him to attend one of its meetings and to present a report on the most recent work of the Council of Europe in fields of interest to the Commission. He welcomed what seemed to be becoming a regular practice, particularly now that the Council of Europe was kept regularly informed of the work of the Commission, *inter alia*, through the excellent report presented by Mr. Eiriksson to the European Committee for Legal Cooperation.
3. He represented the secretariat of the European Committee for Legal Cooperation, but he was also involved with the Committee of Legal Advisers on Public International Law, on which Mr. Eiriksson represented his country. That Committee comprised 32 members, together with a number of observers from European and non-European countries that were not yet full members of the Council of Europe. Foremost among the problems considered recently by the Committee was the problem of State succession, which had become particularly important in the Council of Europe in the last few years,

for, in May 1989, the Council had had only 23 member States, while that number had risen to 32 following the admission of nine countries of central and eastern Europe. The Council of Europe had also received nine other applications for admission from countries such as the Russian Federation, Ukraine and Albania.

4. The Committee of Legal Advisers on Public International Law had also considered the question of the creation of an international tribunal to prosecute crimes committed in the former Yugoslavia. Other Council of Europe bodies had also studied that question, among them the European Committee on Crime Problems, which had held an exchange of views of experts in October 1993 on the repercussions on international legal cooperation and domestic law of the creation 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.<sup>1</sup> One of the issues examined had been the question of the links between human rights protection and the creation of the International Tribunal. According to one view, States were under an obligation to relinquish their jurisdiction in favour of the International Tribunal, and were therefore no longer in a position to comply with the Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights. Article 103 of the Charter of the United Nations would corroborate that view. According to another view, defended by the majority of experts, while States were under an obligation to cooperate with the International Tribunal, such cooperation was subject to respect for other obligations under international law, namely, obligations at the same level or at a higher level with regard to the principles, including the humanitarian principles, in the name of which Security Council resolution 827 (1993) had been adopted. International human rights law thus had precedence over the law created by States, including law deriving from procedures set up by States through international treaties such as the Charter. Therefore, States could derogate from their obligations under international human rights instruments, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights, only to the extent strictly necessary for complying with the humanitarian exigencies of the situation on the basis of which Council resolution 827 (1993) had been adopted. He would transmit an informal note concerning that exchange of views to the secretariat of the Commission.

5. Other issues considered by the Committee of Legal Advisers on Public International Law and in the broader framework of the Council of Europe included the creation of a permanent court. The Parliamentary Assembly of the Council of Europe had recently adopted a recommendation in which it had deemed it desirable to set up a court and had proposed, with a view to expediting that process, that a European Chamber should first be established. That recommendation had been communicated to the Committee of Ministers of the Council of Europe, which had transmitted it to the Committee of Legal

<sup>1</sup> Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

\* Resumed from the 2358th meeting.

Advisers on Public International Law and to the European Committee on Crime Problems. Each of those Committees had drafted an opinion on the basis of which the Committee of Ministers would formulate a reply to the Parliamentary Assembly. Without wishing to anticipate the reply to be given by the Committee of Ministers, he indicated that the opinions of the two Committees were not strongly in favour of the idea put forward by the Parliamentary Assembly of the Council of Europe. Both Committees considered that it was for the international community as such to take responsibility for creating a permanent court.

6. The Vienna Summit of Heads of State and Government of the Council of Europe member States, held on 8 and 9 October 1993, had been a historic event. On that occasion, the first of its kind, the 32 Heads of State and Government attending the Summit had affirmed the responsibility of the Council of Europe regarding "democratic security" in Europe and they had recognized the predominant role of the Council *vis-à-vis* the newly established democracies in central and eastern Europe.

7. One of the very concrete results of the Vienna Summit had been the creation, by means of an additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, of a single European court of human rights. The Protocol had been signed by 31 of the 32 member States and between 18 months and 2 years would now elapse before the effective establishment of the court, which, by handing down judgements that would be binding on Council of Europe member States, would guarantee the exercise of human rights.

8. Another important result of the Vienna Summit had been the decision taken by the Heads of States and Government to draft a convention on minorities.

9. In the same area, it had also been decided to establish a new additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the cultural rights of minorities. Preparation of that protocol was under way.

10. Another very tangible result of the Vienna Summit had been the creation of a commission against racism, xenophobia and intolerance, which had already begun its work and had set up a legal working group to study the drafting of international instruments in that field.

11. Among the work currently under way in the European Committee for Legal Cooperation, he cited a draft European convention on nationality. The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality had existed since 1963, but the draft convention was aimed at incorporating new trends in that sphere. It would deal, *inter alia*, with the consequences of multiple nationality, the rights and duties of citizens, acquisition, loss and recovery of nationality and would include provisions concerning nationality after a State had ceased to exist or following the transfer of sovereignty over a territory. Initially, the discussions were taking place in a working group, but when further progress had been made on the draft, the European Committee for Legal Cooperation would welcome the opportunity for co-

operation with the Commission or with some of its members.

12. In its capacity as a steering committee, the European Committee for Legal Cooperation had also approved a draft recommendation on the independence, efficiency and role of judges, which was to go before the Committee of Ministers for final approval and adoption. That recommendation was particularly important for the countries of central and eastern Europe, which were currently recasting their legislation, including their constitutions, and were thus very mindful of the guiding principles set forth in the Council of Europe's recommendations, which they regarded as European standards which they were obliged to respect.

13. The European Committee on Crime Problems had recently concerned itself with the implementation of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. A first step had been the adoption of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which was a classical instrument of legal cooperation, but one which also contained some interesting provisions concerning damages. For instance, when legal action on liability for damages had been initiated by a person, the parties concerned were to consider consulting each other, where appropriate, to determine how to apportion any sum of damages due. The Convention also provided for an obligation to inform when a party to the Convention had become the subject of a litigation for damages.

14. With regard to the Convention, it was interesting to note that, on 9 September 1991, the Committee of Ministers had adopted Recommendation No. R (91) 12 concerning the setting up and functioning of arbitral tribunals under that Convention.

15. The European Committee on Crime Problems had also recently approved a draft agreement on illicit traffic by sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The draft agreement dealt with areas closely related to State sovereignty, the international law of the sea, and problems of extradition. It had been adopted by the European Committee on Crime Problems at the end of June 1994 and was to be submitted to the Committee of Ministers. The general principle of the agreement was that, when a State referred to as the "intervening State" had information giving reason to believe that a vessel on the high seas was engaged in trafficking in narcotic drugs, it could intervene, provided that it first requested authorization from the flag State, which must, as far as was possible, communicate its decision within four hours of receipt of the request. Having received the authorization of the flag State, the intervening State would probably compel the vessel to enter one of its ports, where a search would be carried out. In the event of narcotic drugs being discovered, the intervening State would be able to prosecute the perpetrators of the offence, unless the flag State decided to exercise its "preferential jurisdiction", meaning its right to exercise its jurisdiction on a primary basis to the exclusion of the concurrent jurisdiction conferred on the intervening State by the draft agreement.

16. The draft agreement was extremely detailed, comprising about 40 articles, and was accompanied by a very full explanatory report.

17. On the question of damages, the draft agreement constituted a substantial advance with regard to the protection of individual rights in the field of legal cooperation in criminal matters, in that it provided that, if a natural or legal person suffered loss, damage or injury as a result of negligence or some other fault attributable to the intervening State, that State was liable to pay compensation.

18. It also provided that, where the action was taken in a manner which was not justified by the terms of the agreement, the intervening State was liable to pay compensation for any resulting loss, damage or injury.

19. Lastly, it was interesting to note that the draft agreement included an article on settlement of disputes and that it had an annex dealing specifically with the arrangements for recourse to arbitration.

20. With regard to the work of the Parliamentary Assembly of the Council of Europe, he referred in particular to its work on reservations made by member States to Council of Europe conventions.

21. In 1993, the Assembly had drawn up Recommendation No. 1223 (1993) on that question, in which it had recognized that, on acceding to an international convention, States were entitled, according to the rules of international law, to make certain reservations and that that possibility simplified the accession of States to certain Council of Europe conventions. It had nevertheless emphasized that the use of reservations also had major drawbacks. First, the unity and coherence of the convention might be impaired. The legal machinery that it instituted might be weakened and fall short of the goal of harmonizing and unifying the relevant law. As States were no longer bound by the same international undertakings, reservations interfered with the equality which should prevail between contracting parties and seriously complicated their relations. In addition, it was often difficult to determine the obligations of each State. The Parliamentary Assembly had thus considered it advisable and even necessary that the number of reservations made in respect of Council of Europe conventions should be considerably reduced. It had accordingly recommended that, with regard to reservations already made and conventions already concluded, the Committee of Ministers should invite member States to make a careful review of their reservations, withdraw them as far as possible and make a reasoned report to the Secretary-General of the Council of Europe if certain reservations were maintained.

22. The Committee of Ministers had already replied to that recommendation in a communication adopted on 17 February 1994 in which it had indicated that it had invited member States to withdraw their reservations, but without great success. The Committee of Ministers had also recalled that, according to the rules of general public international law and the relevant treaty provisions, States had the right to limit their respective international obligations by formulating reservations to certain treaty provisions. It therefore did not believe that it

was appropriate to request Council of Europe member States to make reasoned reports to the Secretary-General when certain reservations were maintained.

23. In its Recommendation 1223 (1993), the Parliamentary Assembly had also invited the Committee of Ministers to authorize the steering committees of the Council of Europe to examine the question of reservations made in respect of each convention in their sphere of competence. The Committee of Ministers had found it much easier to endorse that proposal, which was, moreover, already applied by most of the steering committees, including the European Committee on Legal Cooperation.

24. With regard to Council of Europe conventions which might be concluded in future, the Parliamentary Assembly had suggested that the validity of reservations should be limited to a maximum period of 10 years. That proposal had not been endorsed by the Committee of Ministers, which had considered that such provisions did not facilitate the application of conventions, since they were not respected in practice.

25. In conclusion, he cited the example of a Council of Europe convention which contained a clause under which reservations could be formulated, but which also provided that, if, at the end of a 10-year period, a State which had formulated a reservation failed to inform the Secretary-General of its desire to maintain it, that reservation would automatically be annulled. In one case, because of an administrative error, a State had failed to renew its reservations by the 10-year deadline, which had expired in May 1991. When the ambassador of that country had, in a letter dated May 1994, declared that his Government wished to maintain its reservations, while at the same time limiting their scope, the Secretary-General had had to contact all the Contracting Parties—which he had done on 10 June 1994—and ask them whether they would accept a late renewal of the reservations. In his letter to the Contracting Parties, the Secretary-General had stated that, if no objection had been received within 90 days of the date of notification, the reservations would be considered to be tacitly accepted and would take effect retroactively as of May 1991, the date on which they should have been renewed.

26. Mr. EIRIKSSON said that he had officially represented the Commission at the meeting of the European Committee on Legal Cooperation and had also participated, in other capacities, in the meetings of the Committee of Legal Advisers on Public International Law. The Commission's work figured prominently on the Committee's agenda for its last meeting of 1993 and its members continued to promote the Commission's efforts when asked to advise their Governments on positions to take in the Sixth Committee with regard to the report of the Commission. At the meeting of the European Committee on Legal Cooperation, he had presented a report on the work of the Commission at its preceding session and had noted with satisfaction that the Committee members were following the Commission's work with interest and wished to be kept informed of its progress, in particular, in respect of the draft statute for an international criminal court. He himself had had the opportunity to learn first-hand about the legal activities of the Coun-

cil of Europe. He had been encouraged by the Council's emphasis on legal cooperation between member States. The Council's work on nationality would certainly be of interest to the Commission when it discussed the topic of State succession and its effect on the nationality of natural and legal persons. He thanked Mr. Nilsson and hoped that cooperation with the legal bodies of the Council of Europe would continue.

27. The CHAIRMAN, speaking on behalf of the members of the various regional groups and the Commission as a whole, paid tribute to the excellent work the European Committee on Legal Cooperation had done on various international law issues. He was thinking in particular of the Committee's work on the issues of nationality and reservations to treaties, which were also on the Commission's agenda. The Committee's desire to coordinate its work with that of the Commission was very much appreciated and thought should be given to how such cooperation could be realized in practical terms. He requested Mr. Nilsson to convey to the European Committee on Legal Cooperation his best wishes for its success and his conviction that the long-standing ties of cooperation and friendship between the two bodies would develop even further in future.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>2</sup> (continued) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>3</sup> A/CN.4/460,<sup>4</sup> 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)**

28. Mr. YAMADA said that, on the whole, he endorsed the basic orientation and principal elements of part three, on which he had not yet commented. He noted with satisfaction that in articles 20 (Jurisdiction of the Court in respect of specified crimes) and 21 (Preconditions to the exercise of jurisdiction) the jurisdiction of the court derived essentially from the consent of the States concerned; that was consistent with the idea of jurisdiction "yielded" to the court of which he was in favour. He nevertheless wondered, why the new concept of the court's jurisdiction applied only to the crime of genocide. Genocide did, of course, have a special place in general international law, but all the crimes listed in article 20, paragraph 1, overlapped to some extent and had more or less the same degree of gravity. He hoped that that would not prevent States from acceding to the statute. He also hoped that "grave breaches of the laws of war" and "crimes against humanity" (art. 20, paras. 1 (c) and 1 (d)) would be defined in more detail in the draft Code of Crimes against the Peace and Security of Mankind. Article 20, paragraph 2, limited the court's jurisdiction and excluded crimes which were not consid-

ered to constitute exceptionally serious crimes of international concern. That safeguard was necessary as there was no longer any distinction between jurisdiction in respect of crimes of international concern and jurisdiction in respect of crimes established under treaties. The Commission must give further thought to that provision limiting the court's jurisdiction so that a clearer threshold could be formulated.

29. The system for accepting the jurisdiction of the court ("opting in"), as provided for in article 22 (Acceptance of the jurisdiction of the Court for the purposes of article 21), was sound. In respect of article 23 (Action by the Security Council), he endorsed the provision under which a determination of aggression by the Security Council was a precondition for bringing a complaint of an act of aggression, but he failed to see the logic of paragraph 3, which might in fact link legal proceedings to political measures adopted by the Council.

30. With regard to part five of the statute, he was in favour of the inclusion of a reference to national law in articles 33 (Applicable law) and 47 (Applicable penalties). National law should fill in any gaps left by international criminal law, but the wording of article 33, subparagraph (c), was too vague and might violate the principle of *nullum crimen sine lege* embodied in article 39. The wording should correspond to that of article 47, paragraph 2. One possible improvement would be to make applicable law the basis for jurisdiction granted to the court by States and to specify in article 33, subparagraph (c), that national law was in that case the national law of those States referred to in article 21, paragraph 1 (b).

31. In part seven, the concept of a serious crime, as contained in article 53 (Transfer of an accused to the Court), paragraph 5, should be better defined—perhaps in the commentary—in order to clarify any connections with the exceptionally serious crimes of international concern referred to in article 20, paragraph 2. In respect of the annex, the list of treaties it contained was exhaustive, and that was good, but mention should also be made of how future treaties would be dealt with. One solution would be to amend the annex as necessary, but it would be more practical if future treaties contained a provision under which States could accept the jurisdiction of the court. The commentary could provide guidelines in that regard.

32. Mr. ROBINSON said that the wording of article 25 (Complaint) should be brought into line with that of article 2, which stipulated that the States parties to the statute would be referred to throughout the text as "States parties", as distinct from the States parties to the statute which accepted the court's jurisdiction in respect of a specific crime. As provided for in article 26 (Investigation of alleged crimes), paragraph 4, if, upon investigation, the prosecutor concluded that the grounds were insufficient, he could decide not to prosecute. Under article 27 (Commencement of prosecution), paragraph 1, if, upon investigation, the prosecutor concluded that there was a *prima facie* case, he would file an indictment. While, in both cases, the prosecutor was authorized to make the decision following the investigation, the criterion on which he would decide to prosecute was more

<sup>2</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

<sup>3</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>4</sup> *Ibid.*

restrictive than that on which he would decide not to do so. Otherwise, it should be made clear that the expressions “sufficient basis” and “*prima facie* case” had exactly the same meaning. Along the same lines, article 26, paragraph 5, could be improved by adding the words “in accordance with paragraph 1 of the present article” after the words “not to initiate an investigation” and the words “in accordance with paragraph 1 of article 27” after the words “or file an indictment”.

33. As to article 27 itself, if the definition of a “*prima facie* case” was to be applicable, it should be included in the article and not in the commentary. In any event, he would prefer a *prima facie* case to be defined as evidence which would be a sufficient basis to convict the accused on a particular charge. According to article 27, paragraph 2, the president, after examining the indictment, would decide whether a *prima facie* case existed in respect of the crime, and that was, in his view, not sufficient. The president should in fact be making his determination on the basis of all the available information, including a concise statement of the allegations of fact and of the crime or crimes with which the suspect was charged, as referred to in paragraph 1 of the article. In addition to the question whether the president should base his decision on the indictment or on the indictment and on the concise statement established by the prosecutor, it might be asked whether the concise statement might not be influenced by the individual bias of the prosecutor in terms of the weight to be given to the various elements of evidence and to other factors. The concise statement was practical because it resulted in a speedy procedure, saving time and organization. At the same time, might it not be better for the president to have available all the information gathered by the prosecutor? Lastly, paragraph 2 should make clear what would happen in the event that the president did not confirm the indictment.

34. With regard to article 28 (Arrest), the concept of “probable cause” referred to in paragraph 1 (a) was not common to all legal systems and should therefore be explained. The concept of “special circumstances” referred to in paragraph 3 (b) was explained in paragraph 3 of the commentary (ILC(XLVI)/ICC/WP.3/Add.1) by two examples, but it seemed to give the president too much discretionary power. Perhaps, in addition to the two examples provided in the commentary, other circumstances could be included in the text which would provide the necessary certainty in that regard.

35. Article 29 (Pre-trial detention or release) gave rise to two problems. First, what would happen to the person arrested if the local judicial officer determined that the warrant had not been duly served and that the rights of the accused had not been respected? Was the person then simply released? Secondly, why did the judicial officer have to act in accordance with the “procedures applicable in that State” and not with the procedures and laws, and why, in any case, did the judicial officer not have to act in accordance with the procedures relating to the rights of the accused as included in the statute of the court? The reference to the procedures applicable in the State where the arrest occurred was explained in the commentary by reference to article 9, paragraph 3, of the International Covenant on Civil and Political Rights,

according to which anyone arrested should be brought promptly before a judicial officer. However, that instrument had been drafted with a national court in mind, not an international court, and the meaning of the word “promptly” could not be the same in the two situations. It might thus be asked whether, in the “international” context of the court, a delay of two to three days might not be acceptable so that a judge of the court could be sent to the territory where the arrest had taken place and exercise on that territory the functions of a local judicial officer. Similarly, while article 29, paragraph 3, was based on article 9, paragraph 5, of the Covenant, which provided for compensation in the case of unlawful arrest or detention, it was difficult to imagine who would provide the compensation or what provisions had been made under the statute to ensure the enforcement of a decision to award compensation.

36. Article 31 (Designation of persons to assist in a prosecution) was useful in that it provided for the designation of persons to assist the prosecutor, but paragraph 3, which made the terms and conditions of employment of such persons subject to the approval of the presidency, might prompt the question whether the prosecutor’s independence would not suffer by reason of the requirement for such approval. Why should such persons not be treated in the same way as those appointed under article 12 (The Procuracy), paragraph 2?

37. He was not sure of the meaning of paragraph 2 of article 32 (Place of trial), which provided that the court might exercise its jurisdiction on the territory of any State. Did that mean merely that the court could hold a trial in places other than its seat or did the term “exercise its jurisdiction” have a broader meaning?

38. Subparagraph (c) of article 33 seemed pointless. In all the cases in which the court was required to apply a rule of national law, it would be because the statute so provided, as in article 59 (Pardon, parole and commutation of sentences), or pursuant to applicable treaties or the rules and principles of general international law; those possibilities were already covered in subparagraphs (a) and (b) of article 33, respectively.

39. Article 35 (Discretion of the Court not to exercise jurisdiction) had apparently been drafted in response to comments made in the Sixth Committee of the General Assembly at its forty-eighth session in 1993, but he was not sure that the provision solved the problems raised at that time. Subparagraphs (a), (b) and (c) might in fact create some confusion. Subparagraph (b), for example, stated that the court could decline to exercise its jurisdiction if the crime in question was under investigation by a State having jurisdiction over the crime. In most of the cases brought before the court, the crime would already have been investigated. It might often happen in practice that a State, especially a small State, might have investigated a crime and concluded for one reason or another that it could not cope with the situation and that it would like to bring the case before the international criminal court. As article 35 was worded at present, a State could not do so.

40. Subparagraph (c) also allowed the court to decline to exercise its jurisdiction if it thought that the crime was not of sufficient gravity. The criterion of gravity was al-

ready a defining element for many crimes, in particular the ones referred to in article 20, paragraph 2. That element constituted a necessary condition and its absence might well be invoked under article 34 (Challenges to jurisdiction).

41. The concerns stated in the Sixth Committee could be met by restricting article 35 to its present introductory paragraph, which would end with the word “preamble”, after the deletion of the words “if it is satisfied”.

42. Mr. BENNOUNA said that he had some reservation about paragraphs 1 and 3 of article 23, an essential provision of the draft articles with respect to the independence of the court. Despite what was said in the commentary (ILC(XLVI)/ICC/WP.3), paragraph 1 did prompt doubts. The Security Council had indeed recently established an ad hoc criminal court, but for a specific case and for a limited period. The aim in paragraph 1 seemed to be to make exceptions the rule. That was worrying, given the present membership of the Council and its mode of operation.

43. Paragraph 3 was even more problematical in that it prohibited the court from commencing prosecutions without the approval of the Security Council when the Council had determined the existence of a threat to the peace. The notion of threat was a very broad one, especially in the Council’s recent practice, and such a provision might paralyse the future court. Article 23 ought in fact to contain only paragraph 2, with a very clear definition of the competence of the Council with respect to an act of aggression. In addition, the procedural relations between the court and the United Nations might be spelled out more clearly in an agreement between the Organization and the States parties to the statute.

44. He endorsed the comments made by Mr. Robinson on article 31, paragraph 3, and article 32, paragraph 2. On the latter point, he also thought that the place of trial should always be the seat of the court: the independence of the court was at issue because, otherwise, it might be hostage to public opinion. He also agreed with Mr. Robinson concerning article 33: the court applied national law to the extent that either the statute or treaties or the rules and principles of general international law so required.

45. In article 22, the Commission had adopted the principle of a declaration, but there might be cases in which the court’s jurisdiction would be recognized by virtue of a bilateral or multilateral treaty. It might be useful to provide expressly for that possibility.

46. Article 35 was ambiguous, since it was not clear that it was concerned with jurisdiction, admissibility or the appropriateness of prosecutions. In any event, the article should be reconsidered.

47. Mr. ROSENSTOCK, referring to article 27, paragraph 3, said that he had doubts about authorizing the presidency to amend the indictment of its own motion. The independence of the prosecutor was of vital importance and the provision should therefore be revised.

48. The arguments advanced against article 35, in particular by Mr. Robinson, were hardly convincing. The

article had been drafted in response to the serious concerns which had been expressed, and the provision was a very pragmatic one without which fewer States might accede to the statute. In subparagraph (b) in particular, the conjunction “and” made all the difference: the mere fact that a crime was being investigated did not bind the court in any way at all.

49. Article 42 (*Non bis in idem*) was perhaps not sufficiently clear with regard to the point raised in paragraph 3 of the commentary, meaning that the case must have been the subject of a determination on the merits.

50. Turning to article 44 (Evidence), paragraph 1, he said that the oath should not be the customary one taken in judicial proceedings in the State of which the witness was a national, but, rather, an oath peculiar to the court in which the witness was being heard. The question could certainly be dealt with in the court’s rules of procedure, but also in the statute itself, for example, by means of the formula “to tell the truth, the whole truth and nothing but the truth”. The reference to the customary procedure in the State of which the witness was a national might create problems, if only because some States did not provide for an oath. In the case of perjury, the solution of leaving it to the competent domestic courts to prosecute persons committing perjury before the international court was hardly satisfactory. The court should at least be able, like any criminal court, to punish perjurers for contempt of court. That provision must therefore also be revised.

51. The commentary should make it clear that article 45 (Quorum and judgement), paragraph 3 (b), concerned murder or other crimes which, although particularly heinous, were not covered by article 20 on the jurisdiction of the court. As it stood, the commentary seemed odd and irrelevant.

52. It might be asked whether article 52 (Provisional measures) created an obligation or merely an option. In the case of an obligation, the article should perhaps be made subject to the limits set out in article 51 (Cooperation and judicial assistance), paragraph 3. If it was an option, the commentary should say so more clearly.

53. Article 53, paragraph 4, seemed totally incompatible with the residual nature of the jurisdiction of the court and might impose on States obligations incompatible with their obligations towards States not parties to the statute. The paragraph should therefore be deleted or made much more flexible.

54. Mr. HE, referring to article 37 (Trial in the presence of the accused), which provided for the possibility of trying an accused in his absence, said that a well-established principle of international law prohibited trials in the absence of the accused, not only because such trials raised serious problems of impartiality and respect for the rights of the accused as set out in the International Covenant on Civil and Political Rights, but also because sentences handed down after such trials, since they could not be enforced, would undermine the authority and therefore the credibility of the international criminal court in the eyes of the international community. Moreover, the criminal law of many countries prohibited trying an accused in his absence, and it would be

difficult for such countries to accede to the statute if it authorized such trials. That possibility should therefore be excluded.

55. Article 42 allowed the court, subject to certain conditions, to retry a person already tried by another court. The provision ought to be limited to States which had acceded to the statute of the court and had also accepted its jurisdiction. The point must be stated clearly, either in the article itself or in the commentary, in order to prevent the provisions of the article affecting the rights of States which, without being parties to the statute of the court, had accepted its jurisdiction.

56. Mr. RAZAFINDRALAMBO said that, as a member of the Working Group on a draft statute for an international criminal court, he had generally supported the solutions adopted, except perhaps with regard to the permanent status of the court and the independence of judges. He would therefore confine his comments to a question of form which he thought was very important and which might have an impact on the substance.

57. The problem was with the title of the chamber vested with the powers to review the decisions of the trial chamber: in the French version of the text, it had been called *chambre des recours*, a title which appeared incorrect.

58. In the first place, the term *recours* did not cover the application of the principle of two-tier jurisdiction. The so-called appeals chamber would in fact rule as a traditional court of appeal, since, pursuant to article 49 (Proceedings on appeal), paragraph 1, it had "all the powers of the Trial Chamber", and that meant that it was both judge of the facts and judge of law. But it was then difficult to say that it could make orders *en cassation*, as in the French system, since the French court of appeal ruled only on law and not on the facts.

59. Accordingly, he did not understand why the appeals court could not be called *chambre d'appel*, the term which was, moreover, used in article 25 of the statute of the International Tribunal.<sup>5</sup>

60. Mr. THIAM, speaking as a member of the Working Group and replying to Mr. Razafindralambo, said that, since article 49, paragraph 2 (b) stated that, if the appeal was brought by the prosecutor [the appeals chamber] might order a new trial, it was clear that the appeals chamber had a function of referral. In the case covered by the subparagraph, it could not reverse or amend the decision of the trial chamber, but merely referred the case to another court, which was precisely what a court of appeal did. The appeals chamber thus had two functions: a function of *appel*, when the appeal was brought by the convicted person (when it could reverse or amend the decision); and a function of *cassation*, when the appeal was brought by the prosecutor. The title *chambre des recours* had been adopted in an effort to reconcile different legal systems.

61. Mr. Robinson had questioned the usefulness of subparagraph (c) of article 33, which referred to rules of national law. National law could not in fact be invoked

independently of the statute, a treaty, or the rules of general international law. The provision contained in subparagraph (c) was indeed useful, since a further reference was made to national law in article 47, paragraph 2, concerning applicable penalties. It should also be noted that most of the draft statutes which had been elaborated provided expressly that the court could apply national law.

62. With regard to the wording of article 33, subparagraph (c), on the other hand, he agreed with Mr. Benouna's criticisms of the word *faisable*. He had himself proposed in the Working Group that the first part of the phrase should be replaced by the words *le cas échéant*.

63. His last comment concerned article 35. In his view, the article was inappropriate, as no court could have "discretionary powers", except in respect of its own internal functioning. It was inconceivable for the court to have a discretionary power, as that would mean that no one would have a remedy against it, neither the accused nor even the State that brought a complaint against an individual and met with a judicial decision that the case could not be pleaded. The article was poorly worded and should be reformulated or deleted.

64. Mr. ROBINSON said that he was not convinced by Mr. Thiam's arguments in favour of the retention of article 33, subparagraph (c). True, article 47 did provide that the court could have regard to the penalties provided for by the law of the States referred to in paragraphs 2, subparagraphs (a), (b) and (c), but it was the statute that required the court to take account of the provisions of that law.

65. Unless he could be shown instances in which the court would be obliged to apply national law independently of the statute or of any treaty or any rule of general international law, he would continue to have doubts about the need for the reference to national law in article 33.

66. The CHAIRMAN, speaking as a member of the Commission, said that, according to Mr. Robinson's logic, there would really be no need for any article on applicable law, since the statute would obviously apply as a matter of priority.

67. Mr. THIAM said that some States might conceivably agree to accede to the statute only on condition that their own national law would be applied in specific cases.

68. Mr. TOMUSCHAT said he too considered that the reference to national law in article 33, subparagraph (c) should be maintained. The draft statute, after all, did not contain a complete set of rules and, in practice, the court would often have to rely on national law to fill in gaps in the statute on a particular question. To take but one example, defences, the Statute made no provision in that connection so that the court would have no other choice than to refer to the general principles of the criminal law of the States parties. And those general principles were principles not of international law, but of national law.

69. The reference to national law in article 33 should therefore be regarded as a kind of security provision for

<sup>5</sup> Document S/25704, annex.

cases in which the statute itself did not lay down any rule.

70. Mr. PAMBOU-TCHIVOUNDA, addressing himself to the Chairman of the Working Group, said that paragraph 1 (e) of the preliminary note which preceded the draft commentary dealt with the amendment and review of the statute. He was surprised that the question was not dealt with in the body of the statute itself and would like to know whether the omission was deliberate or whether the Working Group intended to deal with the matter in some other way.

71. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court), replying to Mr. Pambou-Tchivounda, said that the Working Group had decided, and the Special Rapporteur had agreed, that the earlier article dealing with review should be deleted, for two reasons.

72. In the first place, it had decided that amendments and review, like finances, for example, were organizational matters that should be dealt with in the treaty to be concluded and that a reference to the matter in the commentary would therefore suffice.

73. Secondly, it had not wished to prejudge the future of the Code of Crimes against the Peace and Security of Mankind and to envisage only the case where the Code would be incorporated in the statute in the context of a formal review after a specified period.

74. With regard to amendments, Mr. Yamada's suggestion that the annex could be more readily modified than the statute itself, so as to add new crimes to it, seemed attractive.

75. In responding to the remarks made by members, he would endeavour to follow the sequence of the articles.

76. As far as article 2 (Relationship of the Court to the United Nations) was concerned, a distinction had to be made between the community of the Member States of the United Nations, on the one hand, and States parties to the statute, on the other, even though there would also be close links between the two groups. The question which arose therefore was to what extent the United Nations or other groups of States could impose a very substantial financial burden on the States parties to the statute by expanding the jurisdiction of the court. That was certainly the answer to the suggestion that the court should be able to exercise jurisdiction under bilateral treaties and limited multilateral treaties in relation to crimes not covered in article 20. It would be tantamount to requiring the States parties to the statute to make "their" court available to other States, with all the financial consequences that that implied, in relation to crimes not envisaged in the statute. Of course, if it were possible, as some members of the Working Group devoutly hoped, to link the court directly to the United Nations and to make it an organ of the United Nations by means of an amendment to the Charter of the United Nations, there would be no difficulty, since the United Nations itself would be responsible for the financial consequences of the inclusion in the statute, or its annex, of any new crimes defined in treaties concluded under United Nations auspices. But since, at the present stage, the question whether the court would be established by

treaty or as an organ of the United Nations remained open, it would be better for those aspects of the matter to be dealt with in the commentary rather than in the body of the statute itself.

77. With regard to article 5 (Composition of the court), he would rely on those members of the Commission who were specialists in French law to find the best translation into French of the term "appeals chamber", it being understood that it was not possible to afford, in terms either of cost or of personnel, to have a two-tiered system of appeal after trial at first instance, as many national systems did. The appeals chamber would have to combine the functions which, in French law, were exercised by two different bodies, the court of appeal and the court of cassation, and which, in Australian law, for example, were exercised first by an intermediate appeal court, with respect to matters such as the proper conduct of the trial, and then by a final appeal court, on crucial questions of law.

78. As to article 23, it would be most undesirable if the Security Council were compelled, owing to the absence of a provision such as that which appeared in article 23, paragraph 1, to create further ad hoc courts, as it had been forced to do at great expense in the case of the former Yugoslavia, without even knowing in advance whether the court in question would ever have to hear a case. The advantage of the system provided for in article 23, paragraph 1, was that the Council could wait until there was in fact an accused, or a potential accused, before making a decision. Accordingly, whatever views might have been expressed with respect to its wording, article 23, paragraph 1, laid down a very useful principle that was absolutely indispensable for the statute. At the same time, he recognized that the criticisms made with regard to paragraph 3 were not unfounded and, unless it was possible to find a better version, it might be preferable to delete the provision. One possibility would be to limit paragraph 3 to cases in which the Council had not only determined that there was a situation involving a threat to or breach of the peace under Chapter VII of the Charter, but was actively taking steps to resolve the situation. In any event, in his view, the provision was necessary even if its wording fell within the realm of "issues still to be discussed".

79. Turning to part four of the draft statute, he agreed with Mr. Robinson that there was a problem with regard to the relationship between article 26, paragraph 4, and article 27, paragraph 1. The relationship between article 26, paragraph 1, and article 27, paragraph 1, did not, however, seem to him to raise any difficulty.

80. Article 26, paragraph 1, simply provided that the prosecutor could decide not to prosecute if he considered that the case referred to him did not come within the jurisdiction of the court, as, for instance, where someone tried to bring a case of "ordinary" murder before it.

81. Article 26, paragraph 4, dealt with a different case in which the prosecutor had to decide whether or not the court ought to exercise its jurisdiction and that decision was subject to appeal. There was no reason why, if it became clear at an early stage that there was no sufficient basis for the court to exercise its jurisdiction, the prosecutor could not take the necessary decision on the

understanding that his decision would be subject to appeal.

82. Article 27, paragraph 1, provided for the case where the prosecutor considered that there was sufficient basis to proceed. He agreed that the provision could be spelt out in more detail. The question whether there was a *prima facie* case, which was a pure question of evidence in relation to the crime of which the suspect was accused, and the question whether the court should hear the case, which went beyond the question whether there was a *prima facie* case and involved other considerations, were obviously two different matters and it was right, in his view, that they should be the subject of two separate provisions, although he agreed that those provisions required coordination.

83. In his view, the definition of a "*prima facie* case" should not be included in the statute, since that would tie the hands of the court in an area where it would ultimately have to develop its approach in the light of experience. In any event, "*prima facie* case" was defined in the commentary and that definition was sufficiently broad, as the prosecutor would not only have to satisfy himself on paper that there was *prima facie* evidence, but would also have to make quite sure that the whole case "held together".

84. He agreed that, as Mr. Robinson had suggested, it should be made clear in article 27, paragraph 2, that, in arriving at the decisions referred to in subparagraphs (a) and (b), the presidency could have regard to the dossier. That could, however, simply be explained in the commentary. The presidency could, of course, always ask for further material in addition to the indictment itself.

85. It should also be made clear, either in the statute or in the commentary, what happened if the indictment was not confirmed: in that event, the prosecution lapsed and the accused, if in custody, had to be released.

86. "Probable cause", as referred to in article 28, paragraph 1 (a), should not, in his view, be defined in the body of the statute, any more than "*prima facie* case" should be and for the same reasons. There again, having regard to the diversity of cases, the officials responsible for running the system should have some degree of discretion. As to paragraph 3 (b), he agreed with Mr. Robinson that the two "special circumstances" referred to in the commentary were the ones that immediately sprang to mind and that they did not cover the whole range of situations which might arise in the future. None the less, apart from the fact that it was hard to imagine such other situations, that provision should not go into so much detail that it would make the text unduly cumbersome.

87. Similarly, in article 29, paragraph 1, it would be difficult to spell out the role of the "judicial officer". The "compensation" referred to in paragraph 3 of the article would be paid by the States parties.

88. The Working Group had decided that a paragraph 3 should be added to article 31, but it might revert to the matter.

89. With regard to article 32, it was obviously preferable for the place of the trial to be the seat of the court. It had been felt, however, that such a provision might be

too rigid and it had therefore been decided in the interests of, among other things, cost, to provide, in paragraph 2 of the article, that the court could exercise its jurisdiction on the territory of any State.

90. The question of applicable law, which was the subject of article 33, had been discussed in great detail during the past two years. While he agreed with Mr. Thiam that the wording of the French version of subparagraph (c) was awkward and should be redrafted, he would insist on the need to retain a reference to national law in the article. It would, of course, have been possible to spell out, in the provision, the choice of law rules to which the court should refer, but a deliberate decision not to do so had been taken in order to maintain a degree of flexibility.

91. Article 35, which one member had proposed should be deleted and which Mr. Robinson has suggested should be confined to a general clause, was essential, in his view, because the conclusion had been reached, after two years' work, that it was impossible to confine the court's jurisdiction merely by defining the crimes it would have to try. In point of fact, the crimes in question covered a wide range of situations, some of them rather minor; and that was why the court must be vested with the additional power not to exercise jurisdiction. That would also meet a concern which had been widely expressed in the Sixth Committee.

92. With regard to article 37, he was glad to hear that the concern for the trial to be held in the presence of the accused was not confined only to common law countries, but also existed in China. At the same time, article 37 provided for an acceptable compromise, on a vexed issue, between different systems and left it to the court to decide whether or not the trial should take place in the absence of the accused.

93. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to conclude its general discussion on the draft statute for an international criminal court, on the understanding that, when the Working Group had reviewed the relevant commentaries, they would be adopted in conjunction with the adoption of the Commission's report.

*It was so agreed.*

*The meeting rose at 1.15 p.m.*

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## 2362nd MEETING

*Friday, 8 July 1994, at 10.10 a.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

*Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, 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. Yamada, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)\* (A/CN.4/457, sect. C, A/CN.4/459,<sup>1</sup> A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)**

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS

1. The CHAIRMAN invited Mr. Bowett, Chairman of the Drafting Committee, to introduce the draft articles proposed by the Drafting Committee (A/CN.4/L.494 and Corr.1).

2. Mr. BOWETT (Chairman of the Drafting Committee) said that between 16 June and 1 July 1994 the Drafting Committee had allocated six meetings to the draft articles. He wished to thank the Special Rapporteur, Mr. Barboza, for his guidance and cooperation throughout the proceedings, as well as all the members of the Drafting Committee for their contributions and their spirit of cooperation, and also Mr. Calero Rodrigues, who had deputized for him during his brief absence from the Committee.

3. At the forty-fifth session of the Commission, the then Chairman of the Drafting Committee, Mr. Mikulka, had presented to the Commission the texts of draft articles 1, 2, 11, 12 and 14 adopted by the Drafting Committee.<sup>2</sup> At the present session, the Drafting Committee had been able to complete its work on all of the articles dealing with the question of prevention in respect of activities with a risk of transboundary harm which had been referred to the Committee since 1988. Accordingly, the Commission now had before it a complete set of articles on prevention. The texts proposed by the Drafting Committee at the forty-fifth session had been retained without change, with the exception of article 14, in which a change had proved necessary owing to the formulation of subsequent articles.

4. The Committee had thought it useful to divide the articles into two chapters, one entitled "General provisions" and the other "Prevention". The designation of those chapters was provisional, and they were thus placed in square brackets. The provisional chapters would also make it clear that those articles dealt only with one aspect of the whole topic. The Commission had before it a document (A/CN.4/L.494 and Corr.1) which reproduced all of the articles adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions. Since articles 1, 2, 11 and 12 were unchanged, he had

nothing to add to the statement of the Chairman of the Drafting Committee, Mr. Mikulka, at the previous session.<sup>3</sup>

CHAPTER I (General provisions)

ARTICLE 1 (Scope of the present articles)

5. The CHAIRMAN invited members to comment on article 1, which read:

*Article 1. Scope of the present articles*

**The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which create a risk of causing significant transboundary harm through their physical consequences.**

6. Mr. PAMBOU-TCHIVOUNDA said some clarification was needed of the words "or otherwise". They should be fully explained, at least in the commentary.

7. Mr. BOWETT (Chairman of the Drafting Committee) said that the phrase in question had been explained in some considerable detail by the Chairman of the Drafting Committee, Mr. Mikulka, at the previous session.<sup>4</sup> That explanation would presumably be reflected in the commentary to be drafted by the Special Rapporteur.

8. Mr. BENNOUNA said that, at the legal level, that part of the article was poorly drafted and certainly needed improving. What purpose was served by the words "or otherwise"? Could they not perhaps be deleted?

9. Mr. TOMUSCHAT said that article 1 was the most important one in the whole draft, and perhaps also the most problematical, for the exact scope of the draft was not defined with sufficient clarity. Article 1 gave a very general description of the scope, from which it was plain that some activities, for instance, the establishment of a nuclear power plant, fell within the purview of the draft articles, as might many other activities, such as a State's practice of permitting cars to be driven on its roads—an activity which undoubtedly could cause significant transboundary harm. It was thus important to specify what was envisaged, and that might not be made sufficiently precise in the commentary. Without proper clarification, the entire set of draft articles could well suffer from an inherent ambiguity, a possibility that he found disturbing.

10. The CHAIRMAN referred members to the statement made by the Chairman of the Drafting Committee at the previous session, Mr. Mikulka, which read:

The Drafting Committee had felt that territorial jurisdiction should be the dominant criterion. Consequently, when an activity occurred within the territory of a State, that State must comply with its obligations to take preventive measures. Territory was therefore decisive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered in the articles, the territorially-based jurisdiction prevailed. He drew attention to the fact that the words "or otherwise" after the word "territory" were intended to signify the special relation of the concept "territory" to the concept "jurisdiction or control". In cases where jurisdiction was not territorially based,

\* Resumed from the 2351st meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>2</sup> *Yearbook* . . . 1993, vol. I, 2318th meeting, para. 58.

<sup>3</sup> *Ibid.*, paras. 56-91.

<sup>4</sup> *Ibid.*, paras. 59-69.

jurisdiction was determined in accordance with the relevant principles of international law.<sup>5</sup>

11. Speaking as a member of the Commission, he cited space activities as one example of activities carried out "otherwise under the jurisdiction or control of a State". Such activities could clearly lead to very significant transboundary harm. However, they were carried out, not in the territory of the State, but elsewhere, in a place otherwise under that State's jurisdiction or control.

12. Mr. BARBOZA (Special Rapporteur) said he endorsed the remark of the Chairman, speaking as a member of the Commission. It was important to specify that if the activity, although not carried out in the State's territory, was carried out otherwise under the jurisdiction or control of the State, it also fell within the scope of the articles.

13. Mr. BOWETT (Chairman of the Drafting Committee) pointed out that there were areas of the Earth's surface in relation to which no territorial title was generally recognized. Antarctica was a prime example. States could also construct artificial islands for purposes such as waste disposal. It would not have sovereignty over those islands, yet could carry out activities on them that involved a quite serious risk of harm to other States. The phrase was therefore important.

14. Mr. MAHIOU said that he too was not entirely satisfied with the wording of the article. Perhaps it should be stated in the commentary that some members had hoped that a better formulation than the ambiguous phrase "or otherwise" could be found before the draft articles were submitted for second reading.

15. Mr. de SARAM said that he had no difficulty with the expression "territory or otherwise under the jurisdiction or control". With regard to the very important question raised by Mr. Tomuschat, he favoured retention of the existing broad scope of the draft, since the adjective "significant", before "transboundary harm", placed reasonable limits on that scope. However, article 1 would read more smoothly if commas were inserted after the word "activities" and the word "State".

16. Mr. PAMBOU-TCHIVOUNDA said that the important elements of article 1 were, first, the location of the activity, and second, the relationship of imputability that must be established between the State and the activity, if that activity did not take place in the State's territory. With a view to reducing the number of words that might give rise to difficulties, he suggested amending the phrase to read "and carried out in the territory or under the control of a State...".

17. Mr. ROSENSTOCK said that, for the reasons set forth by Mr. Tomuschat, it was exceedingly difficult to accept the articles piecemeal. Article 1 pointed the way to their scope, as did article 2, but it did not really answer the question Mr. Tomuschat had raised, namely, whether the scope of the draft articles would extend to the construction of a nuclear power plant or to the construction of a highway. He recognized that in a previous quinquennium the Commission had decided, for under-

standable reasons, not to elaborate a list of hazardous activities. However, the problem of making a distinction remained unsolved, and although the word "significant" was helpful in a non-finite context, it left one nervous in a finite context. Consequently, Mr. de Saram's remark did not solve the problem. Perhaps, when they became available, it would be seen that the commentaries provided proper guidance as to whether the articles covered pollution from a nuclear power plant, or automobile pollution—which, very arguably, could be said to create a risk of causing harm other than disastrous harm. It was none the less a heavy burden to place on the commentaries. Until such time as it had had an opportunity to scrutinize the draft articles in their entirety, the Commission's acceptance of article 1 must be more than usually provisional. In any event, the issue raised by Mr. Tomuschat must be resolved at some point.

18. Mr. RAZAFINDRALAMBO said that the doubts expressed about the wording of article 1, initially raised by Mr. Pambou-Tchivounda, seemed principally to apply to the French version, since English speakers had said they were satisfied with the wording. What French expression was usually employed in conventions to translate the English formulation, and would it be appropriate to use it in the present case? The purpose of the expression was clearly to contrast activities carried out in the territory of a State with activities carried out only under the jurisdiction or control of that State. As a tentative suggestion, it might be possible to remove some of the ambiguity in the French formulation by using the phrase ... *sur le territoire ou tout au moins sous la juridiction ou le contrôle*.

19. Mr. BARBOZA (Special Rapporteur) said he did not really understand Mr. Tomuschat's concern. Two different problems arose: first, a distinction must be drawn between activities which created a risk of causing transboundary harm, and activities which, in the normal course of operations, actually did cause such harm. Cars constituted a continuous source of pollution, and did not therefore fall within the scope of the articles. Then there was the second, different, problem raised by Mr. Rosenstock, namely, which hazardous activities were included in the scope of the articles. Article 1 constituted a first attempt to answer that question. Mr. Rosenstock was right to say that the Commission should work on a sharper definition of activities falling within the scope of the articles. He himself had proposed drawing up a list of activities and substances, along the lines of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the European conventions. The Commission had rejected the idea of such a precise scope. A working group should be set up to address the issue next year. Meanwhile, article 1 attempted to separate the activities that actually caused transboundary harm from the activities that might cause such harm as a result of an accident. Continuous pollution from cars constituted quite a different hypothesis from that of hazardous activities that might cause harm, and the words "create a risk of causing" were simply a first approach to the question. The Commission would subsequently have to attempt to come up with a precise definition of the activities that fell within the purview of the articles.

<sup>5</sup> Ibid., para. 63.

20. Mr. BENNOUNA said that it was a question of form, not substance, that was giving rise to doubts about article 1. In its present form, the French version was ambiguous, and it was unfair to expect readers to turn to the commentary for clarification. The difficulty lay in the expression *d'une autre façon* (otherwise), which could be wrongly interpreted to mean that some activities were being carried out in a manner different from activities which were being carried out in the territory of the State. To compound the problem, that expression appeared elsewhere in the draft articles, including in article 11.

21. Any activities which were carried out in the territory of a State were by definition under its jurisdiction and control. However, a State might also have under its jurisdiction and control other activities that it was carrying out elsewhere than in its territory. It had to be made clear that the draft articles applied in both circumstances. He proposed therefore that, in the French version, the words *s'exercent sur le territoire ou d'une autre façon sous la juridiction ou le contrôle* should be replaced by *s'exercent sur le territoire et/ou sont sous la juridiction ou le contrôle*.

22. It was important to examine article 1 in the light of article 2, which defined the terms and expressions used in the draft. The two articles were complementary and should probably be considered together.

23. The CHAIRMAN said that the Drafting Committee was not entirely responsible for the manner in which the scope of the articles had been defined. He recalled in that connection, at the forty-fourth session, the Commission had decided that attention should be focused for the time being on drafting articles in respect of activities having a risk of causing transboundary harm and that it should not deal at the present stage with other activities which caused transboundary harm.<sup>6</sup> The draft articles as they now stood were an accurate reflection of that decision. The commentary should explain that the articles currently under consideration represented the first phase of the work and that other activities would be dealt with later on.

24. Mr. TOMUSCHAT said that there was no clear dividing line between activities which caused transboundary harm and activities which created a risk of causing transboundary harm. In fact, in many instances harm could even be avoided by using appropriate environmental impact assessment procedures, as provided for in draft article 12. Consequently, the distinction between the two types of activities was to a large extent artificial.

25. Mr. CRAWFORD said that the decision mentioned by the Chairman had proved to be unfortunate, thus confirming the view he had held at the time. As to the wording of the article, he proposed that the phrase "carried out in the territory or otherwise under the jurisdiction or control of a State" should be replaced by "carried out either in the territory of the State or in places under its jurisdiction or control", which would have the advantage of corresponding to the language used in article 2.

26. Mr. BARBOZA (Special Rapporteur) said that the English version of article 1 seemed clear enough: when

an activity was being carried out in the territory of a State, it was by definition under the jurisdiction or control of the State. That activity could also be carried out in other places while still being under the jurisdiction or control of the State, but in a different manner. It appeared that only the French version needed modification and, to that end, he suggested that a small group of French-speaking members might agree on the wording in French that best corresponded to the English.

27. Mr. ROSENSTOCK said that he agreed with the Special Rapporteur. The English version of article 1 was acceptable in its present form.

28. Mr. BENNOUNA said that it was best not to redraft article 1 in French because that would then require changes in the English version. He would, therefore, prefer to retain the present wording in French, even though it was not entirely satisfactory, and perhaps provide some explanation in the commentary.

29. Mr. EIRIKSSON pointed out that, in elaborating the draft articles, the Drafting Committee had taken into account the wording of the United Nations Convention on the Law of the Sea.

30. Mr. BARBOZA (Special Rapporteur) said that the United Nations Convention on the Law of the Sea used the expression "under the jurisdiction or control" and did not make any reference to territory. However, some members of the Drafting Committee had considered it essential to include in the draft articles some reference to activities carried out in the territory of the State, reasoning that a case might arise in which territorial jurisdiction might prevail over another sort of jurisdiction. Article 1 as it stood thus represented a compromise solution. In his own view, the reference to territory was superfluous, as the expression "under the jurisdiction or control" included, by definition, activities carried out in the territory of a State.

31. Mr. EIRIKSSON said that, in drafting article 1, the Drafting Committee had begun by defining the articles as applying to activities being carried out under the jurisdiction or control of the State. It had subsequently decided to add the explicit reference to the territory of the State, which had therefore made it necessary to add the word "otherwise".

32. Mr. MAHIOU said that, in the French version, the words *ou d'une autre façon sous la juridiction* should be replaced by *ou à un autre titre sous la juridiction*, which corresponded more closely to the English version. His colleagues, Mr. Bennouna and Mr. Pambou-Tchivounda, would presumably support his proposal.

33. The CHAIRMAN said that, as he understood it, Mr. Mahiou's proposal would not require any amendment to the English text.

34. Mr. de SARAM proposed that, in the English version, the words "otherwise under the jurisdiction or control" should be replaced by "elsewhere under its jurisdiction or control".

35. The CHAIRMAN said that, since the proposed amendment to the French version appeared to be accept-

<sup>6</sup> *Yearbook* . . . 1992, vol. II (Part Two), para. 346.

able to the Commission, there appeared to be no need to alter the English version.

36. Mr. HE said that the word "otherwise" appeared at first glance to be ambiguous. A full explanation should therefore be provided in the commentary. He would have preferred the word "elsewhere". The commentary to article 1 should also make it clear that the word "risk" meant that the activity might cause harm.

37. Mr. ROSENSTOCK said that using the word "elsewhere" would give rise to difficulties because it implied that the physical location of the activity was somehow relevant to the legal situation of jurisdiction or control. The English version should remain as it stood, while the French version could be amended as had been suggested.

38. Mr. HE said that it might be preferable to place the word "otherwise" in square brackets.

39. The CHAIRMAN said that, in the light of the discussion, such a course would not seem appropriate.

40. Mr. PELLET said that, in the French text, the expression *qui créent un risque de causer* was redundant and, moreover, was not the way the idea would normally be expressed in French. He accordingly proposed that it should be replaced by *qui risque de causer*.

41. The CHAIRMAN said that, as he had already mentioned, the Commission's decision on the scope of the articles had been taken at the forty-fourth session.<sup>7</sup>

42. Mr. PELLET said that he had no reservations about the scope of the articles, which was accurately reflected in the French version of article 1 by the words *un risque de causer un dommage*. Rather, his concern was with the expression *créent un risque*, which was not the best translation of the English.

43. Mr. BARBOZA (Special Rapporteur) said that Mr. Pellet's point was relevant only to the French version. In English and Spanish, the idea of activities which "create a risk" was acceptable.

44. Mr. BENNOUNA said that, while the phrase *qui créent un risque de causer* was perhaps not the most elegant French, it was consistent with article 1 and article 2, subparagraph (a), of the English text, in which the word "risk" was used as a noun.

45. Mr. PELLET said that, in view of Mr. Bennouna's comment, he would propose as an alternative that the words *qui créent un risque de causer* should be replaced by *qui comporte un risque de causer*.

46. Mr. de SARAM said that it would be preferable for article 1 to speak of activities which "have a risk", rather than "create a risk", of causing harm. The former expression reflected the wording used in the Commission's decision. However, if a satisfactory solution had already been decided on, he would not press his proposal.

47. Mr. FOMBA said that if risk was considered to be inherent in the dangerous nature of the activity, creation of the risk could also be considered as stemming from the dangerous nature of the activity. On that basis, he did not think that the words *qui créent un risque* were appropriate, and he would favour some wording along the lines proposed by Mr. Pellet.

48. The CHAIRMAN suggested that the word "create" should be replaced by "involve" or its equivalent in other languages.

*It was so agreed.*

*Article 1, as amended, was adopted.*

#### ARTICLE 2 (Use of terms)

49. The CHAIRMAN invited members to comment on article 2, which read:

##### *Article 2. Use of terms*

###### **For the purposes of the present articles:**

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

...

50. Following a point raised by Mr. PELLET, Mrs. DAUCHY (Secretary to the Commission) said that the French version of the article was unsatisfactory and should be redrafted.

51. Mr. BENNOUNA said he noted that, whereas subparagraph (b) referred to "the territory of or in places under the jurisdiction or control of a State other than the State of origin", subparagraph (c) spoke of "the State in the territory or otherwise under the jurisdiction or control of which the activities". The language of the two subparagraphs should therefore be harmonized.

52. Mr. EIRIKSSON said that the word "places" in subparagraph (b) should be amended to read "other places". As to the difference in the wording of article 1 and article 2, subparagraph (b), it should be noted that, whereas the former was concerned with the attribution of an activity to a State, the latter was concerned with the geographical context. A ship or an aircraft might be covered, therefore, but not the water over which or the air through which they passed, since the global commons were excluded. The position would, however, no doubt be fully explained in the commentary.

53. Mr. MAHIU asked whether there was any special reason for the difference in wording of the reference in subparagraph (b) to "places" or, as rightly suggested, "other places", and the reference in subparagraph (c) to jurisdiction or control. That remark applied to both the French and the English versions of the article.

<sup>7</sup> Ibid.

54. Mr. BARBOZA (Special Rapporteur) said that, as already pointed out by Mr. Eiriksson, the wording of subparagraph (b) dealt with the geographical aspect: the harm in question was done not to the jurisdiction of a State as such but to the places under its jurisdiction. On the other hand, subparagraph (c), which used the same wording as that employed in article 1, was concerned with the actual consequences of an activity.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 2 subject to any necessary drafting changes in the French text.

*It was so agreed.*

*Article 2 was adopted on that understanding.*

## CHAPTER II (Prevention)

### ARTICLE 11 (Prior authorization)

56. The CHAIRMAN invited members to comment on article 11, which read:

#### *Article 11. Prior authorization*

**States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required when a major change in the activity is planned.**

57. Mr. EIRIKSSON said he was pleased to note that the Commission had reached the stage at which it could consider the adoption of a comprehensive set of articles on a significant part of the topic and could submit those articles to the General Assembly. While he supported the substance of the articles in chapter II, he considered that, in some of them, more direct language could have been considered.

58. Article 11 should, in his view, have been combined with article 13 in a single article dealing with authorization and not just with prior authorization.

59. Mr. RAZAFINDRALAMBO, referring to the French text, proposed that article 11 should be brought into line with article 1 by replacing the words *d'une autre façon* by *à un autre titre*.

*It was so agreed.*

60. Mr. PAMBOU-TCHIVOUNDA, also referring to the French text, said that he was concerned about the words *visées à l'article premier*, for article 1 was a neutral article and did not spell out the activities with which the draft was designed to deal. Consequently, article 11 made reference to activities that were not mentioned anywhere. He wondered whether some better term could be found to reflect the content of article 1.

61. The CHAIRMAN pointed out that the wording in question had been agreed in the Drafting Committee, and it would be difficult to reopen a discussion on the question at the present stage.

62. After a brief discussion in which Mr. CALERO RODRIGUES, Mr. MAHIOU and Mrs. DAUCHY (Secretary to the Commission) took part, Mr. PAMBOU-TCHIVOUNDA said that he would not press the point.

63. Mr. PELLET said that the second sentence of the article contemplated a change in activity only when that activity involved risk from the outset. It thus left out of account an activity that did not involve risk at the outset but did involve risk following a major change. The sentence should therefore be redrafted to provide that authorization would also be required when a major change in an activity of any kind was planned and such change meant that the activity would involve risk.

64. The CHAIRMAN suggested that a small group, consisting of Mr. Bowett (Chairman of the Drafting Committee), Mr. Barboza (Special Rapporteur) and Mr. Pellet, should meet informally to agree on a suitable wording for the second sentence.

*The meeting was suspended at 11.45 a.m. and resumed at noon.*

65. Mr. BARBOZA (Special Rapporteur) said that, following the informal meeting with Mr. Bowett and Mr. Pellet, he would propose that the second sentence of article 11 should be reworded to read "Such authorization shall also be required in cases where major changes in activities are planned".

66. Mr. MAHIOU said that, normally, an activity would fall within the scope of the articles only if a change in that activity created a risk of transboundary harm. The reference to activity in the second sentence must be qualified, failing which it would open the door to all other activities.

67. Mr. BENNOUNA proposed that the second sentence should be deleted as it added nothing to the article and merely created confusion.

68. Mr. BARBOZA (Special Rapporteur) said that Mr. Bennouna's proposal required further reflection. He therefore suggested that a decision on it should be postponed.

69. The CHAIRMAN suggested that the second sentence of article 11 should be placed between square brackets and that the Commission should revert to the matter at a later meeting.

*It was so agreed.*

### ARTICLE 12 (Risk assessment)

70. The CHAIRMAN invited members to comment on article 12, which read:

#### *Article 12. Risk assessment*

**Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States.**

71. Mr. de SARAM said that the phrase "risk of the activity causing significant transboundary harm", in the first sentence, seemed to refer only to existing activities and not to future activities.

72. Mr. BARBOZA (Special Rapporteur) said the meaning of the sentence was that the State would ensure that an assessment was undertaken to ascertain whether in effect an activity presented a risk of causing harm.

73. Mr. de SARAM said that, in that case, he would propose that the words "the risk of the activity causing significant" should be replaced by "the risk of the activity's causing significant". He would not press the point, however, if his proposal was not acceptable to the Chairman of the Drafting Committee.

74. Mr. BOWETT (Chairman of the Drafting Committee) said that the article did not specify whether the activity was already in existence or whether it was being planned. In his view, therefore, it was broad enough to cover both circumstances.

75. Mr. PAMBOU-TCHIVOUNDA said that, with a view to the harmonization of the French text, he would suggest that the word *présente* should be replaced by *comporte*, which was used in the amended form of article 1. Alternatively, the word *présente* should be used both in article 1 and in article 12.

76. Mr. TOMUSCHAT said that the expression "activity causing significant transboundary harm", in the first sentence, was inconsistent with the corresponding definition of that term.

77. Mr. BARBOZA (Special Rapporteur) said that, in his view, the expression was correct in the context.

78. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Tomuschat had raised a valid point: it was not clear to him whether the assessment made would be of the risk or of the activity or of both.

79. Mr. de SARAM suggested that the difficulty could be solved by replacing the words "such activities" by "the activity".

80. Mr. ROSENSTOCK said that Mr. de Saram's suggestion would work up to a point, but the provision would still be concerned only with the assessment of risk. The assessment should be broader than that.

81. Mr. BARBOZA (Special Rapporteur) said that Mr. de Saram's suggestion made the text even clearer. The point raised by Mr. Rosenstock was answered in the second part of the article, from which it was plain that the assessment should cover actual harm as well as risk of harm.

82. Mr. PELLET said that he could accept Mr. de Saram's suggestion, but could not endorse Mr. Rosenstock's point because the notion of risk related to an activity which was not yet being carried out.

83. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt Mr. de Saram's suggestion.

*It was so agreed.*

84. Mr. EIRIKSSON said that, in his view, the only authorization required by article 12 was prior authorization for pre-existing activities, a matter dealt with in article 13.

85. Mr. PELLET said that the second sentence had not been in the Special Rapporteur's original proposal. It did make the first sentence clearer but was badly drafted: the phrase "of other States" clearly applied to "persons", "property" and "the environment", but the text could not properly talk of persons or property of other States.

86. The CHAIRMAN suggested that the phrase should be amended to read "in other States".

*It was so agreed.*

*Article 12, as amended, was adopted.*

#### ARTICLE 13 (Pre-existing activities)

87. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 13, which read:

##### *Article 13. Pre-existing activities*

If a State, after becoming bound by these articles, ascertains that an activity involving a risk of causing significant transboundary harm is being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending such compliance, the State may permit the continuation of the activity in question at its own risk.

88. Mr. BOWETT (Chairman of the Drafting Committee) said that the pre-existing activities dealt with in the article were activities undertaken prior to the entry into force of the articles for the State of origin. When the State learned of the existence of an activity of that sort, it should direct those responsible for carrying out the activity to obtain the necessary authorization. The expression "necessary authorization" meant the permit required under the domestic law of the State so as to implement its obligations under the articles.

89. Obviously, a period of time might be needed for the operator of the activity to comply with the authorization requirements. The Drafting Committee was of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator went through the process of obtaining authorization should be left to the State of origin. If it chose to allow the activity to continue, it did so at its own risk. The expression "at its own risk" was a compromise which replaced the Special Rapporteur's original wording to the effect that, during the interim period, the State of origin would be liable for the damage if an accident occurred. However, the Drafting Committee felt that, since the regime of liability proposed in the Special Rapporteur's tenth report (A/CN.4/459) had not yet been examined by the Commission, the Committee could not prejudge the issue of liability. At the same time, in the absence of any form of language indicating possible repercussions, the State of origin would have no incentive to comply with the requirements. The expression "at its own risk" was intended to leave the possibility open (a) for any liability which the future draft articles on the topic might impose on the State of origin in such circumstances, and (b) for the application of any other rule of international law on liability. The title of the article remained unchanged.

90. Mr. BENNOUNA suggested that the phrase "after becoming bound by these articles" should be deleted from the first line, since it went without saying that the draft articles applied to States parties.

91. Mr. PELLET said that he had initially been of the same opinion as Mr. Bennouna on that point. However, if the phrase was deleted, the article would have no point

because it applied only to activities existing before the entry into force of the draft articles.

92. Mr. EIRIKSSON, Mr. GÜNEY and Mr. TOMUSCHAT said that they endorsed Mr. Pellet's remark.

93. Mr. BENNOUNA said that he was not convinced by Mr. Pellet's argument, since the article could cover unauthorized activities which had started after the entry into force of the draft. However, the problem was one of form rather than substance and he would not press his proposal. It might make things clearer if the first sentence, by analogy with articles 11 and 12, spoke of an activity "referred to in article 1".

94. Mr. ROSENSTOCK said he agreed that it would be better to retain the phrase "after becoming bound by these articles", but the article would be irrelevant unless the draft eventually took the form of a treaty. The Commission had deferred its decision on that point. At the very least, the situation must be explained in a footnote. The Commission must constantly remind itself of the possibility that it might be producing something other than a draft text to be sent to the General Assembly with a view to the convening of a diplomatic conference.

95. Mr. EIRIKSSON said that he endorsed Mr. Bennouna's second proposal. He had himself been going to propose the following text for article 11, with a footnote as suggested by Mr. Rosenstock: "States shall also require authorization for activities referred to in article 1 which are being carried out upon their becoming bound by these articles".

96. Mr. Bennouna had also raised the question of activities which were being carried out without, for a number of possible reasons, prior authorization being obtained. The draft articles must cover cases in which it was too late to authorize an activity because it was already under way by providing that authorization must be obtained for the continuation of the activity. He suggested a formulation that would read: "States which permit the continuation of the activity pending the obtaining of such authorization do so at their own risk".

97. Mr. BARBOZA (Special Rapporteur) said that it was important to maintain the distinction between activities started after entry into force of the draft articles (art. 11) and pre-existing activities (art. 13). Therefore, either the present text should remain unchanged or the phrase "after becoming bound by these articles" in article 13 should be replaced by a reference to activities carried out before entry into force.

98. He disagreed with Mr. Rosenstock that article 13 would be relevant only if the draft articles took the form of a treaty. In fact, the wording of the draft articles would not be substantially affected by the Commission's decision on that point. The Commission had never proceeded in the way Mr. Rosenstock was suggesting with regard to any other set of draft articles.

99. Mr. BENNOUNA said that Mr. Eiriksson's first proposal made the meaning of the article much clearer and should be adopted.

100. Mr. BOWETT (Chairman of the Drafting Committee) said that neither of Mr. Eiriksson's proposals involved any change of substance in the present text.

There was no point in redrafting just for the sake of redrafting.

101. Mr. de SARAM said that he agreed with the Chairman of the Drafting Committee. The phrase "after becoming bound by these articles" was needed in the first sentence of article 13 precisely because of the second sentence. With that second sentence, the Commission was raising the important question of allocation of risk between the parties involved, that is to say the question of liability, a matter with which the article was not concerned. One solution would be to delete "after becoming bound by these articles" from the first sentence and to eliminate the whole of the second sentence. The issue raised in the second sentence should be dealt with in the commentary.

102. Mr. TOMUSCHAT said that he did not agree with the Chairman of the Drafting Committee that Mr. Eiriksson's proposals involved no change of substance. Article 13 spoke of a State "ascertaining" that an activity was being carried out, but the Commission was trying to draft objective provisions which did not depend on ascertainties made by States. States had a general duty to exercise due diligence, but article 13 introduced an element of uncertainty in that requirement. In any event, the whole issue was subject to the interpretation of article 1. The draft articles would not be workable unless their scope as defined in article 1 was clear and limited.

**The law of the non-navigational uses of international watercourses (*continued*)\*\* (A/CN.4/457, sect. E, A/CN.4/462,<sup>8</sup> 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]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING AND DRAFT RESOLUTION PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)\*\*\*

103. The CHAIRMAN said that, when the Commission had adopted the draft articles on the law of the non-navigational uses of international watercourses on second reading<sup>9</sup> and a draft resolution on confined groundwater (A/CN.4/L.492/Add.1)<sup>10</sup> he had indicated that he would in due course invite the Commission to take a decision on the recommendation to be addressed to the General Assembly with respect to what was to be done with the draft articles and the resolution. The officers of the Commission had agreed on the following draft recommendation:

"The Commission, in conformity with article 23 of its Statute, decides to recommend the draft articles on the law of the non-navigational uses of international

\*\* Resumed from the 2356th meeting.

\*\*\* Resumed from the 2355th and 2356th meetings respectively.

<sup>8</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>9</sup> For the titles and texts of articles 1 to 33 as adopted by the Drafting Committee on second reading, see 2353rd meeting, para. 46.

<sup>10</sup> See 2356th meeting, para. 38.

watercourses and the resolution on confined groundwater to the General Assembly with a view to the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries.”

104. If he heard no objection, he would take it that the Commission agreed to include that text in the relevant chapter of its report under the heading “Recommendation of the Commission”.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

## 2363rd MEETING

*Tuesday, 12 July 1994, at 10.20 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. de Saram, Mr. Eiriksson, 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.

### Tribute to the memory of Mr. José María Ruda

1. The CHAIRMAN said that it was his sad duty to inform the members of the Commission of the death, on 8 July 1994, of Mr. José María Ruda, who had been a member of the Commission from 1964 to 1973 as well as its Chairman in 1968. Mr. Ruda had been elected in 1973 to ICJ where he had served for two consecutive terms and over which he had presided from 1988 to 1991. An experienced diplomat who had represented his country in many international forums, Mr. Ruda had also published a number of valuable studies on matters of international law. Special mention should be made of the course Mr. Ruda had given in 1975 at the Hague Academy of International Law on reservations to treaties,<sup>1</sup> which would undoubtedly be extremely valuable to the Commission in its forthcoming consideration of the topic.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. José María Ruda.*

<sup>1</sup> “Reservations to Treaties”, *Collected Courses of The Hague Academy of International Law, 1975-III* (Leiden, Sijthoff, 1977), vol. 146, pp. 95-218.

2. Mr. BARBOZA said that he was particularly saddened by Mr. Ruda’s death, not only as a member of the international legal community, but also as a compatriot and a friend. He had been co-holder of a chair at Buenos Aires University with Mr. Ruda before Mr. Ruda had become Under-Secretary for Foreign Affairs and then representative of Argentina to the United Nations Security Council and General Assembly at a delicate time in his country’s history. Mr. Ruda had always been noted for his integrity and his dedication to the public interest both at the national and international levels.

3. Having risen through the hierarchy of the Department of Legal Affairs of the United Nations, he had then sat as a judge at ICJ for 18 years. His whole life had been devoted to diplomacy, teaching and writing, and it set an example for future generations.

4. Mr. THIAM said that he too wished to pay a tribute to Mr. Ruda, who had been his colleague for one year on the Commission before he had become a judge at the Court. He would stress in particular Mr. Ruda’s human and social qualities, his keen mind and his special interest in relations between Africa and Latin America.

5. The CHAIRMAN said that, on behalf of the Commission, he would address a letter of condolences to Mr. Ruda’s family and enclose a copy of the summary record of the meeting.

### Statement by the Under-Secretary-General, Director-General of the United Nations Office at Geneva

6. The CHAIRMAN said that it was his pleasure to welcome the Under-Secretary-General, Director-General of the United Nations Office at Geneva, who had been associated throughout his career with United Nations efforts to develop international law and thus improve international relations and whose work was held in high esteem by the entire international legal community.

7. Mr. PETROVSKY (Under-Secretary-General, Director-General of the United Nations Office at Geneva) said that he first wished to convey to the Commission the wishes of the Secretary-General, who had himself been a member of the Commission.

8. It was an honour for him to speak before the Commission, which had established its reputation as the world’s leading body in the field of international law-making and included in its membership some of the best experts in that field. Fourteen multilateral conventions had been concluded on the basis of drafts prepared by the Commission. At the current time, in the new international environment, the Commission continued to make a vital contribution to the strengthening of international law through its involvement in a number of important topics, such as the preparation of a statute for an international criminal court, State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law and the law of the non-navigational uses of international watercourses.

9. That involvement in efforts to strengthen international law was a difficult but gratifying experience. He recalled that, in 1989, as Soviet Deputy Foreign Minister, he had had occasion at the forty-fourth session of the General Assembly to present a memorandum setting forth concrete proposals on enhancing the role of international law and, although it had taken some time for those ideas to gain support, they were now becoming a reality.

10. One of the characteristics of the current international scene was the continuous flow of new and important developments affecting all fields of international law. The changes that were taking place at the economic, social and political levels were transforming civilization. That acceleration of history was characterized by increased democratization and the creation of a more human-oriented society which would, it was hoped, lead to the dawn of an era of *pax multilateralis* and the strengthening of the United Nations. But it was also generating some alarming tendencies, such as the multiplication of regional conflicts and the rise of extremist and aggressive nationalistic ideologies.

11. In the current situation, international law had to play an increasingly important role. There was already an evident trend towards the proliferation of international rules and standards, extending to virtually every field of human activity. However, much remained to be done and there was an urgent need to further strengthen the international juridical system. At the present time of global transformation, it could provide guidelines to minimize destabilizing tendencies and to promote peaceful change. As the United Nations Secretary-General had said in a recent statement, the universal aspirations and values common to all societies were proclaimed through international law, which taught peoples how to talk to each other and how to understand each other better.

12. The Secretary-General had also defined the three major fields in which the development of international law was most vital: protection of the rights and human dignity of the individual; promotion of mutual respect among nations; and enhancing prospects for international economic development. The goal of a new world order would be unattainable without a solid legal foundation and its stability could only be maintained by law. In practical terms, that meant that there was a need to facilitate the transformation of existing international law—the law of coexistence based on the balance of power—into a new international law based on partnership and a balance of interests among nations. It also meant that there should be much closer ties between theoretical deliberations on legal matters and practical political activities. He stressed that affirming the primacy of international law had always been one of the main aims of the United Nations. The major purpose of the Organization was in fact to counteract force with law.

13. It was difficult to overestimate the role of the United Nations in the international legal process. The San Francisco Conference had approved the inclusion, in Article 13 of the Charter of the United Nations, of a clause which read: “The General Assembly shall initiate studies and make recommendations for the purpose of

... encouraging the progressive development of international law and its codification”. By including the words “progressive development” in the Article, the Conference had recognized for the first time that an international organization had a role to play in the creation of new legal norms. Since that time, United Nations organs had made an immense contribution to the development of international law and, indeed, were playing a decisive role in the creation and elaboration of international legal norms. For example, the General Assembly had adopted such fundamental documents as the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and four conventions on the law of the sea.<sup>2</sup> It had contributed to the protection of human rights by adopting the Universal Declaration of Human Rights,<sup>3</sup> the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and a number of other basic conventions aimed at the elimination of discrimination based on race, sex or religious belief. A considerable quantity of international regulations had also been developed by the United Nations specialized agencies.

14. One difficulty was that United Nations bodies produced a vast amount of resolutions, decisions, declarations and codes on various subjects, which did not have binding force. As a rule, such documents were adopted in response to urgent political problems and reflected the most recent developments in the international political situation. Because of their non-binding character, they were more readily accepted by most Governments. In fact, they played an important role and often filled the gap between negotiated treaties and customary law. None the less, their quantity was sometimes frightening and, as Sir Robert Jennings, the President of ICJ, had remarked, there was a danger that international law might be “submerged” under the mass of paper emanating from international assemblies. Also, those documents often used vague language and contradicted each other, as a result of which they lost some of their weight and significance. It might be worth considering the introduction of some kind of legal appraisal of major United Nations resolutions before they were approved by the relevant organ.

15. Another problem concerned the under-utilization of the capabilities of United Nations legal bodies and institutions for the solution of international political crises. Thus far, legal means had been implemented far less frequently than was desirable in the settlement of disputes. For example, at the beginning of 1994, some 10 cases had been pending before ICJ. While that was perhaps an achievement as compared with recent years, it was still considerably lower than the potential of the Court. It was worth noting in that connection that the United Nations was currently attempting to settle by political means 79 existing and potential crises.

<sup>2</sup> Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas and Convention on the Continental Shelf.

<sup>3</sup> General Assembly resolution 217 A (III).

16. Since the First World War, there had been a number of disputes of a very diverse nature in the settlement of which legal procedures had been instrumental, even in recent decades. For instance, in 1965, the Soviet Union had acted as mediator in securing a cease-fire between India and Pakistan in their conflict over Kashmir. In 1980, Iceland and Norway had settled their dispute over the continental shelf by conciliation. In 1986, the United Nations Secretary-General had himself acted as arbitrator in the "Rainbow Warrior"<sup>4</sup> case between France and New Zealand. Those examples showed that all legal means of dispute settlement, including mediation, conciliation, arbitration and adjudication, had considerable potential in the settlement of disputes between States and, if properly used, could help to improve significantly the international political climate. Very often, the mere act of submitting a dispute to a juridical body prevented it from deteriorating and thereby transforming a heated political dispute into a normal legal case.

17. The aim should be to put in place an international system of judicial bodies which would include the Commission, ICJ and the Permanent Court of Arbitration as well as other institutions which could together activate the whole range of legal means for settling disputes. The proposal by the Permanent Court of Arbitration the year before that a new Hague convention should be concluded to coincide with the centenary of the Convention for the Pacific Settlement of International Disputes seemed to have considerable support and, if implemented, could help to achieve that goal.

18. It was satisfying to note that, despite all the problems, States increasingly regulated their conduct by reference to an international system of justice. The idea of international justice should be popularized. Political leaders must understand that recourse to juridical bodies was just another pillar in the structure of inter-State relations. International legal organs could assist them in that respect by emphasizing the pedagogical aspect of their work. In that connection, it would seem that the time had come to make another step forward and to enhance respect for international law by linking it to moral values. In ancient times, ethics were separate from the law. The time had now come, however, for a new synthesis.

19. Moral considerations were now one of the major factors in international politics. Nothing united people more than a common understanding of what was evil and what was good. And nothing divided them more than ethical norms that placed a certain group in a privileged position while depriving others of their human dignity and the right to be treated as equals. Ethics was one of the major driving forces that determined human behaviour and political judgement and it had always had a considerable impact on foreign policy.

20. The contemporary world was becoming increasingly interdependent and that interdependence influenced more than just the economic and social spheres. With the intermingling of cultures, an international moral code had come about, whose major norms were

accepted by all the nations of the world. Elements of that code were incorporated in a number of fundamental international accords such as the Charter of the United Nations and the Universal Declaration of Human Rights. That however, was only a first step. There was a need to merge law and ethics in international politics and to create a political mentality of a new kind that would unite rather than divide people and produce a feeling of solidarity among them. The mentality of the political leaders in particular must be changed and they must be made to understand that it was as reprehensible to violate a moral prohibition as to break a norm of international law. If the international community achieved that end, its impact on political life would be comparable to that of the Enlightenment on European culture.

21. Halfway through the United Nations Decade of International Law<sup>5</sup>—one aim of which was to make legal considerations an integral part of the work of all United Nations bodies and not just of the Sixth Committee—the time had perhaps come to review the plans for the rest of the Decade in an attempt to achieve more substantive results by the time it ended. The Commission, the most respected body in its field of activity, had considerable freedom in the choice of topics that it considered and could play a key role in that process.

22. The United Nations had already introduced a considerable amount of morality into international politics and the law and had made political relations more open. The behaviour of States in the various United Nations forums was subject to certain rules of conduct that were based on the highly moral principles of the Charter.

23. The CHAIRMAN thanked the Under-Secretary-General, Director-General of the United Nations Office at Geneva, for his most interesting statement.

24. The Commission greatly appreciated the hospitality of the United Nations Office at Geneva, which provided it with conference services of a high quality.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/457, sect. C, A/CN.4/459,<sup>6</sup> A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)**

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (continued)

CHAPTER II (Prevention) (continued)

ARTICLE 13 (Pre-existing activities) (continued)

25. The CHAIRMAN suggested that consideration of article 13 should be suspended until later in the discussion.

*It was so agreed.*

<sup>4</sup> Ruling of 6 July 1986 by the Secretary-General (UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 197 *et seq.*).

<sup>5</sup> Proclaimed by the General Assembly in its resolution 44/23.

<sup>6</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

## ARTICLE 14 (Measures to prevent or minimize the risk)

26. The CHAIRMAN said that the consideration of the article also concerned the corrigendum which had been issued to the article (A/CN.4/L.494/Corr.1), and invited the Chairman of the Drafting Committee to introduce article 14, which read:

*Article 14. Measures to prevent or minimize the risk\**

States shall take legislative, administrative or other actions to ensure that all necessary measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

\* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

27. Mr. BOWETT (Chairman of the Drafting Committee) said that the Drafting Committee recommended two changes in the article, as adopted by the Drafting Committee at the forty-fifth session. The first change, the purpose of which was merely to ensure consistency in the use of terms throughout the draft articles, involved the addition of the words "prevent or" before the word "minimize" in the text of the article and in the title.

28. The other change concerned the addition of a footnote. During the discussion in plenary at the forty-fifth session, the majority view in the Commission had opted for a narrow conception of prevention, which was confined to measures taken prior to the occurrence of an accident in order to prevent or minimize the risk of such an accident.<sup>7</sup> In his tenth report (A/CN.4/459), the Special Rapporteur had raised the issue again and had presented strong arguments in favour of a broader concept of prevention which would also include measures taken after the occurrence of an accident in order to prevent or minimize the harm caused. The Drafting Committee had had to keep in mind the possibility that, after having considered the report of the Special Rapporteur at its next session, the Commission might opt for that broader concept of prevention. In that event, the wording of the articles would have to be modified wherever the phrase "to prevent or minimize the risk of transboundary harm" occurred and some wording would have to be included to provide for the need to prevent or minimize transboundary harm. That was the reason for the footnote to article 14, which also applied to all the articles in which the expression "to prevent or minimize the risk of transboundary harm" occurred.

29. Mr. ROSENSTOCK said that the new wording of the article raised problems in that it tended to transform an obligation of conduct into an obligation of result, which was not consistent with the Special Rapporteur's tenth report. Far from improving the text, the Drafting Committee had helped to remove it further from *lex lata* and to make it more difficult to accept.

30. He therefore proposed that the word "necessary" should at least be replaced by the word "appropriate"

and, that the words "prevent or" should if possible, be deleted.

31. Mr. HE said that he had two points to make, the first of which concerned the asterisk and the footnote. Although the question of a narrow or broad interpretation of article 14 was still in abeyance, he would prefer a broad interpretation for the reasons explained by the Special Rapporteur in his tenth report. In view of that uncertainty, the explanation given in the footnote should be transferred to the commentary.

32. His second comment concerned the word "necessary". Originally, he had considered that it could be replaced by the word "possible" to take account of the fact that the standards applicable in the developed countries with respect to "necessary measures" were perhaps not suitable for the developing countries, having regard to the stage of their technology. In the light of Mr. Rosenstock's proposal, he could agree that the word "necessary" should be replaced either by the word "possible" or by the word "appropriate".

33. Mr. BARBOZA (Special Rapporteur) said that either word would be acceptable to him. With regard to Mr. He's second comment, he would remind members that he had proposed that a rule should be included in the general principles to provide that in assessing the conduct of a State, the court or any other body responsible for interpreting the law or the treaty should take account of the special situation of the developing countries. A general provision of that kind would cover virtually all the articles.

34. Mr. BOWETT (Chairman of the Drafting Committee) said that, in his view, the addition of the word "possible" in the article would create the impression that an even higher duty was placed on States, in which case an explanation would be required in the commentary to eliminate that interpretation. In view of that risk, it would be preferable to retain the word "appropriate".

35. Mr. ROSENSTOCK said he would agree that his proposal to delete the words "prevent or" should be dropped if it was made clear in the commentary that the article dealt with an obligation of conduct and not of result.

36. Mr. de SARAM, stressing the importance of the question under discussion, said that it was the first reading of the draft articles and he would like his view to be reflected in the commentary. With regard, first, to the words "all necessary measures", there was a gradation between the three words "possible", "appropriate" and "necessary" even if the distinction was sometimes difficult to make.

37. Further, he trusted that the words "or other actions" would not be interpreted to mean that the other measures should be *ejusdem generis* with the legislative and administrative measures. He would prefer the beginning of the sentence to be re-worded to read: "States shall take all [necessary] measures to prevent . . .". He saw no reason for the Commission to determine that a measure should be of a legislative, administrative or any other nature.

38. With regard to Mr. Rosenstock's second proposal, his own view was that the inclusion of the words "pre-

<sup>7</sup> See *Yearbook . . . 1993*, vol. I, 2302nd meeting.

vent or” was important, since, otherwise, the text would convey the impression that the only obligation was to minimize the risk and not to prevent it. All those points would, moreover, have an implication for the way in which the Commission dealt with liability for damage and for the question whether the obligation of the State of origin should be higher than an obligation of due diligence. That debate was still open. The Commission had still not entered into it and it should do nothing that might prejudice the position it would take during its consideration of liability at the forty-seventh session.

39. Mr. YANKOV said it stood to reason that the expression “all measures” included legislative, administrative and other measures. But it was also important—and it was the practice in many legal instruments on the environment—to refer expressly to legislative, administrative and other measures because one of the most reliable ways of ensuring stability with regard to the protection of the environment and the avoidance of risk and damage was through legislation supported by administrative, technical, financial, demographic and other measures. If the Commission should decide on a general form of wording for the article, the commentary must make it clear that it had in mind all legislative, administrative, technical, financial and other measures.

40. His second point concerned the replacement of the word “necessary” by the word “appropriate”. In a spirit of compromise, he was prepared to go along with that replacement, although “necessary” was the proper term in his view.

41. It was also necessary to consider more closely the problem of double standards. Where there was a risk or damage to the environment or to human health, there could be no question of providing one standard for the poor, one for the less fortunate and a third for all the rest. The Commission should try to achieve harmonization and unification in the rules that protected, for instance, the global environment, security and stability, and health. He would therefore suggest, at the current stage, that the Commission should keep the words “prevent or minimize”, which were, in any event not its invention and which dated back to the Stockholm Declaration.<sup>8</sup> When the Commission took up that part of the Special Rapporteur’s tenth report dealing with liability, it could see how that fitted in to the draft articles.

42. Mr. THIAM said he understood that some might want to drop the word “necessary”, although, basically, it was the most suitable. What he found extraordinary, however, was that there were those who wanted to drop the word “possible”, since it meant, precisely, that States were not being asked to do the impossible. The word “appropriate” was very vague and open to many interpretations.

43. He would therefore prefer to retain the word “necessary”, but, as a concession, would agree to its replacement by the word “possible”.

44. Mr. AL-BAHARNA pointed out that there had been agreement in the Drafting Committee on the word

“necessary”, which, in any event, the text required. He was not prepared to agree to its replacement without an explanation from the Special Rapporteur or the Chairman of the Drafting Committee as to the difference in that context between the various terms.

45. Mr. EIRIKSSON said that, whichever adjective was chosen, the nature of the obligation behind the article was not clear from the wording. Some explanation should be given of what the Commission meant by that obligation and which standards it intended to set.

46. Mr. BARBOZA (Special Rapporteur) said that he did not see the point of the discussion, since it was clear, as explained in detail in the comments made in the tenth report, that article 14 dealt only with an obligation of due diligence. Whichever word was adopted, the nature of that obligation would not change. The Commission could therefore equally well choose any one of the three words, although, perhaps, the Chairman of the Drafting Committee had pointed out, the word “possible” implied a higher degree of commitment.

47. Mr. TOMUSCHAT said that he objected to the word “possible”, as it would place too great a burden on the State. On the other hand, he saw little difference between the word “necessary” and the word “appropriate”, apart from the fact that the latter perhaps placed more emphasis on the test of proportionality with regard to the sacrifice demanded of the State.

48. Mr. de SARAM said he agreed with Mr. Al-Baharna that the question had been dealt with by the Drafting Committee and that the word “necessary” should therefore be retained.

49. Mr. GÜNEY said he shared Mr. Tomuschat’s view that it would be impossible to adopt the word “possible”, since it imposed a higher degree of commitment which was not acceptable in the context. If there was to be any change, it should consist of the replacement of the word “necessary” by the word “appropriate”.

50. Mr. ROSENSTOCK said that he welcomed the Special Rapporteur’s explanations, as well as his stated intention to make it clear in the commentary that article 14 dealt with an obligation of due diligence or an obligation of conduct. He was, however, concerned that the word “necessary” could be read as meaning “possible”. He would therefore prefer it to be replaced by the word “appropriate” or the word “practicable”, which would leave no doubt as to the consistency of the text of the article with the commentary and of the text with the Special Rapporteur’s tenth report.

51. Mr. MAHIU said that, like Mr. Tomuschat, he considered that there was no difference between the words “necessary” and “appropriate”. He would not, however, object to the replacement of the former by the latter.

52. Mr. CALERO RODRIGUES, referring to the footnote, said that it was contradictory to speak of “measures taken . . . to prevent or minimize the harm caused”, since, if harm was caused, it could not be prevented. He therefore proposed that the word “caused” should be deleted.

<sup>8</sup> 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.

53. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the word “caused” in the last line of the footnote.

*It was so agreed.*

54. The CHAIRMAN said that, in the light of the explanations given by the Special Rapporteur concerning the nature of the obligation laid down in article 14, he would take it, if he heard no objection, that the Commission agreed to retain the words “prevent or”.

*It was so agreed.*

55. The CHAIRMAN reminded the Commission that Mr. He had proposed that the footnote should be moved from the text of the draft articles to the commentary.

56. Mr. BOWETT (Chairman of the Drafting Committee) said that, if that were done, it would not assist the reader, as it would be difficult to find the content of the footnote in the relatively lengthy commentary.

57. Mr. HE withdrew his proposal.

58. The CHAIRMAN said that the Commission still had before it the proposal to replace the word “necessary” by the word “appropriate”.

*The Commission decided to replace the word “necessary” by the word “appropriate” and took note of the objections of two members.*

*Article 14, as amended, was adopted.*

#### ARTICLE 14 *bis* (Non-transference of risk)

59. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 14 *bis*, which read:

##### *Article 14 bis [20 bis]. Non-transference of risk*

**In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.**

60. Mr. BOWETT (Chairman of the Drafting Committee) said that the number 20 *bis* which appeared between square brackets was the number originally designated for the article by the Special Rapporteur. The Drafting Committee had, however, felt that the article dealt with a general principle, non-transference of risk, that must be taken into account in the implementation of all the articles. It had therefore decided that it would be better to place it after article 14. Article 14 *bis* was inspired by the new trend in environmental law to design a comprehensive policy for protecting the environment. The Drafting Committee had taken note of article 195 of the United Nations Convention on the Law of the Sea and of article II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,<sup>9</sup> which also dealt with the issue.

61. The purpose of the expression “simply transferred” was to preclude actions that purported to prevent or to minimize the risk, but in effect merely externalized it by shifting it to a different place or changing it so as to produce a different risk which was not really a reduced risk. The Drafting Committee was aware that, in the context of the topic, the promotion of an activity, the place where it should be conducted and the use of measures to prevent or reduce the risk of its causing transboundary harm were, in general, matters that had to be determined through the process of finding an equitable balance between the interests of the parties concerned. Obviously, article 14 *bis* had to be understood in that context, but it was the view of the Drafting Committee that, throughout the process of finding an equitable balance of interests, the parties should take into account the general principle set forth in the article.

62. Mr. EIRIKSSON said that he wondered whether article 14 *bis* was really necessary. The consequences of such a provision were perhaps clearer in the instruments referred to by the Chairman of the Drafting Committee, whereas, in the draft under consideration, they might become too dependent on the reading of the word “simply”. Whether or not the risk was transferred from one area to another, if the risk of causing significant transboundary harm subsisted, it should not make any difference at all so far as the future convention was concerned.

63. Mr. BENNOUNA said that, in his view, it should be made clear, if not in the article itself, then at least in the commentary, that a risk of another type which arose out of the transformation of the initial risk continued to be a risk within the meaning of article 2.

64. Mr. BARBOZA (Special Rapporteur) said that the comments made by Mr. Eiriksson and Mr. Bennouna would be taken into account in the commentary.

*Article 14 bis was adopted.*

#### ARTICLE 15 (Notification and information)

65. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 15, which read:

##### *Article 15. Notification and information*

**If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm:**

**(a) The State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required;**

**(b) When necessary, such notification may be effected through a competent international organization;**

**(c) Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.**

66. Mr. BOWETT (Chairman of the Drafting Committee) said that article 15 addressed a situation where the assessment conducted by a State, in accordance with article 12, indicated that the activity planned did indeed have a risk of causing significant transboundary harm. Together with articles 16, 18 and 19, article 15 provided

<sup>9</sup> E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

for a set of procedures that were essential in attempting to balance the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity, subject to satisfactory and reasonable measures being taken to prevent or minimize transboundary harm. The core idea of article 15 was the duty of the State of origin to notify the States likely to be affected. Article 12 of the draft articles on the law of the non-navigational uses of watercourses<sup>10</sup> dealt with a similar issue and the Drafting Committee had also taken note of article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context, which also related to the same question.

67. The notification provided for in subparagraph (a) must be accompanied by technical and other relevant information on which the assessment was based. Subparagraph (a) assumed that not only raw data and technical information were included, but also the analysis of the information which had been used by the State of origin itself to determine the risk of transboundary harm. The notification should also include an indication by the State of origin of a reasonable time within which the States likely to be affected must respond and which should allow them enough time to review the assessment material and make their own determination of the possible transboundary consequences.

68. States were free to decide how they wished to inform the States that were likely to be affected. As a general rule, they would make direct contact through diplomatic channels. In the absence of diplomatic relations, the notification could be made through a third State or a competent international organization. As use of the latter was not as common as the other two, the Drafting Committee had felt that it would be useful to mention that possibility in subparagraph (b). The reference to international organizations had a further purpose, namely, to enable a State of origin which was unable by itself to determine the States that were likely to be affected to request the assistance of a competent international organization for the purpose. In doing so, the State of origin could properly claim that it had exercised due diligence. The word "competent" meant that the organization was technically competent to deal with the problem concerned and legally competent to act in the way described. Subparagraph (c) addressed the situation where the State of origin, despite all its efforts, was unable to identify all the States that might be affected prior to authorizing the activity and learnt later that other States might be affected. In such cases, the State of origin was under the obligation to notify such States without delay.

69. Mr. EIRIKSSON said that one of the general points he had made when expressing his support for the substance of the proposed draft articles was that he would have preferred them to be more direct and methodical. There might therefore be an opportunity to make the link between articles 15, 18 and 19 clearer by adding, before the words "is required", at the end of article 15, subparagraph (a), the words "including a request for consultations under article 18". He also wondered whether there should be an obligation on the

notifying State to indicate a reasonable time. Perhaps it would be preferable to replace the words "and an indication of a reasonable time" by the words "and may indicate a reasonable time". Lastly, the link between subparagraphs (b) and (c) and the remainder of the article was perhaps not very clear and he would therefore suggest that the article as a whole should be recast with an introductory clause followed by three separate subparagraphs corresponding to the three existing subparagraphs. As a further meeting of the Drafting Committee was apparently contemplated, those changes could perhaps be dealt with then.

70. Mr. ROSENSTOCK proposed that the word "other", in subparagraph (c), should be deleted to make it clearer that the obligation to notify without delay would apply even if no State had been notified on the first occasion.

71. Mr. BENNOUNA said that, as a matter of procedure, he found it unacceptable that the Drafting Committee should be reconvened, once it had completed its work, to consider the proposals of one member of the Commission.

72. Mr. VARGAS CARREÑO said that the arguments invoked by the Drafting Committee to justify the reference to a competent international organization in subparagraph (b) were valid in theory perhaps, but in practice the provision could give rise to difficulties and controversy as to which organization was competent. Was there not a risk of undermining the main purpose of the article, which was to ensure that the State of origin was always required to inform the States likely to be affected? Perhaps it should be made clear that subparagraph (b) would apply only in the absence of diplomatic relations.

73. Mr. GÜNEY said that he agreed with Mr. Bennouna concerning procedure. The Drafting Committee was open-ended and Mr. Eiriksson had been free to submit his proposals to it. Even if his proposals had merit, it would be difficult to consider them at the current stage. They could perhaps be considered on second reading.

74. Mr. PELLET said that he had no objection with regard to procedure. He also agreed with Mr. Vargas Carreño about substance. He still did not see the point of effecting notification through a "competent" international organization and in his view, article 15, subparagraph (b), which was obscure and ambiguous, could be deleted.

75. Mr. BARBOZA (Special Rapporteur) said that the purpose of article 15, subparagraph (b), was not to compensate for any absence of diplomatic relations between the State of origin and one or more States that were likely to be affected, but to respond to a concern expressed at the preceding session, namely, that an activity might carry a risk of causing harm to a considerable number of States not all of which the State of origin would be able to identify by its own means. Under the terms of subparagraph (b), it would be able in such a case to turn to a competent international organization for assistance in that connection. Subparagraph (b) would also make it possible to assess the diligence of the State of origin, for it could be argued that, if such a State had

<sup>10</sup> See 2353rd meeting, para. 46.

had the possibility of calling on a competent international organization to notify the States likely to be affected, but had not done so, it had perhaps not employed due diligence. The idea expressed in subparagraph (b) should therefore be retained, at any rate in the commentary.

76. Mr. PELLET said that he was not indifferent to the Special Rapporteur's explanations, but, in his view, the intervention of an international organization was not linked to notification. A State could, of course, seek the help of an international organization, but it would do so more for the purpose of assessment, which was the subject of article 12. He did not see why a State would need help in making a notification.

77. Mr. MAHIU said that he shared Mr. Pellet's doubts. The provision might, moreover, be used by the State of origin to offload its procedural obligation to notify and inform on to an international organization.

78. As to Mr. Eiriksson's proposals, admittedly they were interesting, but the plenary must not be transformed into a drafting committee. It was a pity that his proposals had not been submitted to the Drafting Committee.

79. Mr. AL-BAHARNA said that his understanding of article 15, subparagraph (b), was the same as the Special Rapporteur's and he was opposed to deleting it or placing it elsewhere. Perhaps, for the sake of clarity, the words "at the request of the State of origin" could be added after the word "effected", and the word "through" could be replaced by the words "with the assistance of". At all events, the Special Rapporteur's explanations should appear in the commentary.

80. Mr. TOMUSCHAT said that, although subparagraph (b) was unnecessary, in his view, he would not object to its retention. He considered, however, that the replacement of the word "through" by the words "with the assistance of" would be awkward: he too did not see how a State could have need of the assistance of an international organization in making a notification.

81. Mr. CALERO RODRIGUES said he doubted that the existing wording of subparagraph (b) could be improved. If there was strong opposition to it, it could be deleted and the idea it reflected could be expressed in the commentary, as the Special Rapporteur had proposed.

82. Mr. YANKOV said that he favoured the retention of subparagraph (b) as worded because it defined one of the means the State of origin could use in making a notification. The differences of view concerning the subparagraph could be reflected in the commentary.

83. Mr. BENNOUNA, supported by Mr. KABATSI (Rapporteur), speaking as a member of the Commission, said that subparagraph (b) should be retained. The question had been debated at length and it might well be that a State did not know which States were likely to be affected by an activity and therefore turned to a competent international organization to identify and notify them.

84. Mr. RAZAFINDRALAMBO said that he too favoured the retention of subparagraph (b). The provision was important for the developing countries, which lacked technical resources. Recourse to an international

organization might also be necessary in the case of assessment and the ideal solution would perhaps be for a separate provision to be formulated, along the lines of the provision in the United Nations Convention on the Law of the Sea, on the assistance competent international organizations could provide in that connection. He also considered, like Mr. Tomuschat, that the replacement of the word "through" by the words "with the assistance of" would be awkward.

85. Mr. MAHIU said he agreed with Mr. Pellet that action by an international organization would be more justified when it came to risk assessment and the identification of the States likely to be affected. In that connection, he would not be opposed to a separate provision on assistance by international organizations.

86. Mr. FOMBA said that, although he had not expressed any objection to subparagraph (b) in the Drafting Committee, the discussion taking place raised doubts in his mind as to the relevance and utility of the provision. The State of origin could, of course, request an international organization to assist it in assessing the risk and in identifying the States likely to be affected, but, once those States had been identified, it was for the State of origin to notify them. Consequently, subparagraph (b) should not be retained, at least not as presently worded.

87. Mr. PELLET said that he agreed with Mr. Razafindralambo's analysis, but not with his conclusion. Developing States might need assistance, but it would not be for the purpose of notification. The retention of subparagraph (b) might even be dangerous, since it would suggest, *a contrario*, that international organizations could intervene solely for the purpose of notification—and that was probably the only area in which their assistance was unnecessary. He therefore proposed that subparagraph (b) should be deleted and that the following sentence should be added at the end of article 12: "For the purposes of such assessment, a State shall be entitled to seek the assistance of competent international organizations."

88. Mr. VARGAS CARREÑO said that the important thing was not to undermine the main objective of article 15, namely, that the States likely to be affected should be notified in time that the State of origin intended to undertake an activity that might cause them harm. If the notification could be made through an international organization, it was always possible that, once the harm had occurred, the affected States would say that they had not known that the activity was going to be undertaken and the State of origin would contend that it had notified its intention to undertake the activity in question in time to an international organization which it regarded as competent, but that that organization had carried out the notification in such a way that the affected States had not been informed in time. To avoid that situation, it would be preferable to delete subparagraph (b) or to word it in such a way as to explain the reasons for which an international organization might have to intervene. Also, as had been proposed, the intervention of international organizations could be dealt with in a separate article.

*The meeting rose at 1.05 p.m.*

## 2364th MEETING

Tuesday, 12 July 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

*Present:* Mr. Al-Baharna, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/457, sect. C, A/CN.4/459,<sup>1</sup> A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (continued)

CHAPTER II (Prevention) (continued)

ARTICLE 15 (Notification and information) (concluded)

1. The CHAIRMAN said that two conflicting views appeared to have emerged with regard to subparagraph (b) of article 15. One view, held by Mr. Pellet (2363rd meeting) and others, was that it was not enough to confine the role of the international organizations to one of notification under article 15, subparagraph (b). Mr. Pellet had accordingly made a proposal to add to article 12 (Risk assessment) a proposal concerning the role that might be played by international organizations in risk assessment. The opposing view was that the reference to the role of international organizations in article 15, subparagraph (b) was superfluous or that the subparagraph should at least be reworded. In view of time constraints and of the expressed readiness of the Special Rapporteur to accept such a solution, he proposed that both views—concerning, first, the possible role of international organizations in the context of article 12, and secondly, that role in the context of article 15—should be reflected in the commentary, and that further consideration of the question of a reference to the role of international organizations in the text of the draft itself should be deferred until the second reading. On that understanding, subparagraph (b) of article 15 would be deleted.

*It was so agreed.*

2. The CHAIRMAN said that other suggestions had also been made regarding article 15, in particular by

Mr. Eiriksson. Clearly, some formal change would be needed, now that the article consisted only of subparagraphs (a) and (c). As he saw it, the chapeau of article 15 referred primarily, if not exclusively, to subparagraph (a). He thus proposed that the chapeau and subparagraph (a) should be merged to form a paragraph 1, while subparagraph (c) should become paragraph 2, thus addressing one of Mr. Eiriksson's concerns. No change in wording would be involved.

*It was so agreed.*

*Article 15, as amended, was adopted.*

3. Mr. EIRIKSSON said that, as he did not expect to be present at the second reading of the draft articles, and in view of the form in which article 15 had been adopted, he wished to state more clearly that his own preference would have been to retain subparagraph (a) unchanged up to the word "based", and to continue with the sentence: "The State of origin may indicate a reasonable time within which a response, including a request for consultations under article 18, is required."

ARTICLE 16 (Exchange of information)

4. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 16, which read:

*Article 16. Exchange of information*

**While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to minimizing any risk of causing significant transboundary harm.**

5. Mr. BOWETT (Chairman of the Drafting Committee) said that article 16 dealt with steps to be taken after an activity had been undertaken. The purpose of all those steps was the same as in previous articles: to prevent or minimize the risk of causing significant transboundary harm.

6. Article 16 required the exchange of information between the State of origin and the States that were likely to be affected, after the activity involving risk had been undertaken. In the view of the Drafting Committee, preventing and minimizing the risk of transboundary harm on the basis of the concept of due diligence was not a once-and-for-all effort. It required continuing efforts, which meant that the requirement of due diligence did not terminate after granting authorization for the activity and undertaking the activity; it continued for as long as the activity continued.

7. The information that was required to be exchanged under article 16 was whatever information would be useful for the purpose of preventing risk of significant harm. Normally, such information came to the knowledge of the State of origin. However, when the State that was likely to be affected had any information which might be useful for the purposes of prevention, it should make it available to the State of origin.

8. The Committee had taken note of the fact that the duty to exchange information was fairly common in conventions designed to prevent or reduce environmental and transboundary harm. For example, article VI, paragraph 1 (b) (iii), of the Code of Conduct on Accidental

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

Pollution of Transboundary Inland Waters,<sup>2</sup> and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes contained such a duty.

9. Under article 16, such relevant information should be exchanged in a timely manner, which meant that when the State became aware of such information, it should inform the other States quickly so that there would be enough time for all the States concerned to consult on appropriate preventive measures.

10. The Commission would note that there was no requirement in the article as to how often such information should be exchanged. The original article as proposed by the Special Rapporteur<sup>3</sup> had spoken of “periodic” exchanges of information. In the Drafting Committee’s view, it was unreasonable to impose a requirement as to frequency because the States concerned might not have any information to exchange. The requirement in article 16 came into operation only when States had information relevant to preventing or minimizing transboundary harm.

11. The CHAIRMAN, speaking as a member of the Commission, asked why article 16 referred only to “minimizing” any risk of causing significant transboundary harm. Was the omission of any reference to “preventing” such a risk intentional, or an oversight?

12. Mr. BOWETT (Chairman of the Drafting Committee) said that he personally could see no good reason for excluding a reference to “preventing” such a risk. The Special Rapporteur might perhaps recollect some reason why it had been deliberately excluded.

13. Mr. BARBOZA (Special Rapporteur) said that perhaps the assumption had been that it was not easy to completely prevent any risk of significant transboundary harm, where an activity already involved risk. The addition of a reference to “preventing” would be welcome.

14. Mr. ROSENSTOCK said that the activity referred to was one that involved risk; if that risk was prevented, the activity would cease to be one involving risk. The obligation in dealing with an activity involving risk, was to minimize that risk, not to minimize the harm caused. Article 16 did not cover activities in which no risk was involved. Logically, therefore, the provision should be left unchanged.

15. Mr. BARBOZA (Special Rapporteur) said that the obligation under article 16 was an obligation of information. If, as a result of new discoveries or technological advances, an activity were to cease to involve risk, there was no reason why States should not be obliged to inform other States of that fact. He thus continued to believe that it would be a good idea to insert a reference to “preventing”.

16. Mr. de SARAM said he endorsed the Special Rapporteur’s remarks. If, in the case of an ongoing activity,

a State obtained information which removed the risk involved, it would surely not be in accordance with the purpose of the articles for that State not to disclose the information.

17. Mr. CALERO RODRIGUES said that Mr. Rosenstock’s point might very well be correct. However, article 14 already contained a reference to measures “adopted to prevent or minimize the risk . . . of activities referred to in article 1”. He thus favoured the insertion of a reference to prevention.

18. Mr. TOMUSCHAT said that, in the modern world, not only neighbouring States, but also States in other regions, might be affected by an activity involving risk. Information on such activities should be sent to an international agency, which could act as a central depository, so that States which did not at first sight appear to be exposed to the risk could gain access to the information if they subsequently decided that they might have been affected. He thus favoured adding to article 16 a provision to the effect that information should also be provided to a competent international organization.

19. The CHAIRMAN asked whether, in view of the Commission’s decision merely to reflect in the commentary the role of international organizations in other cases, Mr. Tomuschat would be willing to adopt a similar course regarding those organizations in the context of article 16.

20. Mr. TOMUSCHAT said that he was not aware that the competent international organizations were referred to textually in any of the draft articles. In his view, it was not appropriate merely to relegate a reference to them to the commentaries. The assumption underlying all the articles as currently drafted was that such activities affected States only in their mutual and bilateral relations. However, account must also be taken of new developments in a more structured world which did not consist simply of a network of bilateral relationships, and in which some hierarchical institutions existed. Against that background, it would be an oversight not to mention the international organizations somewhere in the text. Perhaps, if there was agreement on the need for such a reference, the task of finding an appropriate wording could be assigned to a working group.

21. The CHAIRMAN pointed out that, if Mr. Tomuschat’s concern was to be addressed, the entire set of draft articles would probably have to be reviewed, something that would indeed be hard to accomplish in plenary. His suggestion that Mr. Tomuschat’s concerns should be reflected in the commentary had been intended as a means of drawing attention to the fact that the question of incorporating the role of the international organizations into the text of the draft articles would need to be addressed at a later stage. Now that it had been agreed to insert a reference to such organizations in the commentary in the cases of articles 12 and 15, it would be invidious to insist on inserting a reference thereto in the text of article 16 alone.

22. Mr. BARBOZA (Special Rapporteur) said that he would hesitate before including any reference to the international organizations in the draft articles. The Commission had several times contemplated doing so,

<sup>2</sup> E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

<sup>3</sup> *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/450, chap. I, sect. B.

and had concluded that it would be best not to refer to them explicitly. The international organizations would not be parties to the articles, so it was not possible to impose obligations on them. He himself had proposed including a reference to them in article 15, but merely as a means of measuring the degree of the due diligence exercised by a State in its duty of notification. The extent of any subsequent involvement of those organizations would depend on their readiness to cooperate.

23. Mr. BENNOUNA said he was unable to agree with the Special Rapporteur. Mr. Tomuschat had raised a very important question. The Commission had decided to delete subparagraph (b) of article 15, which had provided a means of notification in cases in which it was not known what States might be affected. Chernobyl offered a prime example in that regard. As things stood, it was now up to the State of origin to decide what States were likely to be affected. Yet international organizations existed whose specific task was to deal with transboundary pollution and protection of the environment. To ignore them in a set of draft articles the central concern of which, however generally expressed, was prevention of pollution and protection of the environment, would be a mistake.

24. Mr. MAHIU said that it seemed necessary to insert the word "preventing", in view of the remark made by Mr. Calero Rodrigues regarding article 14. Furthermore, chapter II as a whole was entitled "Prevention" and the idea of prevention was thus implicit throughout the chapter; no harm could thus come of mentioning it explicitly.

25. There seemed to be agreement that the international organizations had a role to play, but insufficient consideration had been given to ways and means of involving them, and to the implications of such involvement. The Special Rapporteur should perhaps be asked to give further thought to the advantages and drawbacks of including a reference to those organizations, and either to draft an additional article for consideration at the next session, or, should he conclude that it was better to omit any explicit reference, to explain the reasons for reaching that conclusion.

26. Mr. PELLET thought that the Special Rapporteur might have begged the question in asserting that international organizations would not be parties to a future convention on the subject. It might in fact be necessary, not only to refer to the international organizations in the draft articles, but also to open the convention for signature by those organizations. He agreed with Mr. Mahiou that the question was one to which the Special Rapporteur should be asked to give further thought before the next session.

27. As to the matter raised by Mr. Tomuschat, the Special Rapporteur was wrong to speak in terms of imposing obligations on the international organizations. The task was to establish what were the rights of States, and what their attitude should be, when faced with a risk associated with a non-prohibited activity. Mr. Tomuschat was right to say that the possibility of States having recourse to international organizations, and the role of those organizations, could not be totally disregarded. Since the Commission was behind in its schedule of

work, he wished to make a procedural proposal that discussion of the question should be suspended and resumed at the end of the next plenary meeting if time permitted. At that point, it might prove possible to formulate an additional article, with some such wording as: "These provisions shall be without prejudice to the role of the international organizations in their implementation and to the right of the States concerned to have recourse to their assistance." A draft article along those lines could serve as a basis for further study by the Special Rapporteur and there would then be a mention made in the report of the Commission to the effect that the Commission had not yet fully considered the issue.

28. Mr. BARBOZA (Special Rapporteur) said it was gratifying that the Commission had at last taken cognizance of a problem he had drawn to its attention three times and on which he had hitherto received no guidance whatever. It was against that background that he had concluded that it was not possible to impose obligations on international organizations unless they were parties to the draft articles, and also that they were not supposed to be parties thereto. To the best of his knowledge, not one convention on responsibility or liability contained a provision on international organizations. The Commission was thus venturing into a previously unexplored territory. He welcomed any suggestions for further reflection on the point at the next session. Perhaps there was no need to draft an additional article and it would be sufficient to state in the report of the Commission that the Special Rapporteur would give further consideration to the matter in his next report.

29. The CHAIRMAN asked whether he could take it that the Commission was prepared not to introduce amendments as to the role of the international organizations in the text of the draft articles at the current stage, without prejudice as to the role of those organizations, which would be the subject of further study in the Commission and would possibly be reflected in the articles themselves at some future stage. In the meantime, the fact that the Commission had not touched on that question would be reflected in its report to the General Assembly.

30. Mr. TOMUSCHAT said he supported Mr. Pellet's suggestion that an additional draft article should be discussed at the next plenary meeting, if time permitted once consideration of the existing draft had been completed. In that way, a glaring lacuna in the draft might be filled.

31. The CHAIRMAN asked whether, on that understanding, the Commission wished to adopt article 16, as amended to include a reference to "preventing or minimizing any risk...".

32. Mr. EIRIKSSON said that the proposed amendment should reproduce the language used in the other relevant articles, and should refer to "preventing or minimizing the risk...", since the words "any risk" gave rise to confusion in the other languages, and had been interpreted as meaning "all risk".

33. Mr. HE said that, at the previous session, many members had been in favour of incorporating in chapter I (General provisions) a general provision which would

take account of the situation of the developing countries, and, in chapter II (Prevention) a specific provision on that same matter. Accordingly, he proposed that a phrase should be added at the end of article 16, reading: "taking into particular account the facilitation of diffusion and transfer of technologies, including new and innovative technologies, by developed States to developing States."

34. Mr. ROSENSTOCK said that such a provision had already caused difficulties with regard to the United Nations Convention on the Law of the Sea and the same was likely to happen with the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. The incorporation of such a formulation might well prevent some States from accepting the draft.

35. The CHAIRMAN said that the wording suggested by Mr. He might be more appropriately placed in a different part of the draft. Perhaps consideration of the proposal could be deferred until the Commission had adopted article 16.

36. Mr. HE said that article 16 seemed to be the most appropriate place for the specific provision he was proposing.

37. Mr. PELLET said that he endorsed the substance of Mr. He's proposal and, moreover, did not share Mr. Rosenstock's concern with regard to its potentially adverse effect on acceptance of the draft by States. Nevertheless, the proposed wording had nothing to do with prevention and therefore did not belong in article 16.

38. Mr. MAHIOU said that he naturally endorsed the idea of taking account of the special situation of the developing countries. The Special Rapporteur had already mentioned the possibility of a general provision to that effect.

39. Mr. BARBOZA (Special Rapporteur) said that, while he agreed with the substance of Mr. He's proposal, he would prefer a general provision which might be incorporated in the chapter on principles. A more specific provision might disturb the balance of the draft and would, furthermore, undoubtedly require changes in several other articles besides the one to which the provision would be added.

40. The CHAIRMAN said that, while there seemed to be a general consensus regarding the substance of Mr. He's proposal, reservations had been expressed about incorporating it in article 16. Perhaps the Commission could consider the matter at the next stage of its work on the topic.

41. Mr. HE said that even if a general provision was elaborated, he still saw the need for a specific provision in chapter II.

42. The CHAIRMAN said that, having noted Mr. He's proposal and if he heard no further objections, he would take it that the Commission agreed to adopt article 16 as it stood.

*It was so agreed.*

*Article 16 was adopted.*

#### ARTICLE 16 *bis* (Information to the public)

43. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 16 *bis*, which read:

##### *Article 16 bis. Information to the public*

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected with information relating to the risk and harm that might result from an activity subject to authorization in order to ascertain their views.

44. Mr. BOWETT (Chairman of the Drafting Committee) said that article 16 *bis* had originally been proposed by the Special Rapporteur as paragraph (d) of article 15.<sup>4</sup> In the view of the Drafting Committee, that paragraph dealt with an issue different from the rest of article 15 and should therefore stand as a separate article.

45. Article 16 *bis* required that States, whenever possible and by such means as they deemed appropriate, should provide their own public with information relating to the risk and harm that might result from an activity subject to authorization in order to ascertain their views. The article was inspired by new trends in international law in general, and environmental law in particular, which sought to involve in the State's decision-making processes those people whose lives, health and property might be affected, by providing them with a chance to present their views to those responsible for making the ultimate decisions. A number of States allowed in their domestic law for hearings before administrative tribunals, so that the public might express its views on a particular project the authorities were considering. At least three recent legal instruments dealing with environmental law had also provided for that option. The Drafting Committee had taken note, in particular, of article 6, paragraph 3, of the Convention on Environmental Impact Assessment in a Transboundary Context; article VII, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters;<sup>5</sup> and article 16 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

46. The obligation contained in article 16 *bis* was circumscribed by the phrase "whenever possible and by such means as are appropriate". The phrase was intended to take into account possible constitutional and other domestic law limitations where such a right to hearings might not be granted. The choice of means by which information could be provided to the public was also left to the States. Therefore, the requirements of article 16 *bis* were conditioned by the provisions of domestic law.

47. The article limited the obligations of each State to providing such information to its own public. The phrase "States shall . . . provide their own public" avoided obligating the State to provide information to the public of another State. Thus, the State that might be affected must, after receiving notification and information from the State of origin, inform its own public before respond-

<sup>4</sup> Ibid.

<sup>5</sup> See footnote 2 above.

ing to the notification, when possible and by whatever means were appropriate.

48. Mr. PELLET said that he had two reservations about article 16 *bis*. First, in the French version, States were required to inform *leurs propres populations* with regard to possible risk and harm. As he recalled, in international legal instruments, the French word *population* was generally used in the singular. In the matter currently under consideration, the Commission should be codifying the law rather than developing it and, accordingly, should base itself on precedents, more particularly the instruments just cited by Mr. Bowett.

49. Secondly, he had serious doubts about the phrase "in order to ascertain their views", a formulation which gave the impression that the sole objective of providing information to the public was to determine its views on the matter in question. It was counterproductive to link providing information with consultation. Article 16 *bis* placed States under a twofold obligation: to inform the public of possible risk and harm, and also to ascertain the view of the public in response to that information. The wording of the article should reflect those dual objectives.

50. Mr. BARBOZA (Special Rapporteur) said that the Drafting Committee had based its work on precedents in the field, but had not necessarily used the exact language of the relevant instruments which, generally speaking, referred to "the public".

51. In elaborating article 16 *bis*, the Committee had endeavoured to find a compromise solution which, on the one hand, would give due consideration to contemporary trends towards informing the public and allowing them to participate, in whatever fashion was appropriate, in decision-making, and on the other hand, would temper the obligation of States to provide public information, as reflected in the phrase "whenever possible and by such means as are appropriate". The phrase "in order to ascertain their views" implied that Governments were under an obligation to take into account the reaction of the public, but not necessarily to involve the public actively in the decision-making process. Thus, the article sought to take into account the various constitutional systems of States.

52. Mr. BENNOUNA said it was important that the public should be informed of the risk inherent in a particular activity and about the details of the activity itself. He suggested, therefore, that the words "information relating to the risk and harm that might result from an activity subject to authorization" should be replaced by "information relating to the activity subject to authorization, the risk of that activity and the harm that might result from it".

53. Deletion of the phrase "in order to ascertain their views" might make article 16 *bis* more suited to the range of political systems under which States operated, but he did not feel strongly about the matter.

54. Mr. BOWETT (Chairman of the Drafting Committee) said that the term "public" was used in paragraph 8 of article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context. The idea

behind article 16 *bis* was that it was for each State, both the State of origin and the notified State, to inform its own public of any risk and harm that might result from the activity in question. The Drafting Committee had wished to ensure that the public was informed and that its views were heard, something which was reflected in the article by the words "in order to ascertain their views".

55. Mr. EIRIKSSON said that the words "activity subject to authorization" should be replaced by "activity referred to in article 1" in order to make it clear that the article was directed towards both the State of origin and the notified State.

56. Mr. PELLET said that he had no objection to the proposals made by Mr. Bennouna and Mr. Eiriksson.

57. In view of the Special Rapporteur's comments, he was satisfied that the phrase "their own public" was in fact based on the appropriate precedents, but none the less wished to be sure that the French translation of the phrase was accurate.

58. He continued to have reservations about the phrase "in order to ascertain their views", which weakened the first obligation set forth in the article, namely, the obligation of States to provide information. In response to article 16 *bis*, a State might decide not to inform the public precisely because it did not wish to consult with the public.

59. The two obligations, to inform and to consult, should be addressed separately in the article and to that end he proposed that the words "in order to ascertain their views" should be replaced by "and, whenever possible, States shall ascertain the views of their population".

60. Mr. MAHIOU said that, in his view, article 16 *bis* should present consultation as an obligation, but a compromise along the lines suggested by Mr. Pellet would give States the option of consulting, rather than compelling them to do so. He accordingly suggested that the words "in order to ascertain their views" should be replaced by "and shall, as appropriate, ascertain their views".

61. Mr. CALERO RODRIGUES said that it was the Commission's duty to reflect developments in international law. The practice of consulting the public existed in some countries and did not exist in others. The Commission should therefore take a stand on the matter and then let States decide if they wished to accept the obligation or not.

62. Mr. BARBOZA (Special Rapporteur) said that using the phrase "as appropriate" a second time, as suggested by Mr. Mahiou, would weaken the obligation on the State to consult the public. Furthermore, the phrase "whenever possible and by such means as are appropriate" which already appeared in the first line of the draft article was intended to apply to both obligations, that of informing and that of consulting.

63. Mr. EIRIKSSON said that a phrase along the lines of "and, where appropriate, ascertain their views" would not weaken the obligation to consult and was also

a good way of meeting Mr. Pellet's criticisms of the article.

64. Mr. TOMUSCHAT said that article 16 *bis* should remain as it stood. Mr. Pellet was, in that instance, being too prudent. There was no need to use the phrase "as appropriate" a second time.

65. Mr. MAHIU said that he could accept the proposed change.

66. Mr. PELLET, in response to Mr. Calero Rodrigues, said that Mr. Calero Rodrigues had not properly understood his objection. He did not in fact want States to be "too happy" with the text and was willing to go further than the Drafting Committee. He was certainly not being too cautious. In any event, he could accept Mr. Eiriksson's proposal.

67. Mr. de SARAM said that it would be preferable for the article to remain unchanged, since it represented a compromise reached in the Drafting Committee. Actually, he was prepared to go even further and add at the end of the article "and take those views into account in any decisions".

68. Mr. BARBOZA (Special Rapporteur) said that he did not share Mr. Pellet's fears. If the obligation to inform was separated from the obligation to ascertain the public's views, States would find it easier to comply with the provision.

69. Mr. BOWETT (Chairman of the Drafting Committee) said that Mr. Eiriksson had made an important point. The proposed phrase "referred to in article 1" made it clear that the provision applied to all States and not just to the State of origin. He could also accept the substitution of "and" for "in order to".

70. Mr. BENNOUNA said that he wished to remind the Commission of his earlier proposal. He would now like to suggest the following wording: "information relating to an activity referred to in article 1, the risk involved and the harm which might result and ascertain their views".

71. Mr. BOWETT (Chairman of the Drafting Committee) said the Committee had assumed that it would be difficult to provide information about risk without describing the activity creating the risk. Perhaps the point could be made clear in the commentary.

72. Mr. BENNOUNA said that many details might be implicit in the Drafting Committee's text but it was better to spell them out.

73. Mr. EIRIKSSON suggested the formulation: "affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views".

74. Mr. AL-BAHARNA said that he had difficulty with the phrase "ascertain their views". It was not clear how that was to be done and he could not understand why the Commission wanted to open that particular door. The phrase should be deleted and the point explained in the commentary.

75. The CHAIRMAN said that there now appeared to be two separate proposals, one from Mr. Al-Baharna and the other from Mr. Eiriksson and Mr. Bennouna. He suggested that the Commission should continue its consideration of those proposals after they had been produced in writing during the break.

76. Mr. de SARAM said that there was a third possibility, which was to retain the existing text.

*The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.*

77. The CHAIRMAN drew the Commission's attention to the three alternatives which had been circulated in writing: (a) to retain the article as it was; (b) to delete the words "in order to ascertain their views"—proposal by Mr. Al-Baharna; and (c) "States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views."—proposal by Mr. Eiriksson and Mr. Bennouna. He suggested that the Commission should first consider the third alternative.

78. Mr. CALERO RODRIGUES said that the substitution of "and" for "in order to" had the effect of imposing two obligations on States: to provide the public with information and to ascertain the public's views. States would not have to comply with both obligations, but he had thought that the whole point of providing the information was precisely to ascertain the public's views in the matter. The linkage provided by "in order to" should be retained. Failing that, he would prefer deletion of the words "in order to ascertain their views", as suggested by Mr. Al-Baharna. In other respects, the third alternative was only a slight improvement over the original text, but he would not obstruct a majority decision to adopt it. It was a pity that the Commission was spending so much time on what were merely drafting changes.

79. Mr. PELLET said that the obligations were weak because of the qualification "whenever possible and by such means as are appropriate". As he had said, he would have preferred to go further. In the English version the phrase "by such means as are appropriate" applied to both of the obligations, but in the French version to only one of them. The French should be brought into line with the English. He could accept the third alternative, subject to the point he had made earlier about the phrase *leurs propres populations* in the French text.

80. Mr. TOMUSCHAT said that the third alternative was an improvement. It was important to have information about the activity so that people could express their views about it and not just about the risk and possible harm.

81. Mr. de SARAM said that he still preferred the compromise solution achieved by the Drafting Committee, but would accept the third alternative. He could not agree to the deletion proposed by Mr. Al-Baharna.

82. Mr. PELLET said that he understood Mr. de Saram's point of view, but the Commission was not bound by the Drafting Committee's decisions.

83. The CHAIRMAN said it appeared that a majority of the members of the Commission were opposed to the first and second alternatives and he suggested that the Commission should adopt the third alternative.

*It was so agreed.*

*Article 16 bis, as amended, was adopted.*

#### ARTICLE 17 (National security and industrial secrets)

84. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 17, which read:

##### *Article 17. National security and industrial secrets*

**Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.**

85. Mr. BOWETT (Chairman of the Drafting Committee) said that the article had been proposed by the Special Rapporteur in his ninth report.<sup>6</sup> It had been generally supported during the discussion in the Commission. The Drafting Committee had introduced only minor editing changes to the Special Rapporteur's original text.

86. Article 17 was intended to create a narrow exception to the obligation of States to provide information in accordance with articles 15, 16 and 16 *bis*. It was obvious that States could not be obliged to disclose information that was vital to their national security or was considered part of their industrial secrets. That type of clause was not unusual in treaties which required exchange of information. In fact, article 31 of the draft articles on the law of the non-navigational uses of international watercourses<sup>7</sup> also provided for such an exception to the requirement of disclosure of information.

87. He wished to emphasize that the article protected industrial secrets in addition to national security. It was highly probable that some of the activities might involve the use of sophisticated technology including certain types of information protected even under domestic law. That type of safeguard clause was not unusual in legal instruments dealing with the prevention of potential harm from industrial activities. The Drafting Committee had taken note of some other conventions such as, for example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context, which provided for similar protection of industrial and commercial secrecy.

88. Article 17 also recognized the need for a balance between the legitimate interests of the State of origin and of the States likely to be affected. It therefore required the State of origin which decided that it must withhold

information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as could be provided under the circumstances. The words "as much information as can be provided" were intended to cover a general description of the risk and the type and the extent of harm to which a State might be exposed. The words "under the circumstances" referred to the reasons invoked for withholding information.

89. Mr. EIRIKSSON said that, since the tenor of article 17 was similar to that of article 31 of the draft articles on the law of the non-navigational issues of international watercourses, he would have thought that the same wording could have been used in both instances. The question could, however, perhaps be reconsidered, with a view to harmonizing the wording of the two articles, on the second reading of the draft articles now before the Commission. He did not, however, insist on an immediate amendment.

90. The CHAIRMAN said that if he heard no objections, he would take it that the Commission agreed to adopt article 17.

*It was so agreed.*

*Article 17 was adopted.*

#### ARTICLE 18 (Consultations on preventive measures)

91. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 18, which read:

##### *Article 18. Consultations on preventive measures*

**1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm and cooperate in the implementation of these measures.**

**2. States shall seek solutions based on an equitable balance of interests in the light of article 20.**

**3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue its rights under these articles or any other treaty.**

92. Mr. BOWETT (Chairman of the Drafting Committee) said that article 18, which had also been proposed by the Special Rapporteur in his ninth report,<sup>8</sup> dealt with the question of consultation between the States concerned on measures that should be taken to prevent the risk of causing significant transboundary harm. The article contemplated activities that were not prohibited by international law and that, normally, were important to the economic development of the State of origin. It would, however, be unfair to other States to allow such activities without consulting them and without taking adequate preventive measures. A balance therefore had to be struck between those two equally important sets of interests. Accordingly, the article did not provide either for a mere formality which the State of origin had to go

<sup>6</sup> See footnote 3 above.

<sup>7</sup> See 2353rd meeting, para. 46.

<sup>8</sup> See footnote 3 above.

through, without any real intention of reaching a solution acceptable to the other States, or for a right of veto for the States likely to be affected. Instead, it relied on the manner in which, and the purpose for which, the parties entered into consultations. Thus, they must enter into consultations in good faith and must take account of each other's legitimate interests; they must also consult each other with a view to arriving at an acceptable solution with regard to the measures to be adopted in order to prevent or minimize the risk of significant transboundary harm.

93. Under paragraph 1 of the article, the parties must enter into consultations, without delay, at the request of any one of them, in other words, at the request of the State of origin or of any of the States likely to be affected. The purpose of consultations was (a) to enable the parties to find acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of significant transboundary harm, and (b) to cooperate in the implementation of such measures. The words "acceptable solutions", which referred to the adoption of preventive measures, meant such measures as were accepted by the parties. Generally, the consent of the parties to measures of prevention would be expressed by way of some form of agreement. The preventive measures should obviously be measures that might avoid any risk of causing significant transboundary harm or, if that were not possible, that would minimize the risk of such harm.

94. The article could be invoked whenever a question arose as to the need to take preventive measures. Such questions might, of course, arise by virtue of article 15, because a notification to other States had been made by the State of origin that an activity it intended to undertake could carry a risk of causing significant transboundary harm, or in the course of exchange of information under article 16, or again, in the context of article 19, which dealt with the rights of the State likely to be affected. The Drafting Committee considered that article 18 had a broad scope of application in as much as it would apply to all issues relating to preventive measures. For instance, if there were ambiguities in communications made by the parties with respect to a notification under article 15 or to exchange of information under article 16, a request for consultations could be made simply to clarify those ambiguities. Under the last part of paragraph 1, the parties were required to cooperate in the implementation of the preventive measures on which they had agreed.

95. Paragraph 2 provided guidance for States in their consultations with each other on preventive measures. Article 20, to which paragraph 2 referred, contained a non-exhaustive list of factors the parties should take into account in balancing their interests in the course of consultations. The parties were not precluded either by paragraph 2 of article 18 or by article 20 from taking account of other factors which they regarded as relevant in achieving an equitable balance of interests.

96. Paragraph 3 dealt with the possibility that, despite every effort by the parties, they could not reach agreement on acceptable preventive measures. It was the view of the Drafting Committee that the State of origin should

then be permitted to go ahead with the activity. The absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. To maintain a balance between the interests of the parties, however, the State of origin, although permitted to go ahead with the activity, was still obliged to take account of the interests of the States likely to be affected. In addition, the State of origin conducted the activity "at its own risk", an expression also used in article 13. The explanations he had given with regard to the latter article applied equally to paragraph 3 of article 18.

97. The last part of paragraph 3 protected the interests of the States likely to be affected by allowing them to pursue any rights they might have under the articles or under any other treaty in force between the States concerned. The Commission had not, of course, yet discussed the question whether there should be any dispute settlement procedures under the draft articles to which such disputes might be referred. The Drafting Committee had decided not to prejudge that issue. The words "any other treaty" were intended to take account of situations in which the parties might be bound by some other treaty to settle that type of dispute through a particular procedure.

98. The CHAIRMAN invited the Commission to consider the article paragraph by paragraph.

#### *Paragraph 1*

99. Mr. de SARAM said he wondered why the words "in good faith" appeared in article 17 but not in article 18. For the sake of consistency, they should perhaps be inserted after the word "consultations", in paragraph 1, or, alternatively, should be deleted from article 17. Further, the sense of the last part of the paragraph would be improved if a comma were added after the words "transboundary harm".

100. Mr. GÜNEY said that the Drafting Committee had decided against including the words "in good faith" after the word "consultation", since it went without saying that States were required to negotiate and consult in good faith. It was therefore unnecessary to repeat them after each and every reference to consultation and negotiation. He would not, however, oppose incorporating them in the paragraph if that was the Commission's wish.

101. Mr. KABATSI said he too considered that it was unnecessary to add the words "in good faith", since it was presumed that States would negotiate and consult in good faith. The paragraph should therefore remain as drafted, in his view, and the words "in good faith" could even be deleted from article 17.

102. Mr. BARBOZA (Special Rapporteur) said that he was not in favour of adding "in good faith" every time a reference was made to consultation or negotiation. It was virtually axiomatic that all obligations under international law must be performed in good faith. The specific reference to good faith in article 17 had been included simply to underline the particular importance of an honest attitude on the part of the State that wished to withhold secret information.

103. Mr. BENNOUNA said that he tended to agree with the Special Rapporteur. The inclusion of the words "in good faith" in article 17 was understandable in view of the special situation with respect to national security. In any event, the requirement to act in good faith was a rule of international law.

104. The CHAIRMAN said that, in the light of the discussion, he took it that the Commission agreed to adopt paragraph 1 as it stood.

*It was so agreed.*

*Paragraph 1 was adopted.*

#### *Paragraph 2*

105. Mr. MAHIOU said that he would like to know why the expression "in the light of article 20" had been used. Article 20 in fact contained a list of factors and circumstances to be taken into account by States but, as was apparent from the word "including" in its opening clause, other factors and circumstances might well be added to that list. In the circumstances, he would have thought that some more direct reference, such as "in accordance with article 20", would have been preferable.

106. Mr. EIRIKSSON suggested that the words "in the light of article 20" should be replaced by the words "as referred to in article 20", which was the expression used in the draft articles on the law of the non-navigational uses of international watercourses.

107. Mr. CALERO RODRIGUES said he would point out that article 20 did not contain a definition of a balance of interests but simply listed factors and circumstances to be taken into account in establishing that balance. The words "in the light of article 20" were therefore entirely appropriate, since they referred to those factors. Naturally, there were other ways of saying the same thing, but if the Commission insisted on every tiny change it would never finish its work and, moreover, the text would not be improved.

108. Mr. YANKOV, agreeing with Mr. Calero Rodrigues, said that the words "in the light of" were perfectly adequate, particularly since article 20 did not contain an exhaustive list of factors and circumstances to be taken into account by States. The words "in accordance with" would be too rigid, and would require a definition or an exhaustive list of factors and circumstances to be set forth in article 20. Since that was not the case, paragraph 2 should remain in its present form.

109. Mr. TOMUSCHAT, agreeing with Mr. Calero Rodrigues and Mr. Yankov, said that he did not favour any change. The wording was entirely in keeping with the intention of the paragraph. The expression "in the light of" referred in a general way to article 20, which was precisely what was required.

110. Mr. AL-BAHARNA said that it might be clearer if the words "in the light of article 20" were replaced by the words "in the light of the factors and circumstances referred to in article 20".

111. Mr. MAHIOU said that he was satisfied with the explanations given in response to his question and was prepared to accept the wording of the paragraph as it stood.

112. Mr. GÜNEY said that Mr. Al-Baharna's suggestion would limit the scope of the provision. It would be preferable therefore either to leave paragraph 2 as drafted or, as Mr. Mahiou had originally suggested, to replace the words "in the light of article 20" by the words "in accordance with article 20".

113. The CHAIRMAN said he understood that Mr. Al-Baharna did not insist on his suggestion. He therefore took it that the Commission agreed to adopt paragraph 2 as drafted.

*It was so agreed.*

*Paragraph 2 was adopted.*

#### *Paragraph 3*

114. Mr. PELLET said that he objected to the last part of the paragraph, reading: "without prejudice to the right of any State withholding its agreement to pursue its rights under these articles or any other treaty". International law consisted not only of treaties but also of customary rules of law, particularly in the matter of prevention, as was apparent from the *Chorzów Factory* case (Merits).<sup>9</sup> He therefore suggested that the words "or any other treaty" should be replaced by the words "or under any other relevant rules of international law".

115. The CHAIRMAN said that, since it was late, the Commission would continue its consideration of article 18, paragraph 3, at the next meeting.

*The meeting rose at 6.05 p.m.*

<sup>9</sup> *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

## 2365th MEETING

*Wednesday, 13 July 1994, at 10.10 a.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

*Present: Mr. Al-Baharna, Mr. Barboza, Mr. Ben-nouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, 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.*

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/457, sect. C, A/CN.4/459,<sup>1</sup> A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (continued)

CHAPTER II (Prevention) (concluded)

ARTICLE 18 (Consultations on preventive measures) (concluded)

Paragraph 3 (concluded)

1. The CHAIRMAN reminded the Commission that Mr. Pellet had proposed (2364th meeting) that the words “or any other treaty”, at the end of the paragraph, should be replaced by the words “or any other relevant rule of international law”. He understood that Mr. de Saram had another proposal to the same effect.

2. Mr. de SARAM said that, since States which withheld their agreement could also have rights under private law, general principles of law and even equity, it would be better to adopt wording that was as general as possible. He therefore proposed that the end of the paragraph should read “to pursue such rights as it may have under these articles or otherwise”.

*It was so agreed.*

3. Mr. TOMUSCHAT said that the expression “at its own risk” was unfortunate, as it seemed to refer to the concept of strict liability. If, however, the States likely to be affected and the State of origin did not come to an agreement, the only obligation on the State of origin was to take all necessary measures to prevent or minimize the risk of harm. It certainly could not be held strictly liable for harm, as the expression “at its own risk” seemed to suggest. Consequently, if those words could be interpreted as making the State of origin liable for any harm caused, they should be deleted.

4. Mr. BOWETT (Chairman of the Drafting Committee) said that the Drafting Committee had not thought that the expression “at its own risk” implied the strict liability of the State of origin. They did not prejudge the question of liability, which would be covered in a later article.

5. The CHAIRMAN said that he would refer members to the explanations given by the Chairman of the Drafting Committee when introducing article 13,<sup>2</sup> at the end of which the expression “at its own risk” also appeared.

6. Mr. ROSENSTOCK said that, if the words “at its own risk” were deleted—as they should be, in his view—it would be preferable also to delete the words that went before: “and may proceed with the activity”.

They stated the obvious and their inclusion could suggest that the State of origin required the authorization to proceed with the activity it would be given under the draft articles. That, however, was not so.

7. Mr. PELLET said that the introduction of the words “at its own risk” was a curious and unnecessary innovation. They did indeed state the obvious, for under international law, too, a State always acted at its own risk. Their inclusion in article 18, paragraph 3, could be wrongly interpreted and it would therefore be preferable to delete them. That remark also applied to article 13. He would not oppose the longer deletion proposed by Mr. Rosenstock, although it did not seem to be strictly necessary.

8. Mr. BOWETT (Chairman of the Drafting Committee), supported by Mr. KABATSI (Rapporteur), speaking as a member of the Commission, Mr. CALERO RODRIGUES and Mr. RAZAFINDRALAMBO, said that the words “at its own risk” were essential for the clarity of article 18, paragraph 3. In the event that there was no agreement between the State of origin and the States likely to be affected, the State of origin must know exactly what it could do and what the consequences of proceeding with the activity in the event of harm would be. It was essential to clarify that question so that the States which would apply the draft articles would not have to proceed by logical inference.

9. Mr. MAHIU said that Mr. Rosenstock’s proposed longer deletion would divest the paragraph of its meaning and there would inevitably be problems of interpretation. While he would not oppose the deletion of the words “at its own risk”, he considered that it would be preferable, for the sake of clarity, to leave the paragraph as it stood.

10. Mr. ROBINSON, supported by Mr. HE, said that from the standpoint of internal consistency and of the actual meaning of the paragraph, it would be difficult to delete the words “and may proceed with the activity”, as proposed by Mr. Rosenstock. Also, while the words “at its own risk”, did not, in his view, have the effect that those who wanted to delete them feared, their deletion would not in any way detract from the provision, since they merely confirmed that the State of origin remained subject to the obligations imposed on it under general international law.

11. Mr. ROSENSTOCK said that he would not insist on the deletion of the words “and may proceed with the activity at its own risk”, but, at the very least, the words “at its own risk” should, at the current stage, be deleted.

12. Mr. PELLET said that the introduction in a roundabout way of the expression “at its own risk”, which seemed harmless, but was not defined anywhere in the draft articles, drew attention to an obscure and complex concept which little by little, and almost by stealth, transformed activities that were not prohibited into activities that were prohibited. Consequently, it would be better by far to delete the expression and to define the “risks” assumed by the State of origin in the provisions relating to its liability.

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. 11 (Part One).

<sup>2</sup> See 2362nd meeting, para. 89.

13. Mr. TOMUSCHAT said he too considered that the words "at its own risk" inevitably had the connotation of strict liability regardless of any explanations to the contrary given in the commentary. Where consultations had been held and the State of origin had accordingly been notified of the dangers inherent in the activity contemplated, the criterion used to assess its diligence would, of course, be stricter, but its liability would not be transformed into strict liability on that account. Furthermore, he feared that, if the words in question were retained, the States likely to be affected could have an interest in not coming to an agreement with the State of origin so as to be in a better position with respect to the latter's liability.

14. Mr. FOMBA said that the expression "at its own risk" stated the obvious and would therefore inevitably give rise to difficulties of interpretation, particularly since it was not defined anywhere in the draft articles. The consequences of proceeding with the activity in terms of liability would have to be stipulated in subsequent provisions and the expression should be deleted.

15. Mr. BARBOZA (Special Rapporteur) said that none of the arguments put forward in favour of the deletion of the expression "at its own risk" were convincing to him. The purpose of the expression was to preserve a balance, although it must not be possible to delay the activity—and that was why no right of veto was conferred on the States likely to be affected—the State of origin, which had been duly notified during consultations of the consequences the activity could have, had to take full responsibility for the consequences if it proceeded with the activity. That was the meaning of the expression "at its own risk". As to the concern expressed about possible strict liability, it was quite clear that all the obligations of prevention were obligations of due diligence and that there could be no strict liability inasmuch as the State itself was liable for its own negligence if it did not take all the necessary measures to prevent or minimize the risk of harm. The Drafting Committee had spent considerable time on the provision and had used the expression in question only after due consideration. In his view, and in the view of many members of the Drafting Committee and the Commission, its deletion would be unacceptable. He therefore proposed that a vote should be taken on the question by show of hands.

*It was so agreed.*

*A vote was taken by show of hands on the retention of the expression "at its own risk" in article 18, paragraph 3. There were 14 votes in favour of the retention of the expression and 6 against.*

*Paragraph 3 was adopted.*

16. The CHAIRMAN said it had been agreed, in informal consultations, that the commentary of the Special Rapporteur would state that "several" members had been in favour of the deletion of the words "at its own risk" and that the other members had been in favour of their retention.

17. Mr. PELLET said that he was not satisfied with that solution: a formal vote should have been taken as

the opposition to the retention of the expression in question had been significant. He reserved the right to ask for a vote in that kind of situation in future.

*Article 18 was adopted.*

ARTICLE 19 (Rights of the State likely to be affected)

18. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 19, which read:

*Article 19. Rights of the State likely to be affected*

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may request consultations under article 18.

2. The request shall be accompanied by a technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State of origin may be requested to pay an equitable share of the cost of the assessment.

19. Mr. BOWETT (Chairman of the Drafting Committee) said that article 19 addressed the situation in which a State became aware that an activity planned in another State, either by the State itself or by a private entity, carried a risk of causing it significant harm, but had received no notification of that activity in accordance with article 15 (Notification and information). A similar provision appeared in article 18 of the draft articles on the law of the non-navigational uses of international watercourses.<sup>3</sup> The Drafting Committee had also taken note of article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context, which contemplated a procedure by which a State likely to be affected could itself initiate consultations with the State of origin.

20. With regard to paragraph 1 of the article, he drew attention in particular to the words "has serious reason to believe". Since the activities covered by the draft articles were not prohibited by international law, the Committee had felt that the State which requested consultations should have sufficient reason for doing so and should not act on mere suspicion or conjecture.

21. Once consultations had begun, the parties would either agree that the activity was one of those covered by article 1 and the State of origin should therefore take preventive measures or the parties would not agree and the State of origin would continue to believe that the activity was not within the scope of the articles. In the former case, the parties must conduct their consultations in accordance with article 18 and find acceptable solutions based on an equitable balance of interests. In the latter case, namely, where they disagreed on the nature of the activity, no further step was anticipated in the paragraph. Originally, some members of the Drafting Committee had proposed that a sentence should be included to the effect that, in the event of disagreement, the parties should have recourse to a dispute settlement procedure as provided for in an article X to be adopted in the future or that a technical body should be established

<sup>3</sup> See 2353rd meeting, para. 46.

for the purpose of conciliation. Some members had, however, been unwilling to accept an article that made reference to another article whose content was still unknown. For that reason, the article did not provide for the possibility of a dispute between the parties. It would probably be necessary to review the matter at a later stage.

22. In paragraph 2, the first sentence attempted to maintain a fair balance between the interests of the State of origin, which had been required to enter into consultations, and the interests of the State that believed it had been affected or was likely to be affected by requiring the latter to provide justification for such a belief, supported by technical documents. The second sentence dealt with financial consequences: if it was proved that the activity in question came within the scope of article 1, the State of origin could be requested to pay an equitable share of the cost of the technical assessment. The Drafting Committee had considered that such a sharing of costs was reasonable since, first, the State of origin would already have had to make an assessment in accordance with article 12 (Risk assessment); secondly, it would be unfair to expect that the cost of the assessment should be borne by the State that was likely to be injured by an activity in another State; and, thirdly, if the State of origin was not obliged to share the cost of the assessment undertaken by the State likely to be affected, that might serve to encourage the State of origin not to make the assessment provided for in article 12 or not to effect the notification provided for in article 15, leaving all such costly assessments to be carried out by the States likely to be affected.

23. The Committee had, however, considered that the State of origin which failed to effect the notification might have acted in good faith because, for example, it believed that the activity posed no risk of causing significant transboundary harm. That was the reason why paragraph 2 stated that the State of origin "may be requested to pay an equitable share of the cost of the assessment". That meant that if, following discussion, it appeared that the assessment did not reveal a risk of significant harm, the matter was at an end and the question of sharing the cost did not arise. If, on the other hand, such a risk was revealed, then it was reasonable that the State of origin should be requested to contribute an equitable share of the cost of the assessment, namely, that part of the cost resulting directly from the failure of the State of origin to notify its activity and to provide the necessary technical information.

24. The CHAIRMAN invited the members of the Commission to consider article 19 paragraph by paragraph.

#### *Paragraph 1*

25. Mr. AL-BAHARNA said that, if the Chairman of the Drafting Committee had no objection, he would suggest that the words "causing significant harm to it" should be replaced by the words "causing it significant harm".

*It was so agreed.*

26. Mr. PELLET said that there was a contradiction between the title of the article, "Rights of the State likely to be affected", and the words "may request". Obviously, what the Drafting Committee had wanted to say was that the State likely to be affected had the right to ensure that the State of origin was a party to the consultations. The words "may request" did not convey an idea of obligation and the sentence should perhaps be rephrased.

27. Mr. EIRIKSSON said that the paragraph should perhaps be read in the light of article 18. The State likely to be affected was, of course, one of the "States concerned" which had the right to request consultations in accordance with article 18, paragraph 1.

28. Mr. MAHIU said that Mr. Pellet's concern could perhaps be met if the words "may request" were replaced by the words "may have".

29. The CHAIRMAN asked the Special Rapporteur if he could provide a further explanation.

30. Mr. BARBOZA (Special Rapporteur) said that, if the State of origin did not agree to the consultations requested, it was in breach of its obligation to act with due diligence under the draft articles. The State of origin must agree to consultations; that was why the word "Rights" had been included in the title of article 19.

31. Mr. Mahiou's proposed amendment was perfectly acceptable to him, however.

32. Mr. PAMBOU-TCHIVOUNDA suggested that, to make the situation even plainer, the word "request" could be replaced by the word "require".

33. The CHAIRMAN asked whether the members of the Commission would be prepared to agree to the replacement of the words "may request" by the words "may require", which would be translated into French by the words *peut exiger*.

34. Mr. ROBINSON asked whether the reference to "consultations under article 18" referred to all the paragraphs of article 18 or only to paragraph 1.

35. Mr. BARBOZA (Special Rapporteur) confirmed that it referred to the whole of article 18.

36. Mr. GÜNEY, noting that the proposed change affected substance, said that he would prefer the French version to remain as drafted and as adopted by the Drafting Committee.

37. Mr. CALERO RODRIGUES said he wished to place on record that, in his view, the proposed change was not the right solution.

38. Mr. PELLET said that he would be inclined to retain the word *demande* in the French version if, in the English version, the word "require" replaced the word "request", since the English text would, if necessary, help to dispel any ambiguity in the French text and, also, article 18, to which paragraph 1 made reference, was sufficiently precise.

39. The CHAIRMAN invited the members of the Commission to take a decision on the text, in English

and French, of article 19, paragraph 1. He suggested that the French text should remain as proposed by the Drafting Committee and that the English text should be reworded to read:

“1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18”.

*It was so agreed.*

*Paragraph 1 was adopted.*

#### *Paragraph 2*

40. The CHAIRMAN asked the Chairman of the Drafting Committee whether he considered, in view of the change introduced in paragraph 1, that there should be a consequential amendment to the first sentence of paragraph 2.

41. Mr. BOWETT (Chairman of the Drafting Committee) confirmed that the first sentence of paragraph 2 should be reworded to read: “The State requiring consultations shall provide a technical assessment . . .”.

42. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission agreed to the rewording of the first sentence of paragraph 2 as proposed by the Chairman of the Drafting Committee.

*It was so agreed.*

43. Mr. PELLET said he again regretted to note that the second sentence was couched in very weak terms. The words “may be requested” had no meaning in law and their effect was to divest the article of any interest or substance. He would, however, be prepared to agree to a compromise solution along the lines of that adopted for paragraph 1.

44. Mr. ROSENSTOCK said he felt bound to point out, since the Chairman of the Drafting Committee had said that in substance the article restated the terms of article 18 of the draft articles on the law of the non-navigational uses of international watercourses, that the second sentence of paragraph 2 on the sharing of the cost of assessment did not appear in article 18.

45. Paragraph 2 was unnecessary, in his view, as it was concerned with a matter of detail. In any event, if the paragraph was deleted, it would suffice to leave it to the common sense of States; if one of them was in violation of the obligations imposed on it under article 18, paragraph 1, the matter would come within the scope of the law on State responsibility. If other members of the Commission considered that paragraph 2 should be retained, however, he would not insist.

46. Mr. BOWETT (Chairman of the Drafting Committee) said that it would be a great pity to delete a paragraph which, even if it did not import strict legal obligations, did provide extremely helpful guidelines for any State that requested consultations and did indicate a

reasonable basis for asking the other State to pay some part of the cost of assessment. To delete the provision on the ground that it would suffice to rely on the law of State responsibility would be depriving States of valuable guidance.

47. Also, it would be going too far to replace the word “request”, in that paragraph, by the word “require” and it would, moreover, cause endless difficulties for those members of the Commission who already had some hesitation in accepting such a concept.

48. Mr. TOMUSCHAT said that an extremely simple solution would be to reword the second sentence of paragraph 2 to read: “If the activity is found to be one of those referred to in article 1, it [the State requiring consultation] may claim from the State of origin an equitable share of the cost of the assessment”.

49. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 2 of article 19, as amended by the Chairman of the Drafting Committee, and Mr. Tomuschat.

*It was so agreed.*

*Paragraph 2, as amended, was adopted.*

*Article 19, as a whole, as amended, was adopted.*

50. Mr. EIRIKSSON said that he had two comments to make on article 19 which he would like to be recorded. In the first place, there could be cases in which there was a notification, but it was not addressed to a particular State, whereas paragraph 1 of the article stated simply: “When no notification has been given . . .”. Secondly, the article dealt with cases where an activity which had already been undertaken created a risk, but not with those where an activity was planned.

51. He would therefore have proposed, had the Commission had more time, that article 19, paragraph 1, should be reworded to read:

“1. A State may require consultations in the manner indicated in article 18 if it has serious reason to believe that an activity referred to in article 1 which is likely to affect it is being planned or conducted in the territory or otherwise under the jurisdiction or the control of another State and no assessment under article 12 has taken place or, if it has taken place, it has not led to it being notified under article 15.”

52. In that case, the first part of the second sentence of paragraph 2 would have to be amended to read: “If the activity is found to be one which should have led to that State being notified under article 15, . . .”.

#### ARTICLE 13 (Pre-existing activities) (*concluded*)\*

53. Mr. BOWETT (Chairman of the Drafting Committee) said that the informal working group appointed to consider article 13 proposed that it should be amended in

\* Resumed from the 2363rd meeting.

the following manner. The words “after becoming bound by” should be replaced by the words “having assumed the obligations contained in” and the word “already” should be added before the word “being”. The purpose of the first of those amendments was to provide States with the opportunity of embodying the obligations in question in a bilateral or multilateral instrument which was quite separate from the future convention. The purpose of the second amendment was simply to highlight the fact that the activity existed before the obligation arose.

54. Mr. ROSENSTOCK said that the clarification introduced by the new wording, showing that the article was not *de lege lata*, was a step in the right direction and it would suffice if the explanations given by Mr. Bowett were reflected in the commentary. The problem of the last sentence of the article had still not been settled, however.

55. Mr. EIRIKSSON said that the obligation to require an authorization was implicit, whereas it should have been expressed more directly in the article. He would have preferred the following wording: “States shall also require authorization for the continuation of activities referred to in article 1 which are being carried out upon their having assumed the obligations contained in these articles”.

56. Mr. PELLET said that his opposition to the expression “at its own risk” was as strong in the case of the last sentence of article 13 as it was in the case of article 18.

57. Mr. de SARAM said that he favoured the deletion of the last sentence of article 13, which, in his view, touched on the difficult question of liability for harm. The differences of view with regard to the deletion or retention of the expression “at its own risk” derived from the differences of view with regard to such liability. It would be better to do away with the problem by deleting the last sentence of the article.

58. Mr. TOMUSCHAT said that, like Mr. Pellet, he was firmly opposed to the expression “at its own risk”. The words “pending such compliance” were also not very clear. The article actually laid down a number of requirements: that the State of origin should inform the operator that it must seek an authorization; that the operator must seek the authorization; and that the State must grant the authorization. To which requirement did those words refer?

59. Mr. BOWETT (Chairman of the Drafting Committee) said that it could take time to process a request for authorization and, during that time, it was necessary to know what was happening with the activity.

60. Mr. EIRIKSSON said that the problem raised by Mr. Tomuschat could be solved by the following wording: “States which permit the continuation of the activity pending the obtaining of such authorization do so at their own risk”.

61. Mr. TOMUSCHAT said that some of the ambiguity of the last sentence of the article would be dispelled if the words “Pending such compliance, the State may

permit ...” were replaced by the words “Pending authorization, the State may permit ...”.

62. Mr. ROSENSTOCK said that Mr. Tomuschat’s proposal could give rise to a problem if the authorization were refused once the assessment had been completed. That problem could be dealt with in the commentary, but the position should be made quite clear.

63. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 13, as amended by the Chairman of the Drafting Committee and Mr. Tomuschat, on the understanding that the commentary would reflect the concerns and objections of those members who were opposed to the expression “at its own risk”.

*It was so agreed.*

*Article 13, as amended, was adopted.*

#### ARTICLE 11 (Prior authorization) (*concluded*)\*\*

64. Mr. BARBOZA (Special Rapporteur) said that, following consultations on article 11, it was proposed that the second sentence should be reworded to read: “Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1”.

*It was so agreed.*

*Article 11, as amended, was adopted.*

65. Mr. EIRIKSSON said he trusted that the original wording of the second sentence would appear in the commentary as the obligation with respect to prior authorization also applied in the case to which it made reference.

#### ARTICLE 20 (Factors involved in a balance of interests)

66. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 20, which read:

##### *Article 20. Factors involved in a balance of interests*

**In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:**

(a) **the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;**

(b) **the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;**

(c) **the risk of adverse effects of the activity on the environment and the availability of means of preventing or minimizing such risk or restoring the environment;**

(d) **the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;**

(e) **the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;**

\*\* Resumed from the 2362nd meeting.

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

67. Mr. BOWETT (Chairman of the Drafting Committee) said that the purpose of the article was to provide some guidance for States in their consultations with regard to an equitable balance of interests, in which respect many facts had to be established and all the relevant factors and circumstances had to be weighed. In view of the diversity of activities and situations, the article set forth a non-exhaustive list of those factors and circumstances and no priority or weight was assigned to them. In general, the factors and circumstances indicated would allow the parties to compare the costs and benefits in each particular case.

68. Subparagraph (a) compared the degree of risk and the availability of means of preventing or minimizing such risk and of repairing the harm. The degree of risk could be high, but there might be measures that could prevent that risk or good possibilities for repairing the harm. The comparisons there were both quantitative and qualitative.

69. Subparagraph (b) compared the importance of the activity, in terms of its social, economic and technical advantages for the State of origin, and the potential harm to the States likely to be affected.

70. Subparagraph (c) made the same comparison as subparagraph (a), but as it applied to the environment. The concept of transboundary harm as used in subparagraph (a) could, of course, be interpreted as applying to the environment, but the Drafting Committee had wished to make a distinction, for the purposes of the article, between harm to some part of the environment which could be translated into value deprivation to individuals and could be assessable by standard economic and monetary means, on the one hand, and harm to the environment that was not susceptible to such measurement, on the other. The former was covered by subparagraph (a) and the latter by subparagraph (c).

71. Subparagraph (d) compared the economic viability of the activity with the costs of prevention demanded by the States likely to be affected. Such costs should not be so high as to make the activity economically non-viable. Economic viability was also assessed in terms of the possibility of conducting the activity elsewhere or by other means or by replacing it with an alternative activity. The words "conducting [the activity] by other means" referred to situations in which, for example, one type of chemical substance, which might be the source of transboundary harm, could be replaced by another chemical substance or where mechanical equipment in the plant or factory could be replaced by different equipment. The words "replacing [the activity] with an alternative activity" were intended to take account of the possibility of securing the same or comparable results by another activity with no risk, or much lower risk, of significant transboundary harm.

72. Subparagraph (e) provided that one of the elements which determined the choice of preventive measures was the willingness of the States likely to be affected to contribute to the cost of prevention. If such States were

prepared to contribute to the expense of preventive measures, it might be reasonable to expect, all other things being equal, that the State of origin could take more costly, but also more effective, preventive measures.

73. Subparagraph (f) compared the standards of prevention demanded of the State of origin with those applied to the same or comparable activity in the State likely to be affected. The rationale was that, in general, it might be unreasonable to demand that the State of origin should comply with a much higher standard of prevention than that applied by the States likely to be affected. That factor was not, however, in itself conclusive. If the State of origin was highly developed and applied domestically established environmental law regulations, it might have to apply its own standards of prevention, even if they were substantially higher than those applied by a State likely to be affected, in a developing country where there might be few if any regulations on prevention. States should also take into account the standards of prevention applied to the same or comparable activities in other regions or the international standards of prevention adopted for similar activities. That was particularly relevant when the States concerned did not have any standard of prevention for such activities or they intended to improve their existing standards.

74. Mr. EIRIKSSON said he noted that subparagraph (c) spoke of "adverse effects", whereas, throughout the rest of the draft articles, the word used was "harm". He therefore proposed that, for the sake of consistency, the beginning of subparagraph (c) should be reworded to read: "The risk of harm to the environment ...". He further proposed that the concept of equitable balance, referred to at the beginning of the article, should be repeated in the title, which would then become "Factors involved in an equitable balance of interests".

75. Mr. ROSENSTOCK said that, to be completely consistent, the word "significant" should be added to the word "harm".

76. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20, as amended by Mr. Eiriksson and Mr. Rosenstock.

*It was so agreed.*

*Article 20, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

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## 2366th MEETING

*Wednesday, 13 July 1994, at 3.10 p.m.*

*Chairman: Mr. Vladlen VERESHCHETIN*

*Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de*

Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, 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.

State responsibility (*continued*)\* (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>2</sup> A/CN.4/L.501)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 11 to 14 of part two of the draft articles on State responsibility as adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission (A/CN.4/L.501). The titles and texts of those provisions read as follows:

*Article 11. Countermeasures by an injured State*

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled, (subject to the conditions and restrictions set forth in articles 12, 13 and 14) not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 6 to 10 *bis*.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

*Article 12. Conditions relating to resort to countermeasures*

1. An injured State may not take countermeasures unless:

(a) it has recourse to a [binding/third party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or

(b) in the absence of such a treaty, it offers a [binding/third party] dispute settlement procedure to the State which has committed the internationally wrongful act.

2. The right of the injured State to take countermeasures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

*Article 13. Proportionality*

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

\* Resumed from the 2353rd meeting.

<sup>1</sup> *Yearbook . . . 1993*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

*Article 14. Prohibited countermeasures*

An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.

2. Mr. BOWETT (Chairman of the Drafting Committee) reminded members that, at the Commission's forty-fifth session, the Drafting Committee had adopted for articles 11 to 14 texts that had been introduced by the then Chairman of the Drafting Committee, Mr. Mikulka, but had not been acted on in plenary pending the submission of the relevant commentaries.<sup>3</sup> In his sixth report (A/CN.4/461 and Add.1-3), the Special Rapporteur had proposed rewording articles 11 and 12 and the Commission had agreed to refer his proposals to the Drafting Committee. The document before the Commission (A/CN.4/L.501) therefore contained article 11 as it had emerged from the discussion in the Drafting Committee at the present session and articles 12, 13 and 14 as adopted by the Drafting Committee at the forty-fifth session in 1993.<sup>4</sup> Since articles 13 and 14 had not been referred back to the Drafting Committee at the present session they required no comment on his part and he would simply refer the Commission to the presentation made by the Chairman of the Drafting Committee at the forty-fifth session of the Commission.<sup>5</sup>

3. The Drafting Committee had re-examined the text of article 11 as adopted at the forty-fifth session in the light of the Special Rapporteur's contention that the concept of adequate response must have a place in the article if a proper balance was to be struck between the position of the injured State and that of the wrongdoing State. The Special Rapporteur took the view that the effect of the omission of the notion of adequate response would be to allow the injured State too much scope to use countermeasures in order to compel both cessation and reparation. In the case of cessation, the injured State would be allowed to apply countermeasures without the wrongdoing State being given any opportunity to explain, for example, that there was no wrongful act or that the wrongful act was not attributable to it. In the case of reparation, the injured State might continue to be the target of countermeasures even after it had admitted its responsibility and even though it was in the process of providing reparation and/or satisfaction.

4. The Drafting Committee had noted that, because the text it adopted at the previous session made the right of the injured State to resort to countermeasures subject to the conditions and restrictions set forth in subsequent articles, it provided a safeguard against abuse, and that the requirement of proportionality went some way to meeting the Special Rapporteur's concerns. It had

<sup>3</sup> *Yearbook . . . 1993*, vol. II (Part Two), para. 204.

<sup>4</sup> *Ibid.*, vol. I, 2318th meeting, para. 3.

<sup>5</sup> *Ibid.*, paras. 2-35.

further noted that the phrase “as necessary to induce [the wrongdoing State] to comply with its obligations under articles 6 to 10 *bis*”, in paragraph 1, clearly implied that there were cases where resort or continued resort to countermeasures might not be necessary. At the same time, the Drafting Committee had agreed that, in such a sensitive area as that of countermeasures, there was merit in providing as much opportunity as possible for dialogue and that elaborating on the concept of necessity would serve a useful purpose. In that connection, when introducing article 11 at the previous session, the then Chairman of the Drafting Committee, Mr. Mikulka, had explained that the expression “as necessary” performed a dual function in that it first made it clear that countermeasures might be applied only as a last resort, where other means available to an injured State such as negotiations, diplomatic protests or measures of retortion would be ineffective in inducing the wrongdoing State to comply with its obligations and that it also indicated that the decision of the injured State to resort to countermeasures was to be made reasonably and in good faith and at its own risk.

5. To emphasize the desirability of a dialogue between the injured State and the wrongdoing State, the Drafting Committee had introduced, in paragraph 1, after the word “necessary”, the phrase “in the light of the response by the State which has committed the internationally wrongful act”. The phrase served a dual purpose. It made it incumbent on the wrongdoing State to take due account of the injured State’s reaction in assessing the need for resort to countermeasures, and it encouraged the wrongdoing State to enter into a dialogue with the injured State.

6. Paragraph 2 of article 11 remained unchanged.

7. The text of article 12 was identical to that adopted by the Drafting Committee at the forty-fifth session. The Drafting Committee at the present session had discussed extensively successive versions of the text as proposed by the Special Rapporteur in his sixth report. It had tried in particular to structure article 12 on the basis of the Special Rapporteur’s distinction between countermeasures, resort to which would have to be preceded by the initiation of a third party dispute settlement procedure, and urgent protective measures, which would not be subject to that precondition. However, the Drafting Committee had been unable, despite strenuous efforts by the Special Rapporteur and all members, to reach agreement on a rewording of article 12 along the lines proposed by the Special Rapporteur. Members would recall that the Commission had taken the decision to refer the Special Rapporteur’s new proposals for articles 11 and 12 to the Drafting Committee<sup>6</sup> on the understanding that, if the Committee found it impossible to modify articles 11 and 12 as adopted by the Committee at the forty-fifth session, the Commission would revert to the text adopted at the previous session and that text would then form the basis of the action to be taken in plenary. In the light of that understanding, the Drafting Committee had no alternative but to revert to the text adopted for article 12 at the previous session. As that text had been

introduced by the then Chairman of the Drafting Committee, he would again simply refer members to his statement.<sup>7</sup>

8. The CHAIRMAN suggested that, since the commentaries to articles 11, 13 and 14 were available, the Commission should consider those three articles first and then turn to article 12.

*It was so agreed.*

ARTICLE 11 (Countermeasures by an injured State)

*Paragraph 1*

9. Mr. CALERO RODRIGUES said that the phrase “in the light of the response by the State which has committed the internationally wrongful act”, in paragraph 1, made no sense. Response to what? The Drafting Committee had in fact included that phrase in article 11 because there had been a possibility that a reference to the notion of adequate response would be added in article 12, as proposed by the Special Rapporteur. Since article 12 as adopted by the Drafting Committee at the previous session was to remain unchanged, at least for the time being, there was no need for the phrase in question in article 11.

10. Mr. TOMUSCHAT, agreeing with Mr. Calero Rodrigues, said that the article should be couched in more precise terms and should, in particular, impose an obligation on the State which had suffered an internationally wrongful act to give a formal notification to the wrongdoing State.

11. Also, it was essential to spell out in the body of the text what was meant by countermeasures. He therefore proposed that after the number “14”, a comma should be added and followed by the words “to take countermeasures, that is, . . .”.

12. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested, in response to the point made by Mr. Calero Rodrigues, that the words “to its demands” should be added in paragraph 1, either after the word “response”, or after the words “internationally wrongful act”. That should make the text crystal clear.

13. As to Mr. Tomuschat’s proposal he considered that the title sufficed to make it quite clear to the reader that paragraph 1 dealt with countermeasures.

14. Mr. EIRIKSSON said that, the exact meaning of the additional wording proposed by Mr. Tomuschat would depend on where it came in paragraph 1. If it came after the number “14”, as Mr. Tomuschat had proposed, a question would arise as to the legality of the countermeasures, for they would not then be subject to the conditions and restrictions set forth in articles 12 to 14 and, moreover, they might go beyond what was necessary in the light of the response by the State which had committed the internationally wrongful act. To overcome that difficulty, he would suggest that the words in question should be added after the word “entitled”.

<sup>6</sup> See 2353rd meeting, para. 36.

<sup>7</sup> See footnote 5 above.

15. Mr. TOMUSCHAT said that Mr. Eiriksson's suggestion was acceptable.
16. Mr. PAMBOU-TCHIVOUNDA suggested that the words "that is" should follow the clause reading "subject to the conditions and restrictions set forth in articles 12, 13 and 14".
17. Mr. BOWETT (Chairman of the Drafting Committee) supported the suggestion.
18. Mr. AL-BAHARNA said that paragraph 1 would read better if the phrase "subject to the conditions and restrictions set forth in articles 12, 13 and 14" came at the very end of the paragraph.
19. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Eiriksson's point was well taken. Mr. Pambou-Tchivounda's proposal might be acceptable in the case of the French version, but in the English version the words "to take countermeasures, that is" should come after the word "entitled"; otherwise, the sense of the clause "subject to the conditions and restrictions set forth in articles 12, 13 and 14" would be altered.
20. The CHAIRMAN noted that a consensus of opinion seemed to be emerging in favour of Mr. Tomuschat's proposal as amended by Mr. Eiriksson.
21. Mr. ARANGIO-RUIZ (Special Rapporteur) reiterated that the words "to its demands" could be inserted after "response", in the English version.
22. Mr. CALERO RODRIGUES said that the Special Rapporteur's suggestion partly resolved the problem, but it was still not clear to what "demands" the amended text was referring. Nevertheless, the entire text was scarcely a model of good drafting and he would have no objection to the proposed amendment.
23. The CHAIRMAN said that the suggested amended version of paragraph 1 of article 11 would read:
- "1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled to take countermeasures, that is, subject to the conditions and restrictions set forth in articles 12, 13 and 14, not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response to its demands by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 6 to 10 *bis*."
24. Mr. GÜNEY asked whether it would not be better, in the French version of paragraph 1, to avoid the expression *c'est-à-dire*, which seemed inappropriate in a legal text.
25. Mr. PELLET said that he was not happy with the wording of the English version. Nevertheless, it was important to maintain the greatest possible consistency between the English and the French.
26. The CHAIRMAN suggested that the words *c'est-à-dire* should be replaced by the more elegant expression *à savoir*, in the French version.
- It was so agreed.*
- Paragraph 1, as amended, was adopted.*
27. Mr. PELLET said that he had deliberately waited until paragraph 1 had been adopted before speaking on a matter about which he had strong feelings. He was hostile to paragraph 1 in the form in which it had been adopted because, like Mr. Calero Rodrigues, he found it extremely badly drafted. There was also a deeper substantive reason for his hostility. It was his belief that countermeasures must be authorized only in exceptional circumstances. Yet all too often, articles 11 to 14 seemed to be drafted in precisely the opposite spirit, starting from the principle that countermeasures were lawful and going on to establish exceptions to that principle. He thus had a very fundamental general reservation regarding the articles on countermeasures. It was not his intention to oppose them at the present session, since he felt unable to take a final position on them until article 12—which, in his view, the Commission was not yet in a position to discuss—had been adopted. Only then would he be able to ascertain whether what were at present his reservations concerning article 11 would be transformed into active opposition. If article 12, when adopted, imposed firm and precise limits on the right to take countermeasures, he would not oppose it. If, on the other hand, article 12 was drafted unacceptably, his opposition would extend also to article 11. He accepted article 11 only subject to its being corrected by article 12.
28. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the light of the reservations expressed by Mr. Pellet, which in part he shared, he too had to make a reservation. He believed that the opening lines of paragraph 1 conferred excessive power on the injured State. He had not wished to obstruct the adoption of paragraph 1. None the less, his sixth report explained concisely and clearly why he believed that wording to be wrong.
29. Mr. ROSENSTOCK said that he—and, he suspected, a number of other members of the Drafting Committee—had accepted the addition of the phrase "in the light of the response by the State which has committed the internationally wrongful act" on the understanding that it was part of a compromise pursuant to which the Drafting Committee was willing to accept article 11. That wording had not been a first choice. It raised problems, and the introduction of the words "to its demands" was misleading in that it attributed a role to demands which they did not in fact possess. But perfection was the enemy of the good. The Commission was supposed to attempt to find common ground and therefore he did not press an objection to the addition of that wording. Yet that required a spirit of cooperation on the part of all those involved: not a reversion to first principles or first preferences, but rather an acceptance of a compromise package worked out by all concerned. Mr. Pellet had not been a party to that agreement.

*Paragraph 2*

30. Mr. TOMUSCHAT said that paragraph 2 was unnecessary. It merely stated the obvious truth that a countermeasure could not justify a breach of an obligation to the detriment of a third State. The paragraph should therefore be deleted.

31. Mr. PELLET said that he totally disagreed with Mr. Tomuschat. Paragraph 1 gave certain rights to the State, and it was very important to specify that those rights ran counter to a general rule. Unless that was stated, there would be a very great ambiguity. He was very strongly in favour of keeping paragraph 2.

32. Mr. CALERO RODRIGUES said he agreed with Mr. Tomuschat that paragraph 2 was not necessary. He could not accept Mr. Pellet's argument. Paragraph 1 laid down that the State was entitled not to comply with one or more of its obligations towards the State which had committed the internationally wrongful act. Consequently, it was not entitled to breach an obligation towards a third State. Strictly speaking, it could be contended that paragraph 2 was thus unnecessary, but no harm would come of retaining it.

33. Mr. BARBOZA said he agreed with Mr. Tomuschat. Paragraph 2 was totally unnecessary, for the reasons already given.

34. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he agreed with Mr. Calero Rodrigues, and especially with Mr. Tomuschat. If a majority of the Commission favoured deleting paragraph 2, he would be happy to accept that decision.

35. The CHAIRMAN asked members to indicate their preference by a show of hands.

*Paragraph 2 was adopted.*

36. Mr. PELLET said that he was not hostile to the type of procedure that the Commission had just employed. However, the debate had not yet been exhausted, and fuller explanations were needed. What was at stake was more than just a problem of legal technique. The deletion of paragraph 2 that had been proposed would have been totally preposterous in the context of the law of treaties, and it seemed to him equally preposterous in the context of countermeasures. It was gratifying that the Commission was moving towards a solution of which he approved, but the reasons why it was so doing must also be made clear. Accordingly, the proposed deletion had been incomprehensible. He regretted that Mr. Calero Rodrigues had been unable to agree with the reason he had given for wishing to retain paragraph 2. It was an important reason, one to which he held to very firmly.

37. The CHAIRMAN pointed out that articles 11 to 14 had been under discussion in the Commission and the Drafting Committee for the past two years. As Chairman, he was not prepared to resume the whole round of debate, only one and a half hours before the deadline for completion of the Commission's work on the topic. In the circumstances, he could not allow the debate on every issue to be prolonged endlessly, and it had thus been necessary to take an indicative vote.

*Article 11, as a whole, as amended, was adopted.*

## ARTICLE 13 (Proportionality)

38. Mr. PAMBOU-TCHIVOUNDA said that the Commission must be grateful to the Special Rapporteur for proposing the words "degree of gravity" as a solution to the problem concerning the "gravity of the internationally wrongful act". Yet he wondered whether that proposal in fact solved the problem. If assessment of the gravity of the act posed problems, assessing the degree of gravity of the act was still more problematical. How was that degree of gravity to be measured? He was concerned at the juxtaposition of the two ideas of "degree" and "gravity". Perhaps the Special Rapporteur could provide the Commission with some guidance in that regard in his forthcoming commentary, on the basis of which the Commission would be in a better position to endorse his proposal.

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, as he saw it, "degree" was a quantitative element, whereas "gravity" was a qualitative element. He saw no reason why the two elements could not coexist. If Mr. Pambou-Tchivounda was satisfied with that distinction, he would make the point clear in his commentary.

40. Mr. HE said that one purpose of article 13 was to prevent the dispute from escalating. However, such an escalation might be due to excessive countermeasures taken by the injured State, or to the persistence or intensification of delicts of the wrongdoing State. It was thus perhaps unfair to lay down obligations of proportionality only on the part of the injured State. If possible, article 13 should also provide for a corresponding obligation for the wrongdoing State not to take improper measures against the injured State.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was his impression that Mr. He was referring to counter-countermeasures. Article 13 was concerned simply with countermeasures. Counter-countermeasures would possibly constitute another internationally wrongful act.

42. Mr. HE confirmed that the measures to which he had referred were indeed counter-countermeasures.

*Article 13 was adopted.*

## ARTICLE 14 (Prohibited countermeasures)

43. Mr. TOMUSCHAT said that he endorsed the text of article 14. As to the commentary there was a difference between rights which could not be affected by countermeasures and rights which could not be affected by a State in a situation of emergency. The two cases were not the same. But he agreed in essentials with the commentary, in which the Special Rapporteur rightly referred to a "core" of human rights. That was the interpretation to be given to the formula "basic human rights".

*Article 14 was adopted.*

ARTICLE 12 (Conditions relating to resort to countermeasures)

44. The CHAIRMAN said that, as stated by the Chairman of the Drafting Committee (para. 7 above), the Commission had decided to refer the Special Rapporteur's new proposals for articles 11 and 12 to the Drafting Committee, on the understanding that, if the Drafting Committee found it impossible to modify articles 11 and 12 as adopted by the Committee at the forty-fifth session, that text would form the basis of the action to be taken by the plenary. In the light of that understanding, the Drafting Committee had referred article 12 back to the Commission. He invited the Special Rapporteur to give his views on the situation with regard to the article.
45. Mr. ARANGIO-RUIZ (Special Rapporteur) said that it was of course now too late to resume the debate on article 12. As Special Rapporteur, he felt obliged to explain, however briefly, why he strongly objected to the version of the article appearing in document A/CN.4/L.501.
46. He trusted that everyone understood that article 12 related to that most central issue of the law of State responsibility, namely, the relationship between the right to take countermeasures on the one hand, and dispute settlement obligations on the other. The drawbacks of unilateral countermeasures had been so effectively and realistically denounced in the debate in the Sixth Committee at the forty-seventh session of the General Assembly that there was no need to devote further time to discussing them. The unilateral character and possible arbitrariness of countermeasures represented a constant threat to the principle of the sovereign equality of factually unequal States and to the requirement of Article 2, paragraph 3, of the Charter of the United Nations, that international disputes should be settled in such a manner that not only the exigency of peace but also the exigency of justice should be satisfied. That was why a former member of the Commission, Mr. Shi, had gone so far as to suggest at the forty-third and forty-fourth sessions that countermeasures should not be recognized by the Commission as lawful means of redress of international tort.
47. Since the Commission had rightly thought it impossible to renounce countermeasures, as proposed by Mr. Shi, as a means of enforcement of international obligations, article 12, as he had proposed at the forty-fourth session,<sup>8</sup> had been intended to bring in the only possible corrective to the drawbacks of an uncontrolled system of countermeasures. The only conceivable corrective was the rule that available settlement means should be resorted to first, meaning prior to resort to countermeasures.
48. For him, it had not been a pipe-dream. It was not only the inescapable consequence of the drawbacks of countermeasures denounced in the General Assembly at its forty-seventh session; it had already been the solution proposed by the previous Special Rapporteur,
- Mr. Riphagen, in article 10 contained in his fifth report,<sup>9</sup> in which he had spoken precisely, going beyond the language which he (Mr. Arangio-Ruiz) had proposed at the present session, of exhaustion of available dispute settlement procedures. That line had also been approved by the Commission in 1985 and 1986, just as it had been approved again by a decisive majority of the present members of the Commission since about 1992. Both Mr. Riphagen's and his own proposals had been referred to the Drafting Committee and a great majority of the Drafting Committee at the forty-fifth session of the Commission—as clearly stated by the then Chairman of the Committee in his presentation of the article at that session—had declared themselves in favour of the principle of prior recourse to dispute settlement means.
49. How things had developed in such a way since the previous year that the Commission was now confronted with the present situation he preferred not to argue. However, of course, like everybody else, he could see the cause very well. But he would leave that aside for the time being. The essential point was that the Commission was confronted with a text—that of the Drafting Committee proposed at the forty-fifth session—that was of a nature to set aside, by the choice of a minority of the members, any idea of prior resort to dispute settlement means.
50. Following the previous year's experience, he had proceeded towards the end of 1993 to a drastic watering-down of the proposal made in his fourth report,<sup>10</sup> to say nothing of the 1985 proposal. In early 1994 he had submitted a new draft of the article, briefly and clearly explained in chapter I, section D, of his sixth report. In particular, the new text had done two things: first, it had reduced the variety of settlement procedures requiring prior implementation. Secondly, and most importantly, it had clarified the concept of the provisional, interim measures that would escape—to the satisfaction, he believed, of the "conservatives"—the prior recourse to the settlement procedures requirement. That watering-down had been acknowledged by a decided majority of the Drafting Committee at the present session, a majority which again—the point must be stressed beyond any possible doubt—had expressed in principle its favour for the prior resort to dispute settlement requirement. Again, however, the principle had been set aside *in concreto* in the resulting text.
51. Confronted with what he perceived as an article in which the minority view had prevailed, namely article 12 as set out in document A/CN.4/L.501, he had circulated the previous day his latest proposed version of article 12. In view of the late hour, he was not suggesting that the Commission should debate the matter immediately. Nevertheless, the issue was too crucial to the future of the law of State responsibility and the law of dispute settlement for it to be lightly set aside. He was proposing, then, that the Commission should postpone consideration of article 12 until the next session. The article would thus benefit from a more extensive review than it

<sup>8</sup> For the text of draft article 12 proposed by the Special Rapporteur, see *Yearbook... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3; and *ibid.*, vol. I, 2273rd meeting, para. 18.

<sup>9</sup> For the texts of draft articles 6 to 16 of part two referred to the Drafting Committee, see *Yearbook... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

<sup>10</sup> See footnote 8 above.

had had in the Drafting Committee, which had only been able to devote three meetings to what he considered to be one of the central issues of State responsibility.

52. In respect of article 12, he was mainly concerned about the consequences of adopting either the version proposed by the Drafting Committee at the forty-fifth session or any of the versions worked on by the Drafting Committee at the current session, all of which he found unsatisfactory.

53. Once adopted on first reading, draft articles served as one basis for developing international law. Although not considered as binding legal enactments, the draft articles by the Commission were frequently seen as important elements in determining *opinio juris* about *lex lata* or *lex in fieri* and in establishing policy with regard to *lex ferenda*. An example of the impact of the Commission's work was provided by a recent lecture given by Mr. Tomuschat at the Academy of International Law. In discussing the enforcement of international law, Mr. Tomuschat had noted, not without implied approval, that the Drafting Committee had recently confirmed the traditional position, notwithstanding many reservations of members of third world countries in particular. The "traditional position" was that international law should be enforced by unilateral countermeasures, the dangers of which Mr. Tomuschat failed to recognize in his lecture.

54. In his view, the question was whether the Commission actually wished such implications to be drawn from article 12 by scholars, practitioners, judges and arbitrators? Did it feel compelled to make a final decision with regard to article 12 at the present session or would it not be wiser to leave the question aside for one year, allowing time for mature reflection? Given the time it would take to complete the second reading of the articles on State responsibility, the Commission might not review article 12 again for several years: did it really want to be represented during that entire period by article 12 in one of its existing versions? Would such a text be of any help at all in elaborating the law of countermeasures and dispute settlement? Would it not irremediably hamper progressive development?

55. One could still read scholarly works which revived, wholly or in part, Kelsen's notion that there was no such thing, in international law, as an obligation to make, and a right to obtain, reparation and that such a right and obligation derived only from an agreement following the application of reprisals, namely countermeasures.<sup>11</sup> Fortunately, that view had been rejected by the Commission in the draft articles on State responsibility that had been adopted thus far. But, if countermeasures were, as seen by the Commission, the means of enforcing legal obligations and rights, why should they not be subject to a minimum of juridical control? In that connection, he referred again to Mr. Tomuschat's recent lecture in which he had stated that it was true that a legal device which was not embedded in a wider framework of rules and mechanisms that restrain unilateral action, bringing disputes under community discipline, risked

indeed to open up a battlefield where soon political power would prevail. Under the constitution of a system of governance, there should be some institutions entrusted with safeguarding the interests of the community at large which would be jeopardized by any conflict that got out of hand. Thus, Kelsen's line of reasoning looks like a makeshift defence of international law—*faute de mieux et jusqu'à nouvel ordre*. This was the position taken by Mr. Tomuschat in his lectures.

56. As to *faute de mieux*, the position taken by Mr. Tomuschat, in his view something better did, in fact, exist in the international system: the judge, the arbitrator and the conciliator. Why then should a Commission, dedicated by its statute to the progressive development of the law, not give consideration to the role of such agents, at least as a corrective remedy, if not a substitute, for unilateral countermeasures? And in what sense should *jusqu'à nouvel ordre* be understood—until there was a world government or until the international community was really organized? But how could the Commission contemplate the idea of an organized international community and at the same time refuse to incorporate the obligation of prior resort to dispute settlement in article 12?

57. He wished to conclude by renewing his plea for the Commission to defer consideration of article 12 until the next session.

58. The CHAIRMAN said that, as he understood it, if the Commission were to endorse the proposal made by the Special Rapporteur, it would then be inviting the Sixth Committee and Governments to comment on articles 11, 13 and 14, on countermeasures contained in part two of the draft articles on State responsibility, but not on article 12.

59. Mr. ARANGIO-RUIZ (Special Rapporteur) said that precedents existed for such a procedure: the Commission had, on one occasion, adopted one single article on State responsibility during its entire session.<sup>12</sup>

60. The Commission could simply send articles 11, 13 and 14 to the General Assembly, informing it of the Commission's decision to postpone consideration of article 12. The Sixth Committee, which had at the forty-seventh session of the General Assembly in 1992 expressed vehement objections to countermeasures, would certainly understand that the Commission wished to devote more time to that crucial issue.

61. Mr. BOWETT (Chairman of the Drafting Committee) said that some members of the Commission, including himself, were doubtful about the wisdom of sending to the General Assembly a set of articles on countermeasures without article 12, which was in fact the key provision. He had thought, therefore, that it might be useful for the Commission to have before it the last version of article 12 on which the Drafting Committee had been working before it had run out of time. That version had been distributed to members.

<sup>11</sup> H. Kelsen, *Peace Through Law* (Chapel Hill, University of North Carolina Press, 1944).

<sup>12</sup> See *Yearbook* . . . 1985, vol. II (Part Two), p. 24.

62. Mr. BARBOZA said that the Commission was not really in a position to consider a draft article which had not been adopted by the Drafting Committee.

63. He himself was convinced by the Special Rapporteurs' arguments. Article 12 already had a long history; postponing consideration for one more year would not make a great difference. Moreover, it was true that articles adopted by the Commission did have an impact on the legal community; ICJ, in the case concerning *United States Diplomatic and Consular Staff in Tehran*<sup>13</sup> for example, had found support in the Commission's reasoning in part one of the draft articles on State responsibility.

64. He was in favour of deferring consideration of article 12. The Commission could transmit articles 11, 13 and 14 to the General Assembly, while explaining that it reserved the right to revert to article 11 if necessary.

65. Mr. ROSENSTOCK said that, unlike Mr. Barboza, he had found the arguments put forward by the Special Rapporteur singularly unconvincing. The allegation that article 12 had been considered in haste was completely unfounded. The Drafting Committee had spent many hours considering the article and had produced a text for it. That text had been before the Commission for a year. The failure to arrive at a satisfactory compromise could certainly not be attributed to a cursory review of the issue.

66. The contention that article 12 presented a traditional view of the law was inaccurate. The article went beyond existing law and contained the measure of progressive development that it was reasonable to expect States to accept. The statement that the article ignored dispute settlement was so inaccurate as to be ingenuous. Article 12, as it now stood, set out a clear prohibition against taking countermeasures. Under paragraph 1, an injured State could not take countermeasures unless it met the conditions under subparagraphs (a) and (b); and under paragraph 2, the right of the injured State to take countermeasures was subject to suspension. Those provisions constituted steps beyond existing law.

67. References to a few statements in the Sixth Committee as if they represented action by that Committee or an expression of its opinion were also misleading. He was firmly opposed to postponing consideration of article 12. The Commission had before it two versions of the article, the one contained in document A/CN.4/L.501 and the one that had just been circulated informally. His personal preference was for the former. There was nothing to prevent the Commission from considering the two alternative texts at its present session. If, by the end of the session, the Commission had failed to agree on either text, it would then have to admit to the Sixth Committee that it had been unable to find a compromise solution.

68. While he had no strong objection to sending a partial set of articles to the General Assembly, he understood the views of those who felt that part two should only be transmitted in its entirety.

69. Mr. MAHIU said that article 12 was indeed the cornerstone of the articles on countermeasures. If, by postponing consideration until its next session, the Commission could devote more time to the article and arrive at a satisfactory compromise, he would certainly endorse that solution.

70. While it would, of course, be best to submit a complete set of articles to the General Assembly, that did not seem feasible in the time remaining to the Commission at the present session. The logical alternative was to transmit articles 11, 13 and 14, while stipulating that article 11 might be modified subsequently in light of the final version of article 12.

71. Mr. PELLET said that, although it had been close to consensus with regard to article 12, the Drafting Committee had not in fact adopted a final text. In view of the importance of the matter, it would be unwise to transmit to the General Assembly an article which had not met the formal requirements of the Commission.

72. The informal text that the Special Rapporteur had just circulated did not, contrary to what the Special Rapporteur had implied in his statement, represent a revolutionary approach to current practice. Nevertheless, he agreed with the Special Rapporteur that consideration of article 12 should be postponed, unless the Commission found a way to devote extra time to the article at the present session.

73. He could not accept article 11 definitively while article 12 was pending. If the Commission decided to transmit articles 11, 13 and 14 to the General Assembly, it should be made clear that the Commission reserved the right to revert to article 11 as necessary, in the light of the final drafting of article 12.

74. Mr. THIAM said that it was the task of the Drafting Committee to elaborate and adopt draft articles. The Commission seemed to be setting a dangerous precedent by considering an article, in that particular instance article 12, that had not been adopted by the Drafting Committee.

75. As to transmitting the draft articles to the General Assembly, the least desirable choice was not to send any articles at all. The Commission could easily submit a partial set of articles while reserving the right to return to article 11 as necessary.

76. Mr. EIRIKSSON said that he disagreed with many of the points made by the Special Rapporteur, especially with regard to his description of the work done on the topic. It would be an unusual procedure to ask the Drafting Committee to reconsider its proposal in the light of the Special Rapporteur's comments. He agreed that one more effort should be made to reach agreement. The Commission should not, therefore, take a decision at the present stage to defer its consideration of the item to its forty-seventh session in 1995. He would himself be interested in hearing members' views on the question whether countermeasures could be taken before all possible other recourse had been exhausted.

77. Further to a query by Mr. AL-BAHARNA, the CHAIRMAN said that the only possibility for one fur-

<sup>13</sup> *Judgment, I.C.J. Reports 1980*, p. 3.

ther meeting of the Drafting Committee would be in the afternoon of Friday, 15 July, and it was not certain that interpretation services would be available.

78. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he understood the wish of several members of the Commission to make one further attempt to reach agreement. The Drafting Committee had been unable to reach a consensus because it had held only three meetings on the topic. What would be the position if it met again and still failed to reach agreement? The Commission needed to give the matter some thought between sessions, and at the forty-seventh session in 1995 the Drafting Committee should be given more time to consider it. In the past, the Commission had neglected the topic of State responsibility, especially in terms of the time allotted to it in the Drafting Committee, because of the priorities indicated by the General Assembly.

79. Mr. ROSENSTOCK pointed out that the Drafting Committee had submitted a report on the topic to the Commission at the forty-fifth session in 1993. The Commission had had plenty of time to consider it. Furthermore, the Drafting Committee had spent much time on article 12. Accordingly, there was no reason why the Commission should not take a decision on the Drafting Committee's text or consider a formal proposal to amend it. To defer the matter for another year would not help. If the Drafting Committee's version was not acceptable, then the Commission now had before it an alternative proposal. It would be less than responsible for the Commission not to take a decision now.

80. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he did not wish to go into the merits of the matter, but like other members he had the same great appreciation of the work done and the report produced by the Drafting Committee at the previous session. However, the Chairman of the Drafting Committee at that session had acknowledged that a majority of its members preferred to have a prior dispute settlement principle inserted in article 12. That had not proved possible at the time, but progress had been made at the present session on interim measures. Therefore, if the topic was given a little more thought, he was sure that a solution could be found. Mr. Rosenstock was happy with the version proposed at the forty-fifth session; other members of the Commission were not.

81. Mr. PELLET said that, although the Commission was apparently engaged in a procedural debate as to what to do next, the underlying disagreement was on a point of substance. The situation was that many members were unable to accept the text proposed at the forty-fifth session, and at the current session the substantive debate in the Drafting Committee had not been completed. It was unreasonable to expect that just one more meeting would produce a solution.

82. Mr. CALERO RODRIGUES said that he did not entirely agree with Mr. Pellet. At the current session the Drafting Committee had been trying to reach a consensus by amending the text proposed at the previous session. He had had the impression that it was close to such a consensus, and it would be a pity to let slip the opportunity of concluding the work at the present session. The Drafting Committee should make one more attempt to

reach agreement. If it failed, then obviously the matter would have to be deferred to the next session in 1995. However, he was sure that a solution was possible given good will and flexibility on all sides.

83. The CHAIRMAN said that he agreed with Mr. Calero Rodrigues. The Commission should exhaust all possibilities before deferring the matter. Perhaps the Drafting Committee should therefore meet on 15 July. There did not seem to be much enthusiasm for trying to amend the Drafting Committee's text at the present meeting.

84. Mr. BOWETT (Chairman of the Drafting Committee) said that the Drafting Committee could certainly make one more attempt, but the chances of success depended almost entirely on the attitude of the Special Rapporteur. The draft text before the Commission was the outcome of lengthy discussions involving many members, but the Special Rapporteur had withdrawn his support at the last moment and submitted his own alternative text.

85. Mr. ARANGIO-RUIZ (Special Rapporteur) said that several members of the Commission had already explained that the issue concerned two different philosophies of the relationship between countermeasures and means of dispute settlement. The point of the debate was to find a proper balance between the two philosophies, for neither one should prevail 100 per cent over the other. With some time for thought before the next session and provided a reasonable number of meetings was allotted to the Drafting Committee, a solution could probably be found. The Commission should not lose sight of the problem raised by Mr. Calero Rodrigues in the Drafting Committee at the previous session that article 12 could not be settled properly without taking into account part three of the draft. That problem could also be looked at at the next session.

86. The CHAIRMAN asked the Special Rapporteur whether he would be prepared to work on the revised text if a meeting of the Drafting Committee was arranged for 15 July.

87. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was always happy to work in the Drafting Committee, but was not at all confident that the revised text would provide a solution to the problem.

88. Mr. ROBINSON said that he had initially been attracted by the Special Rapporteur's arguments. It was clear that a majority of the members of the Commission did not support the Drafting Committee's version of article 12 and that there was no agreement to submit it to the Sixth Committee in its present form. He agreed that one more effort should be made to find a solution and he would be happy to participate in the Drafting Committee. However, there was no point in members referring continually to the text produced by the Drafting Committee at the previous session: that was to promote formalism at the expense of reality.

89. Mr. BOWETT (Chairman of the Drafting Committee) said that the Special Rapporteur had apparently answered the Chairman's question in the negative.

90. The CHAIRMAN suggested that the Commission should take up the matter again at its meeting on the morning of 15 July.

*It was so agreed.*

**International liability for injurious consequences arising out of acts not prohibited by international law (concluded)** (A/CN.4/457, sect. C, A/CN.4/459,<sup>14</sup> A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (concluded)

91. The CHAIRMAN invited members to make general statements on the draft articles adopted by the Drafting Committee (A/CN.4/L.494 and Corr.1) and by the Commission on first reading.

92. Mr. TOMUSCHAT said that, after the adoption of the draft articles by the Commission he wished to place his reservations on record once again. By virtue of the draft articles, States would be burdened with heavy obligations, for the articles amounted essentially to an environmental impact assessment procedure, but one which extended over many fields, such as medical research and genetic engineering, which had not been identified. That lack of clarity must be remedied at a later stage by means of a clear definition of activities involving risk. All the existing parallel sets of rules providing for an environmental impact assessment procedure contained annexed lists of activities to which they applied. Were it otherwise, the authorities would not know what they were expected to do.

93. The much emphasized distinction between activities involving risk and activities causing harm was an artificial one which could not be sustained in practice. It was inconsistent, in particular, with the idea of prevention. Most activities could be carried out in different ways and if sufficient care was taken—generally requiring expensive investment—any concrete threat of harm, and thus of transboundary harm, could be excluded from almost any industrial activity. Prevention was intended to ensure that no significant harm would be caused. Unforeseen and unforeseeable accidents, on the other hand, were not a proper subject matter of prevention and must be handled within the framework of liability in the true sense of the word. The Commission had thus taken only a modest step forward. The draft articles could at most serve as a blueprint for a declaration to be adopted by the General Assembly but not as a treaty, since the scope of activities involving risk was so ill-defined that States could not possibly submit to a regime requiring great expenditure of time, money and manpower.

94. Mr. de SARAM said that the basic concept of article 20 (Factors involved in an equitable balance of interests) was very useful. But, given the breadth of the topic,

it was difficult to identify in the abstract the factors that were to be taken into account by the parties concerned in making their crucial determinations. The draft articles would, of course, be given fuller consideration at a later stage in the light of comments by Governments. If there were other examples of the concept of balancing of interests in the field of transboundary harm, apart from in the law of the non-navigational uses of international watercourses, which included the concept of equitable and reasonable utilization, it would be useful to have them available later.

95. He was also concerned at the endeavour to subordinate proper concern that an activity might cause harm to considerations of cost and a comparison of the situations in States or in the region. There was a vast technological gap between the industrial and the developing countries. In a situation in which a developing country did not possess the best available technology, it would be wrong to lower the technical standards, for what was at stake was large-scale harm. Therefore, he was not sure that the Commission should become involved in identifying the factors to be taken into consideration and, if it did so, whether it could cover the whole range. The balancing of interests was really a matter for the States concerned.

96. Mr. ROSENSTOCK said that he largely shared Mr. Tomuschat's reservations. The draft articles could be accepted as an interim stage pending a more precise definition of their scope. Producing a list of activities might be the best solution, although that possibility had been looked at before. Even with a more precise definition, the Commission should be envisaging an instrument other than a treaty. It must not assume that it was drafting a treaty.

97. Mr. PELLET said that he too had reservations about the text, especially articles 13 and 18. However, it was generally acceptable, and the Commission had been right to concentrate on prevention as a first step in its work. The draft articles as they stood could serve as the basis either for a treaty or for some other instrument. The consideration of the draft articles should not be affected by the decision—yet to be taken—on the subsequent procedure.

98. The Commission had dealt with the safest part of the topic—injurious consequences—and was now about to step on to much less firm ground—the question of international liability. Unlike some members of the Commission, he thought it would be interesting to consider what could be done with the existing part of the draft articles independently of the rest.

99. The CHAIRMAN said that the Commission had thus concluded its consideration of the draft articles on first reading. It would take up the draft commentary under preparation by the Special Rapporteur as soon as possible.

*The meeting rose at 6.05 p.m.*

<sup>14</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

## 2367th MEETING

Friday, 15 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. 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.

**State responsibility (concluded) (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,<sup>2</sup> A/CN.4/L.501)**

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(concluded)

1. The CHAIRMAN said that the Commission had to decide two separate issues, namely, what action should be taken on article 12, and whether the results achieved at the current session with respect to countermeasures should be reported to the General Assembly.

2. With regard to the first issue, the text adopted by the Drafting Committee at the forty-fifth session<sup>3</sup> was apparently not satisfactory to some members, particularly since almost all of its provisions contained wording that appeared between brackets. Since it seemed that it would be very difficult to arrange for an additional meeting of the Drafting Committee at the current stage in the session, he would suggest that action on article 12 should be postponed until the following session.

*It was so agreed.*

3. The CHAIRMAN said that, with regard to the second issue, namely, whether draft articles 11, 13 and 14 should be included in the report on the work of the session, together with an indication that article 12 was still under consideration and would be completed at the following session, he wished to remind members that, at its forty-fourth session, the Commission had adopted certain guidelines concerning the content of its reports to the General Assembly,<sup>4</sup> paragraph (f) of which stated, in substance, that, if the results of the work of the Commission were fragmentary and could only be properly assessed by the Sixth Committee after further elements had been added, the information contained in the report should be very summary, with the indication that the

matter would be more fully presented in a future report. Certain delegations in the Sixth Committee—including those of Bahrain, Sweden (on behalf of the Nordic countries), Austria, Hungary and the United States of America—had hailed those guidelines as particularly commendable. The situation with regard to articles 11, 13 and 14 fell squarely within the parameters of those guidelines inasmuch as the results achieved were fragmentary and could be properly assessed by the Sixth Committee only after the crucial element represented by article 12 had been added. Furthermore, some members had accepted article 11 subject to its modification in the light of the content of article 12. In the circumstances, he wondered whether it would not be more advisable not to transmit articles 11, 13 and 14 to the General Assembly.

4. Mr. BENNOUNA said that, while he considered that the Chairman had made a very wise proposal, he wondered whether it would not be better, with a view to making progress in the discussion, to refer to the General Assembly draft articles 13 and 14, which did not give rise to any fundamental problems and were less dependent on article 12. In that way, the Commission could get some feedback, particularly on the more difficult part of the draft—prohibited countermeasures.

5. Mr. JACOVIDES, supported by Mr. VARGAS CARREÑO and Mr. AL-BAHARNA, said he was afraid that, if nothing concrete was submitted on State responsibility for two consecutive years, it would create a bad impression in the Sixth Committee. If the Commission submitted draft articles 13 and 14 at least, it would give the Assembly a more accurate picture of the work it had accomplished.

6. Mr. MAHIOU and Mr. MIKULKA said that, although the Commission should normally submit complete drafts to the General Assembly, in the present case, they considered that it should submit draft articles 13 and 14, as well as draft article 11, together with an indication that the latter would be re-examined when article 12 had been adopted.

7. Mr. AL-KHASAWNEH said that the Commission would create an even worse impression if it did not apply the guidelines it had itself adopted two years earlier. Article 11 was linked to article 12, but so were articles 13 and 14. It would therefore be better to wait until the following session to give the General Assembly a complete picture of the work carried out on State responsibility.

8. Mr. CALERO RODRIGUES, supported by Mr. EIRIKSSON, Mr. IDRIS, Mr. HE and Mr. ROBINSON, said that the Commission should apply the guidelines it had adopted. There was no point in informing the General Assembly about a limited part of the Commission's work.

9. Mr. GÜNEY and Mr. de SARAM said they too agreed that the Commission should not submit any draft article in its report on the current session. The Commission had completed the work on two topics, which should keep the Sixth Committee quite busy.

10. Mr. THIAM said that the Commission should submit a complete set of articles to the General Assembly or nothing at all. If it did decide to submit articles, it could

<sup>1</sup> Yearbook . . . 1993, vol. II (Part One).

<sup>2</sup> Reproduced in Yearbook . . . 1994, vol. II (Part One).

<sup>3</sup> Yearbook . . . 1993, vol. I, 2318th meeting, para. 3.

<sup>4</sup> Yearbook . . . 1992, vol. II (Part Two), para. 373.

not put forward draft articles 13 and 14 without draft article 11, since that would be tantamount to referring to prohibited countermeasures before specifying what authorized countermeasures were.

11. Mr. PELLET said that a set of articles would not be complete without draft article 12. A balance had to be struck between draft articles 11 and 12, so that the submission of the former would be tantamount to prejudging a balance that had yet to be found. It would also cause offence to those who had accepted draft article 11 only reluctantly and subject to the future content of draft article 12. If the Commission were to submit articles to the General Assembly, it should make it quite clear that it did so only by way of information and that it had taken no decision either on article 12 or even on article 11.

12. Mr. YANKOV, supported by Mr. ROSENSTOCK, Mr. PAMBOU-TCHIVOUNDA, Mr. RAZAFINDRALAMBO, Mr. FOMBA and Mr. KABATSI, said that, while he fully endorsed the guidelines adopted by the Commission at its forty-fourth session, he wondered whether they should be applied without any flexibility whatsoever and without regard for the requirements of the particular situation. In his view, it would be preferable to submit draft articles 11, 13 and 14 to the General Assembly, together with explanations, which might be more detailed than usual, of the various views expressed and the links with draft article 12. That would also serve to acknowledge the work accomplished by the Drafting Committee and the Special Rapporteur over the past two years.

13. Mr. CALERO RODRIGUES said the fact that no article was submitted to the General Assembly certainly did not mean that it could not be informed in detail about the work carried out by the Commission on the topic of State responsibility. It was possible not only to keep the General Assembly informed, but also to abide by the principle that only a complete set of articles could be submitted to it.

14. Mr. BARBOZA, supported by Mr. YANKOV, said he considered that articles 11, 13 and 14 were a fairly complete set of provisions and that the Commission should submit them to the General Assembly together with an indication that the final wording of article 11 would depend on the wording of article 12. That solution had the advantage not so much of demonstrating that the Commission had worked on the topic at the current session as of submitting the result of its work to the General Assembly as quickly as possible, so that it could have the benefit of its opinion in its further work.

15. Mr. YAMADA said that it would be preferable to follow the guidelines adopted by the Commission at its forty-fourth session in 1992. It should be recognized that the Commission had been unable to adopt one of the main provisions with respect to countermeasures, namely, article 12, and that, as a result, the Sixth Committee could not take a valid decision in the matter.

16. The CHAIRMAN said that it was difficult for the Commission to refer articles 11, 13 and 14 to the General Assembly when half of its members were opposed to that.

17. Mr. YANKOV, supported by Mr. ROSENSTOCK and Mr. BENNOUNA, agreeing with the Chairman, said that he would not insist on the articles in question being referred to the General Assembly.

18. Mr. THIAM said that the Commission should not let itself be paralysed by the lack of a consensus. It would be better to take a vote and settle the matter.

19. Mr. IDRIS proposed that an interim report should be submitted to the General Assembly without submitting the articles to it officially. That solution would have the advantage of enabling the General Assembly to take a decision in the matter.

20. Mr. YANKOV, speaking on a point of order, said that, since the Commission was clearly very divided as to the advisability of referring articles 11, 13 and 14 to the General Assembly, any decision taken in that connection would inevitably lack weight. He therefore suggested the following compromise solution: first, the report of the Commission to the General Assembly should give a detailed account of the discussions that had taken place in the Commission on articles 11 to 14 of part two of the draft on State responsibility. It should be indicated that the Commission had adopted articles 11, 13 and 14, but had been unable, at the current stage, to reach agreement on article 12. It should also be mentioned that it would perhaps be necessary to improve the text of article 11 later in the light of the wording finally adopted for article 12. Secondly, the relevant part of the report should refer to a footnote that would contain the text of articles 11, 13 and 14 and that would explain that all the articles on countermeasures, together with the commentaries thereto, would be submitted to the General Assembly officially in 1995. Article 12 would not, of course, appear in the footnote, as the Commission had yet to adopt the text.

21. That solution would have a number of advantages. It would be a way of drawing the attention of the members of the Sixth Committee to the articles in question and of seeking their view while facilitating their task, since the Drafting Committee documents would not necessarily be available to them. It would also be a way of showing them that the Commission had worked hard on the matter.

22. Mr. JACOVIDES said that Mr. Yankov's proposal met his own concerns and would give the members of the Sixth Committee an opportunity to make their own comments on the points examined by the Commission. He wondered whether it was not necessary to go even further and, in the report, expressly seek the view of the Sixth Committee on the questions that had been the stumbling block in the work of the Commission and, in particular, on article 12.

23. Mr. ROSENSTOCK, supported by Mr. EIRIKSSON, said that he, on the contrary, considered that it would not be advisable at the current stage to encourage a substantive debate in the Sixth Committee on those matters. It was because the footnote proposed by Mr. Yankov would merely provide information and serve as a reference that the solution seemed acceptable to him.

24. Mr. CALERO RODRIGUES, agreeing with the two previous speakers, said that whether or not he could

accept Mr. Yankov's proposal would depend on how it was formulated in the report.

25. Mr. PELLET said that, before taking a decision on Mr. Yankov's proposal—which did, moreover, seem to offer an acceptable compromise—he too would first like to know what the commentary would state. In particular, he would like it to indicate that a sizeable portion of the members of the Commission had stressed that article 12 should achieve a proper balance with article 11.

26. Mr. THIAM said that, in a spirit of conciliation, he too would support Mr. Yankov's proposal. However, he did not see why the disagreement in the Commission had not been expressed through a formal vote.

27. Mr. BENNOUNA said that, given that disagreement, he would have preferred not to refer anything to the Sixth Committee. In particular, he saw little point in the inclusion of a footnote purely for informative purposes.

28. The CHAIRMAN invited the members of the Commission to accept Mr. Yankov's proposal on the understanding that the Special Rapporteur would be asked to draft the text to appear in the report.

*It was so agreed.*

29. The CHAIRMAN said that the Commission had before it a proposal by Mr. Eiriksson concerning article 14. At present, the article was entitled "Prohibited countermeasures" and Mr. Eiriksson proposed that that title should be replaced by "Restrictions on resort to countermeasures". In that connection, article 11, as amended by Mr. Tomuschat, laid down the right of the injured State to take countermeasures. The word "countermeasures", could therefore, only designate lawful measures and the expression "prohibited countermeasures" was a contradiction in terms.

30. Mr. YANKOV said his concern was that the word "Restrictions" was too wide and would include conditions connected with resort to countermeasures, which were the subject of article 12.

31. Mr. EIRIKSSON said that Mr. Yankov's point was well taken and he would therefore propose that article 14 should be entitled "Prohibited measures".

32. Mr. MIKULKA, supported by Mr. ROSENSTOCK, said that, in his view, Mr. Eiriksson's proposed amendment was the logical consequence of the amendment to article 11 adopted on Mr. Tomuschat's proposal (2366th meeting). The word "countermeasures" should be confined to measures taken in reaction to an internationally wrongful act which were lawful; were it otherwise, they would be violations of international law, as Mr. Tomuschat had explained when submitting his amendment. If certain members considered that the word "restrictions" caused confusion, article 14 could be entitled "Prohibited measures", as Mr. Eiriksson had proposed. The word "measures" also had the advantage of ensuring consistency with article 30 of part one.<sup>5</sup>

<sup>5</sup> For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

33. Mr. ARANGIO-RUIZ said he did not see why the title of article 14 as worded caused a problem. Countermeasures were already defined in article 30 of part one as non-compliance with an international obligation, which was regarded as lawful because it was a reaction by a State to an internationally wrongful act of another State. That definition was perfectly clear and the introduction into the title of article 14 of the word "measures" could only mislead the reader. He would prefer the existing title of the article to be explained, if necessary, in the commentary.

34. Mr. de SARAM, supported by Mr. BENNOUNA, said that he agreed with the Special Rapporteur, since the effect of Mr. Eiriksson's proposed amendment would be to make the title of article 30 of part one inconsistent with article 14 now under consideration.

**The law of the non-navigational uses of international watercourses (*continued*)\* (A/CN.4/457, sect. E, A/CN.4/462,<sup>6</sup> 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 ARTICLES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION ON SECOND READING<sup>7</sup>

35. THE CHAIRMAN invited the members of the Commission to consider the commentaries to the draft articles beginning with the commentaries to articles 8 to 20.

COMMENTARIES (A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

COMMENTARIES TO ARTICLES 8 TO 20 (A/CN.4/L.493/ Add.1 and Add.1/Corr.1)

*The commentaries to articles 8 to 20 were adopted.*

COMMENTARIES TO ARTICLES 21 TO 23 (A/CN.4/L.493/ Add.2)

*The commentaries to articles 21 to 23 were adopted.*

COMMENTARIES TO ARTICLES 24 AND 25

*The commentaries to articles 24 and 25 were adopted subject to the correction of a drafting error in the English version.*

COMMENTARY TO ARTICLE 26

36. Mr. ARANGIO-RUIZ, referring to paragraph (3), said that it would be preferable to replace the Latin term *de minimis* by the word "minimal".

\* Resumed from the 2362nd meeting.

<sup>6</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>7</sup> For the texts of the draft articles provisionally adopted by the Commission on first reading at its forty-third session, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

*The commentary to article 26, as amended, was adopted subject to the correction of a minor drafting error in the English version.*

COMMENTARY TO ARTICLE 27

37. Mr. BENNOUNA, referring to paragraph (6), proposed that the words “other evidence of” in the first sentence should be deleted.

38. Mr. CALERO RODRIGUES proposed that, in the same paragraph, the words “of these authorities” in the second sentence should also be deleted.

*The commentary to article 27, as amended, was adopted subject to the correction of a minor drafting error in the English version.*

COMMENTARY TO ARTICLE 28

*The commentary to article 28 was adopted subject to the correction of a minor drafting error in the English version.*

COMMENTARIES TO ARTICLES 29 TO 31

*The commentaries to articles 29 to 31 were adopted.*

COMMENTARY TO ARTICLE 32

39. Mr. CALERO RODRIGUES, referring to paragraph (3), proposed that the term “Inter-State agreement” should appear without initial capitals. Furthermore, in paragraph (5), it would be more accurate to say “One member of the Commission found the article as a whole unacceptable”.

40. Mr. ROSENSTOCK (Special Rapporteur) confirmed that the word “article” should appear in the singular in the first line and in the plural in the second line.

41. Mr. BENNOUNA, referring to the French version of paragraph (5), said that the word “articles” had been omitted from the second line, so that there was a discrepancy compared with the English text. The paragraph should be reworded to read:

*“(5) Un membre de la Commission a jugé l'article inacceptable dans son ensemble au motif que le projet d'articles traite des relations entre États et ne devrait pas s'étendre aux procédures engagées par des personnes physiques ou morales en vertu du droit interne.”*

42. Mr. EIRIKSSON said he was concerned that the word “actions” might convey the idea of “activities” and not of legal proceedings.

43. Mr. ARANGIO-RUIZ said that, in his view, the wording of paragraph (5) was ambiguous as it might intimate that the member of the Commission whose view was reported had claimed that no treaty “should extend into the field of actions by natural or legal persons under domestic law”.

44. Mr. ROSENSTOCK suggested, to dispel that ambiguity, that the words “on the ground that the articles deal with relations between States and should not”

should be reworded to read: “on the ground that these articles deal with relations between States and should not”.

45. Mr. IDRIS, agreeing that the word “articles” should appear in the singular in the first line of the paragraph, said that the Commission should be careful not to introduce major changes in a text which was the result of detailed discussion and which, in fact, reflected the view of one member of the Commission.

46. The CHAIRMAN, speaking as a member of the Commission, said that he had himself questioned the advisability of article 32, but for somewhat different reasons.

47. Speaking as Chairman, he suggested that the Special Rapporteur should re-examine the wording of paragraph (5) and that the Commission should defer its decision on the commentary to article 32 until the following meeting.

*It was so agreed.*

COMMENTARY TO ARTICLE 33

48. Mr. BOWETT (Chairman of the Drafting Committee) said that, in his view, the quotation in paragraph (4) was too long. Only the words “on its acquiring detailed knowledge about the factual circumstances” were of relevance and really related to the definition of fact-finding activities.

49. Mr. CALERO RODRIGUES, agreeing with that remark, noted that the fourth sentence of the same paragraph stated wrongly that “the availability to water-course States of fact-finding machinery will often prevent disputes from arising”, since the article would apply only if the dispute already existed. He therefore proposed that the words “from arising” should be replaced by the words “from continuing or escalating”.

50. Mr. EIRIKSSON pointed out that, in article 33 itself, a comma should be added in sub-paragraph (c), after the words “if a fact-finding”.

51. Mr. BENNOUNA said that he supported the substance of Mr. Calero Rodrigues’ proposed amendment, but considered that the Special Rapporteur should review the paragraph as a whole, since the third sentence already conveyed the idea that the information gathered should make it possible to prevent the dispute from escalating.

52. THE CHAIRMAN suggested that the Commission should defer its decision on the commentary to article 33 until the following meeting.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

**2368th MEETING**

*Monday, 18 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.

**The law of the non-navigational uses of international watercourses** (*continued*) (A/CN.4/457, sect. E, A/CN.4/462,<sup>1</sup> 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 ARTICLES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION ON SECOND READING<sup>2</sup> (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the commentaries to the draft articles.

COMMENTARIES (*continued*) (A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

COMMENTARY TO ARTICLE 32 (*concluded*) (A/CN.4/L.493/Add.2)

*Paragraph (5)* (*concluded*)

2. The CHAIRMAN recalled (2367th meeting) that the Special Rapporteur had agreed to produce a revised text for paragraph (5).

3. Mr. ROSENSTOCK (Special Rapporteur) said he had concluded that only minor changes were needed. The beginning of the paragraph should now read: "Several members of the Commission found the article as a whole unacceptable on the ground that these articles ...".

4. The CHAIRMAN said, speaking as a member of the Commission, that he would like to add two sentences to the paragraph to reflect his view. They would read:

"Another member of the Commission held the view that this article is undesirable within the broad scope

of the present articles because it may be interpreted as establishing an obligation of States to grant to foreign nationals based on the territories of their respective States the rights which not only procedurally but in all other respects would be equal to the rights of their own nationals. In the view of this member, such a broadening of the principle of the exhaustion of local remedies would not correspond to the present content of this principle."

5. Mr. ROSENSTOCK (Special Rapporteur) said that his amendment had been intended to reflect the view of the Chairman, speaking as a member of the Commission, but he could accept the proposed addition.

6. Mr. IDRIS said that in the Drafting Committee he had taken more or less the same position. The first sentence proposed by the Chairman, speaking as a member of the Commission, should therefore begin "Two other members ...".

7. Mr. RAZAFINDRALAMBO said that the existing sentence of the paragraph, which had just been amended by the Special Rapporteur, should now revert to its original wording since the objection raised by Mr. Sreenivasa Rao (2355th meeting, para. 24) was covered in the proposal of the Chairman, speaking as a member of the Commission.

8. The CHAIRMAN said he had the impression that Mr. Sreenivasa Rao had objected on a different ground.

9. Mr. KABATSI said he supported the position of Mr. Razafindralambo.

10. Mr. CALERO RODRIGUES said that the original first sentence should remain unchanged: it reflected Mr. Sreenivasa Rao's position, while the two new sentences proposed by the Chairman reflected the position of the Chairman and Mr. Idris.

11. Mr. IDRIS endorsed Mr. Calero Rodrigues' comment.

12. Mr. BENNOUNA said that, it might not be wise to be so specific as to say "Two other members". It was often difficult to be accurate about the number of members taking a particular view.

13. Mr. CALERO RODRIGUES said that he agreed in principle with Mr. Bennouna, but in the present case the objection was a strong one, and it was therefore better to specify that it had been raised by two members.

14. The CHAIRMAN said that, if he heard no objection he would take it that the existing sentence of paragraph 5 should remain unchanged and that the Commission accepted the two additional sentences he had proposed, as amended by Mr. Idris.

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

*Paragraph (6) was adopted.*

*The commentary to article 32 as a whole, as amended, was adopted.*

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> For the texts of the draft articles provisionally adopted by the Commission on first reading at its forty-third session, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

COMMENTARY TO ARTICLE 33 (*concluded*)*Paragraph (4) (concluded)*

15. The CHAIRMAN recalled that the Special Rapporteur had been asked to review the fourth sentence of paragraph (4) in the light of the observations made by Mr. Calero Rodrigues and Mr. Bennouna (2367th meeting), and the sixth sentence in the light of the observations made by the Chairman of the Drafting Committee (*ibid.*).

16. Mr. ROSENSTOCK (Special Rapporteur) said that the best way to deal with the fourth sentence was to place it in parentheses, since the point raised by Mr. Calero Rodrigues and Mr. Bennouna was a separate one concerning the usefulness of fact-finding machinery. In the sixth sentence, the beginning and the end of the quotation should be deleted so that it would read "acquiring detailed knowledge about the factual circumstances of any dispute or situation".

*Paragraph (4), as amended, was adopted.*

*Paragraph (11)*

17. Mr. ROSENSTOCK (Special Rapporteur) said that the last sentence of the paragraph should be deleted, because it was no longer necessary.

*Paragraph (11), as amended, was adopted.*

*The commentary to article 33 as a whole, as amended, was adopted.*

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

18. The CHAIRMAN invited the Commission to consider the draft report on the work of its forty-sixth session, starting with Chapter IV.

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

19. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested that section B.1 (*e*) should be renumbered section B.2 and retitled "Comments on the topic of State responsibility in general".

20. Mr. ROSENSTOCK, supported by Mr. CALERO RODRIGUES, said that it was already clear that section B dealt with State responsibility. If necessary, however, the title of the whole section should be amended to read "Consideration of the topic of State responsibility at the present session".

21. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the sole paragraph in the section, paragraph 121, was in any event out of place because the problem of a dispute settlement procedure had not been discussed in general terms in the Commission. It was a pity that some members of the Commission always added the kind of negative comments reflected in paragraph 121 at the end of a debate when other members had no opportunity to respond, for that gave a wrong impression of the situation in the Commission. In the present instance it also

made things awkward for him as Special Rapporteur because of the absurdity of the inference of paragraph 121 that dispute settlement had nothing to do with State responsibility.

22. The CHAIRMAN suggested that the Commission should deal with that problem when it reached paragraph 121.

*It was so agreed.*

**A. Introduction (A/CN.4/L.497)**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

23. After a discussion in which Mr. BENNOUNA, Mr. ROSENSTOCK, Mr. AL-BAHARNA, Mr. CALERO RODRIGUES, Mr. PELLET, Mr. ROBINSON and Mr. ARANGIO-RUIZ (Special Rapporteur) took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission was in favour of retaining the word "assume" in the English version and that the secretariat should consult the French-speaking members with a view to agreeing on a suitable translation of the word into French.

*Paragraph 4 was adopted.*

Paragraphs 5 and 6

*Paragraphs 5 and 6 were adopted.*

*Section A, as a whole, as amended, was adopted.*

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

Paragraph 7

*Paragraph 7 was adopted.*

**1. THE QUESTION OF THE CONSEQUENCES OF ACTS CHARACTERIZED AS CRIMES UNDER ARTICLE 19 OF PART ONE OF THE DRAFT (A/CN.4/L.497)**

Paragraphs 8 to 10

*Paragraphs 8 to 10 were adopted.*

Paragraph 11

24. Mr. PELLET said that the words "and even modesty" were gratuitously offensive and should be deleted.

25. Mr. BENNOUNA suggested that the reference to prudence should also be deleted. The Special Rapporteur had, if anything, been too bold.

26. Mr. CALERO RODRIGUES said he could agree to deletion of the reference to "modesty" but not "prudence".

27. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the words "and even modesty".

*Paragraph 11, as amended, was adopted.*

(a) The distinction between crimes and delicts as embodied in article 19 of part one of the draft

(i) *The concept of crime*

Paragraphs 12 to 14

*Paragraphs 12 to 14 were adopted.*

(ii) *The question of the legal and political basis of the concept of crime*

Paragraph 15

28. Mr. MAHIU said that the words *était riche d'exemples*, in the French version, should be replaced by *était plein d'exemples* or *comportent beaucoup d'exemples*.

*Paragraph 15, as amended in the French version, was adopted.*

Paragraph 16

*Paragraph 16 was adopted.*

(iii) *The type of responsibility entailed by breaches characterized as crimes in article 19 of part one of the draft*

Paragraphs 17 to 23

*Paragraphs 17 to 23 were adopted.*

(iv) *The need for the concept of crime—possible alternative approaches*

Paragraph 24

29. Mr. PELLET, supported by Mr. GÜNEY, said there seemed to be some contradiction in the first sentence, as it was not a case of defending the rights of the victim State but of defending those of the international community as a whole. The words "in order to defend the rights and interests of the victim State" should be deleted.

30. Mr. TOMUSCHAT said that the statement in question was correct, and the sentence should be retained.

31. Mr. ROSENSTOCK said that it was important to preserve the possibility of intervention when, for instance, a State launched a policy of genocide against a part of its own population. Accordingly, he favoured deletion of the last phrase.

32. Mr. ARANGIO-RUIZ (Special Rapporteur), supported by Mr. RAZAFINDRALAMBO, said that the word "also" could be inserted before the phrase "in order to defend", to make it quite clear that the purpose of the intervention should be to defend the interests both of the international community and of individual victims.

33. After a discussion in which Mr. JACOVIDES, Mr. PELLET, Mr. AL-BAHARNA and Mr. CALERO RODRIGUES took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to change the last phrase of the first sentence to read: "in order to defend the interests of both the victim State and the international community". Moreover, the words "According to one view" would be altered to "According to one body of opinion".

*Paragraph 24, as amended, was adopted.*

Paragraph 25

*Paragraph 25 was adopted with a minor drafting change.*

Paragraphs 26 to 29

*Paragraphs 26 to 29 were adopted.*

(v) *The definition contained in article 19 of part one of the draft articles*

Paragraphs 30 to 35

*Paragraphs 30 to 35 were adopted.*

Paragraph 36

34. Mr. HE proposed that the phrase "and suggested to replace it by a more neutral phrase . . ." should be altered to read: "and expressed serious concern as to how the concept could be applied. Suggestions were made to replace the term 'crime' by a more appropriate phrase . . .".

35. Mr. PELLET said that paragraph 36 dealt with a problem of terminology, whereas Mr. He's proposal reflected a more fundamental objection and raised wider-ranging problems of substance.

36. Mr. HE, supported by Mr. IDRIS, said that Mr. Pellet's concern would be addressed if, in his proposed amendment, the words "in this context" were added after the words "could be applied".

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Pellet's view was the right one. Paragraph 36 should deal only with the question of terminology.

38. After a discussion in which Mr. ROSENSTOCK, Mr. HE, Mr. AL-BAHARNA, Mr. PELLET and Mr. THIAM took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to change the first part of the paragraph to read: "Some members observed that the term 'crime' might be an unnecessary source of difficulties because of its penal law connotations which caused concern as to how the concept would be applied. Suggestions were made to replace the term 'crime' by phrases such as . . .".

*Paragraph 36, as amended, was adopted.*

Paragraphs 37 and 38

*Paragraphs 37 and 38 were adopted.*

(b) *Issues considered by the Special Rapporteur as relevant to the elaboration of a regime of State responsibility for crimes*

39. Mr. TOMUSCHAT said that the title of section B.1 (b) was misleading, since it implied that what followed was a reflection only of statements made by the Special Rapporteur. In fact, it reflected the general debates in the Commission.

40. Mr. BENNOUNA proposed that, to make it clear that not just the views of the Special Rapporteur were reflected, a sentence or paragraph should be inserted

after the title stating that, in his sixth report (A/CN.4/461 and Add.1-3), the Special Rapporteur had invited members to give their views on a number of issues he considered relevant to the elaboration of a regime of State responsibility for crimes. A cross-reference should also be made to paragraph 11.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that mention should also be made of chapter II, section B, of his fifth report,<sup>3</sup> which constituted a still more basic document. To save time, consideration of the wording of the title of section B.1 (b) should be suspended, pending consultations between himself and the secretariat to find an appropriate wording.

*It was so agreed.*

(i) Who determines that a crime has been committed?

Paragraphs 39 to 44

*Paragraphs 39 to 44 were adopted.*

(ii) The possible consequences of a determination of crime

42. Mr. AL-BAHARNA said that the title of section B.1 (b) (ii), should be amended to read "The possible consequences of determination of a crime".

43. Mr. PELLET said that he did not take exception to the title of section B.1 (b) (ii), but some members had maintained that what was at issue was the consequences of the commission of a crime. Perhaps a paragraph 44 *bis* should be inserted after the title, reading:

"Some members had objected to the wording of the question raised by the Special Rapporteur and had pointed out that within the framework of part two of the draft articles, the problem was not to determine the possible consequences of the determination of a crime but those of the commission of such a crime."

*It was so agreed.*

a. Substantive consequences

Paragraph 45

44. Mr. VARGAS CARREÑO drew attention to an important error in the Spanish version, in which the last sentence had been rendered as: *También se mantuvo sin embargo la opinión contraria.*

45. Mr. ROSENSTOCK said the expression "the prevailing opinion" was inappropriate. Only when a final decision had to be made as to the merits of two contending texts would one of those texts prevail.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the prevalent or prevailing opinion in the Commission had been as described in paragraph 45.

47. After a discussion in which Mr. BOWETT, Mr. ROSENSTOCK, Mr. ARANGIO-RUIZ (Special Rapporteur) and Mr. BENNOUNA took part, the

CHAIRMAN asked whether the phrase "according to a substantial number of members" would be acceptable.

*It was so agreed.*

*Paragraph 45, as amended, was adopted.*

Paragraph 46

*Paragraph 46 was adopted.*

Paragraph 47

48. Mr. ROSENSTOCK proposed that the words "The prevailing opinion was however that", in the last sentence, should be replaced by "According to a substantial number of members,".

49. Mr. ARANGIO-RUIZ (Special Rapporteur) said that as he saw it, a prevailing view had emerged in the Commission in respect of reparation *lato sensu*.

50. The CHAIRMAN said that, if he heard no objection, he would take it that the words "The prevailing opinion was however that" would be replaced by "According to a substantial number of members,".

*Paragraph 47, as amended, was adopted.*

Paragraph 48

51. Mr. ROSENSTOCK said that the last sentence of the paragraph was not logical and should be redrafted.

52. The CHAIRMAN suggested that, pending consultations with Mr. Mikulka and Mr. Al-Khasawneh, the Commission should adopt paragraph 48, with the exception of the last sentence.

*Paragraph 48 was adopted on that understanding.*

Paragraphs 49 to 51

*Paragraphs 49 to 51 were adopted.*

b. The instrumental consequences (countermeasures)

Paragraph 52

53. Mr. ROSENSTOCK said that the use of the term *faculté* in paragraph 52, and elsewhere in the draft articles, was singularly inappropriate. The term was in many instances translated incorrectly into English, resulting in a lack of precision.

54. The CHAIRMAN said that the word *faculté* was often translated into Russian as a "right", when it actually meant the option to use a particular right.

55. Mr. BENNOUNA said that the term should continue to be used in English texts, because it referred, in general, to a possibility provided under the law. He objected to weakening the substance of the paragraph for linguistic reasons.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the term was used in the draft articles in part one and in the commentaries thereto. He saw no reason why the same term could not be used throughout the report.

<sup>3</sup> Yearbook . . . 1993, vol. II (Part One), document A/CN.4/453 and Add.1-3.

57. Mr. BOWETT said that the correct translation of *faculté* was "power", in the sense of a legal power to take a particular action.

58. The CHAIRMAN said that, if he heard no objection, the word *faculté* would be replaced by "power" throughout the draft report.

*It was so agreed.*

59. Mr. PELLET pointed out that the last sentence of the paragraph referred to a particular case without giving any details. It should be deleted and the words "and pointed out that such a practice was far from uniform, as demonstrated by certain recent examples" should be inserted after "Other members expressed a different opinion".

60. After a discussion in which Mr. ARANGIO-RUIZ (Special Rapporteur), Mr. TOMUSCHAT and Mr. AL-BAHARNA took part, the CHAIRMAN said that, if he heard no objection, he would take it that the last sentence was to be retained, with the exception of the words "but principled".

*Paragraph 52, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

## 2369th MEETING

*Monday, 18 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. 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.

### Tribute to the memory of Mr. Francisco García Amador

1. The CHAIRMAN informed the members of the Commission of the recent death of Mr. Francisco García Amador, who had been a distinguished member of the Commission from 1954 to 1961 and its Chairman in 1956. He had also been the first Special Rapporteur on the topic of State responsibility. He had been born in Cuba, but had spent most of his life in the United States of America, and had left many works on a variety of subjects, including international liability, international development law and the law of the sea.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. Francisco García Amador.*

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

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

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

1. THE QUESTION OF THE CONSEQUENCES OF ACTS CHARACTERIZED AS CRIMES UNDER ARTICLE 19 OF PART ONE OF THE DRAFT (continued) (A/CN.4/L.497)

(b) Issues considered by the Special Rapporteur as relevant to the elaboration of a regime of State responsibility for crimes (continued)

(ii) The possible consequences of a determination of crime (continued)

b. The instrumental consequences (countermeasures) (continued)

Paragraph 53

2. Mr. HE said that he would like the following sentence to be added at the end of the paragraph:

"The view was also expressed that, in addition to imposing obligations of proportionality on the injured State, corresponding obligations not to take further intensified counter-countermeasures to upgrade the dispute should also be prescribed on the wrongdoing State".

3. Mr. ARANGIO-RUIZ (Special Rapporteur) said that that seemed to imply that the State which had committed a wrongful act was entitled to take "counter-countermeasures". However, if the countermeasures taken by an allegedly injured State were wrongful because there had been no wrongful act, the alleged wrongdoing State would then become an injured State and there would be no "counter-countermeasures", but, rather, countermeasures to which article 13 would be applicable.

*Paragraph 53, as amended, was adopted.*

Paragraph 54

*Paragraph 54 was adopted.*

Paragraph 55

4. Mr. TOMUSCHAT proposed that the last part of the second sentence, as from the words "and that the world had recently witnessed" should be deleted because citing such an example was tantamount to making an anonymous accusation against a State.

5. Mr. PELLET said that he objected to that deletion. A choice had to be made: either all the examples were taken out of the text or they were all maintained, but some could not be maintained and others deleted.

6. Mr. AL-KHASAWNEH said that he did not agree with Mr. Pellet's view. Each example had to be evaluated separately.

7. Mr. AL-BAHARNA said that he would be prepared to accept the phrase as it stood.

8. After an exchange of views in which Mr. AL-BAHARNA, Mr. AL-KHASAWNEH, Mr. ARANGIO-RUIZ, Mr. BENNOUNA, Mr. PELLET, and Mr. TOMUSCHAT took part, the CHAIRMAN said that a proposal on the wording of the phrase would be submitted in writing later. He therefore suggested that the members of the Commission should postpone a decision on paragraph 55 until the following meeting.

*It was so agreed.*

Paragraph 56

9. Mr. KABATSI proposed that the word "believed" should be replaced by the word "alleged".

*Paragraph 56, as amended, was adopted.*

Paragraph 57

*Paragraph 57 was adopted.*

Paragraph 58

10. The CHAIRMAN recalled that it had been decided that the words "faculté of reaction to a crime" should be replaced by the words "power of reaction to a crime" throughout the text.

*Paragraph 58 was adopted.*

Paragraphs 59 to 65

*Paragraphs 59 to 65 were adopted.*

(iii) The punitive implications of the concept of crime

Paragraphs 66 to 72

*Paragraphs 66 to 72 were adopted.*

(iv) The role of the United Nations in determining the existence and the consequences of a crime

Paragraph 73

11. Mr. TOMUSCHAT proposed that the words "supra State" should be replaced by the words "super State".

12. Mr. PAMBOU-TCHIVOUNDA proposed that, in the French text, the words "Etat supranational" should therefore be replaced by the words "super Etat".

*Paragraph 73, as amended, was adopted.*

Paragraphs 74 to 76

*Paragraphs 74 to 76 were adopted.*

Paragraph 77

13. Mr. ELARABY said that Article 39 of the Charter of the United Nations referred not to acts, but to situa-

tions. He therefore proposed that the second part of the first sentence should be amended to read: "provided that the alleged act was one of those which would give rise to the situation referred to in Article 39".

*Paragraph 77, as amended, was adopted.*

Paragraph 78

*Paragraph 78 was adopted.*

Paragraph 79

14. Mr. BENNOUNA proposed that, in the French text, the words *freins et contrepoids* should be replaced by the words *poids et contrepoids*.

*Paragraph 79, as amended, was adopted.*

Paragraphs 80 to 84

*Paragraphs 80 to 84 were adopted.*

Paragraph 85

15. Mr. BOWETT (Chairman of the Drafting Committee) said that the word "evolution" was ambiguous and that what was meant was an expansion of the Security Council's competence.

16. Mr. ELARABY said that the real question was whether or not the Security Council was exceeding its authority.

17. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had dealt with the matter referred to in paragraph 85 in chapter II of his fifth report.<sup>1</sup> He had done so as clearly and carefully as possible without trying to make a judgement.

18. He confirmed that the word "expansion" would be more accurate than the word "evolution".

19. Mr. ROSENSTOCK said that there was no point in coming back to a question that should not have been raised or discussed in the first place.

20. Mr. BENNOUNA said that, in his view, paragraph 85 was very ambiguous because there were in fact two issues at stake, namely, whether the resolutions in question had established an interpretive custom giving the Security Council more power than the Charter of the United Nations had done and whether, in exercising a kind of legislative power, the Security Council had exceeded the authority vested in it by the Charter.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 85, on the understanding that the word "evolution" would be replaced by the word "expansion".

*Paragraph 85 was adopted on that understanding.*

<sup>1</sup> *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3.

## Paragraph 86

22. The CHAIRMAN said that, following the discussion which had just taken place on paragraph 85 on the question whether the resolutions had established an interpretive custom relating to the competence of the Security Council and in order to take account, in particular, of the comments by Mr. Bennouna, the following new compromise text was proposed to replace the text of paragraph 86:

“86. Most of the members who commented on this question answered in the negative. It was stated in particular that each of the above-mentioned resolutions dealt with the maintenance of international peace and security, i.e. the area of responsibility of the Security Council. In this context, however, one member held the view that the Council had, at times, exceeded its authority under the Charter of the United Nations. Attention was drawn by several members to the fact that whether there had been an expansion of the competence of the Council was a question of interpretation of the Charter which fell outside the Commission’s mandate.”

23. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the new text of paragraph 86 in English, on the understanding that the secretariat would prepare an appropriate French version.

*Paragraph 86, as amended, was adopted on that understanding.*

## Paragraph 87

24. Mr. YANKOV proposed that, in the second sentence, the words “to invent new laws” should be replaced by the words “to enact new rules” and that the word “mandate” should be replaced by the word “competence”.

25. Mr. PAMBOU-TCHIVOUNDA said that he could agree to that amendment if he knew how the words “enact new rules” would be translated into French. The words *énoncer de nouvelles règles* might be appropriate.

*Paragraph 87, as amended, was adopted.*

## Paragraph 88

26. Mr. BOWETT (Chairman of the Drafting Committee) suggested that the word “decision” should be replaced by the word “position”.

27. Mr. IDRIS said that he supported the proposal by the Chairman of the Drafting Committee. He also noted that the words “just about everything”, which came right afterwards, were particularly clumsy.

28. Mr. ELARABY suggested that those words should be replaced by the words “on a wide range of issues”.

29. Mr. TOMUSCHAT, supported by Mr. ARANGIO-RUIZ, Mr. BOWETT, Mr. AL-BAHARNA, and Mr. MAHIU, criticized the words “it was the centre of gravity of the conscience of the international community” at the end of the first sentence.

30. Mr. CRAWFORD suggested that those words should be replaced by the words “it reflected the conscience of the international community”.

31. Mr. BOWETT pointed out that, in the second sentence, reference should have been made to Articles 10 and 11 of the Charter of the United Nations, not to Articles 10 and 34.

32. The CHAIRMAN suggested that reference should simply be made to the Charter of the United Nations, stating: “It was pointed out that, on the basis of the Charter,”.

33. Mr. AL-BAHARNA said that, in order to make the text less cumbersome, the second sentence might end with the word “opportunity.” and the following sentence would begin with the words “Although, in regard to...”.

34. Mr. PAMBOU-TCHIVOUNDA said that the word *possibilité* in the second sentence of the French text was wrong and should be replaced by the word *pouvoirs*. The phrase would then read: *qu’elle tirait le meilleur parti possible de ces pouvoirs*.

35. The CHAIRMAN said that the first two sentences of paragraph 88, as reworded by the secretariat to take account of the proposed amendments, would read:

“Several members expressed the opinion that the General Assembly had a role to play in the case of crime since, it was said, it reflected the conscience of the international community. It was pointed out that, on the basis of the Charter of the United Nations, the Assembly could deal with a wide range of issues and made the most of that opportunity.”

*Paragraph 88, as amended, was adopted.*

## Paragraph 89

36. Mr. IDRIS proposed that the words “of the Charter” should be added after the words “Article 51” at the end of the second sentence.

*Paragraph 89, as amended, was adopted.*

## Paragraphs 90 and 91

*Paragraphs 90 and 91 were adopted.*

- (v) Possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness

## Paragraphs 92 and 93

*Paragraphs 92 and 93 were adopted.*

- (vi) The general obligation of non-recognition of the consequences of a crime

## Paragraphs 94 and 95

*Paragraphs 94 and 95 were adopted.*

- (vii) The general obligation not to aid a “criminal” State

## Paragraph 96

*Paragraph 96 was adopted.*

(c) The courses of action open to the Commission

37. Mr. PAMBOU-TCHIVOUNDA said that, in the French text, the title of subheading (c) was clumsy and requested that the secretariat should redraft it.

*It was so agreed.*

Paragraphs 97 to 99

*Paragraphs 97 to 99 were adopted.*

Paragraph 100

38. Mr. TOMUSCHAT suggested that the following new second sentence should be added: "Other members considered it urgent to draw up an appropriate regime for international crimes".

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, for the sake of harmony with the first sentence, that new second sentence should read: "It was also suggested that the Commission should draw . . .".

40. Mr. PELLET said that, if that amendment was accepted, the word "however" in the last sentence should be deleted or replaced by the word "moreover".

*It was so agreed.*

*Paragraph 100, as amended, was adopted.*

Paragraph 101

*Paragraph 101 was adopted.*

(d) Conclusions of the Special Rapporteur on the debate

Paragraphs 102 to 120

41. The CHAIRMAN recalled that paragraphs 102 to 120 of the report reflected the conclusions of the Special Rapporteur. Before requesting the members of the Commission to adopt them, he wanted to be sure that they had the Special Rapporteur's approval.

42. Mr. ARANGIO-RUIZ (Special Rapporteur) said that those paragraphs did reflect his position and had his approval.

*Paragraphs 102 to 120 were adopted.*

*The meeting rose at 6.10 p.m.*

## 2370th MEETING

*Tuesday, 19 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. 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. Yamada, Mr. Yankov.

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

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

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

1. THE QUESTION OF THE CONSEQUENCES OF ACTS CHARACTERIZED AS CRIMES UNDER ARTICLE 19 OF PART ONE OF THE DRAFT (*concluded*) (A/CN.4/L.497)

(b) Issues considered by the Special Rapporteur as relevant to the elaboration of a regime of State responsibility for crimes (*concluded*)

(ii) The possible consequences of a determination of crime (*concluded*)

b. *The instrumental consequences (countermeasures) (concluded)*

1. The CHAIRMAN invited the Commission to continue its consideration of Chapter IV of its draft report.

Paragraph 55 (*concluded*)

2. The CHAIRMAN said that a proposed reformulation of the second sentence of paragraph 55 would read:

"The remark was made in this connection that recognition of the concept of crime did not mean recognition of an absolute and unlimited right of riposte or of *lex talionis* and that the world had recently witnessed an armed intervention following on a genocide where the use of force had never been recognized as lawful by the international community because, in order to put a stop to the crime, the intervening State had in turn violated a preemptory rule of international law."

*Paragraph 55, as amended, was adopted.*

(e) Comments on the topic in general

Paragraph 120 *bis*

3. The CHAIRMAN said that a new paragraph 120 *bis*, proposed by Mr. He, would read:

"120 *bis*. Some members took the view that, in view of the Special Rapporteur's estimation in his summing-up, it should be stressed that there was a considerable body of opinion having reservations on the language of article 19. If constructive efforts were to be made for part two, it would seem advisable to move on based on a distinction, not necessarily between crimes and delicts, but between quantitatively less serious and most serious delicts."

An addition to paragraph 120 *bis*, proposed by Mr. AL-Khasawneh, would read: "Other members took the view that nothing was more debatable".

4. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he objected to adding paragraph 120 *bis* to the report. He had summarized the views of members with regard to article 19 and had clearly indicated the various positions taken (2348th meeting).

5. Mr. ROSENSTOCK said that paragraph 120 *bis* was an accurate reflection, in very mild form, of the statements made during the debate and it would be misleading to omit it from the report. The proposed addition to paragraph 120 *bis* should not be included, as no statement to that effect had actually been made by any member.

6. Mr. MAHIOU said that the paragraph did not belong among the Special Rapporteur's conclusions with regard to article 19, because it actually dealt with the reactions of only one group of members to those conclusions.

7. Another and even larger group had been in favour of using article 19 as the basis for future work. Therefore, a paragraph 120 *ter* proportionate in length to the strength of that opinion, should be prepared to reflect those views.

8. Mr. BENNOUNA said he endorsed the idea of a paragraph 120 *ter*. The last sentence of paragraph 120 *bis* was unsatisfactory because it used the very language that had been the object of reservations. Accordingly the words "between quantitatively less serious and most serious delicts" should be replaced by "between quantitatively less serious and more serious violations of international law".

9. Mr. HE said that paragraph 120 *bis* was an accurate reflection of the views expressed during the debate.

10. Mr. CALERO RODRIGUES said that he was in favour of including paragraph 120 *bis* in the report as well as a new paragraph 120 *ter*. As to paragraph 120 *bis*, he proposed, with the support of Mr. KABATSI and Mr. de SARAM, that the words "Some members took the view" should be replaced by "Some members expressed the opinion"; that the words "set out in paragraph 103 of Chapter IV of the Commission's report" should be inserted after "in his summing-up"; and that the words "of part one of the draft articles" should be inserted after "article 19".

11. Mr. ARANGIO-RUIZ said he hoped that the Commission would give him more precise guidance on how it wished him to proceed with his work on the topic. The inclusion of paragraph 120 *bis* in the report might cast doubt on his mandate.

12. Mr. TOMUSCHAT said he, too, was in favour of including paragraph 120 *bis* and paragraph 120 *ter* in the report. The Special Rapporteur's mandate was to strike the very delicate balance between the opposing views expressed in the Commission.

13. Mr. KABATSI (Rapporteur) pointed out that paragraph 36 already expressed the reservations of members with regard to the language of article 19.

14. Mr. de SARAM supported by Mr. AL-BAHARNA, said that he associated himself with those who favoured the inclusion of paragraph 120 *bis* and paragraph 120 *ter*. The word "considerable", in the first sentence of paragraph 120 *bis*, should be replaced or deleted.

15. Mr. AL-BAHARNA observed that the draft report already answered some of the questions just raised in the discussion: paragraph 103 clearly reflected the main viewpoints with regard to article 19; paragraph 120 clearly defined the mandate of the Special Rapporteur.

16. Mr. CALERO RODRIGUES said he agreed that the Special Rapporteur's task of striking a balance between the general view and other shades of opinion was a difficult one. However, the instructions to the Special Rapporteur were clear and he was certainly up to the task, which would not in fact be made any more difficult by including the proposed new paragraph.

17. Mr. RAZAFINDRALAMBO said that the second sentence of paragraph 120 *bis* was less a reaction to the Special Rapporteur's summary than an attempt to restate an opinion already put forward in the debate. It should therefore be deleted. The first sentence seemed to be contesting the Special Rapporteur's view that there was a majority in favour of the present wording of article 19. Perhaps it would be better to make that point in a separate paragraph at the end of the Special Rapporteur's summary.

18. Mr. PELLET said that paragraph 120 *bis* was designed to reflect the brief debate which had taken place on the Special Rapporteur's summary. There was really no need to repeat that debate in the report. If the paragraph was inserted, an additional paragraph would be required to reflect the opposing view.

19. Mr. AL-KHASAWNEH said that the inclusion of paragraph 120 *bis* would not prevent the Special Rapporteur from fulfilling his mandate. The main purpose of the report was to convey information to the Sixth Committee. However, Mr. Pellet was right. Paragraph 120 *bis* would have to be balanced by yet another paragraph, especially as it interpreted the Special Rapporteur's views wrongly. The proliferation of additional paragraphs was becoming absurd, and it would be better to reject paragraph 120 *bis* and his own proposal thereon.

20. Mr. TOMUSCHAT said that it was not absurd for members to want the debate to be properly reflected in the report.

21. Mr. MAHIOU said that he agreed with Mr. Pellet. There would have to be a paragraph 120 *ter* stating that several members expressed an opposing view to the effect that, notwithstanding the debate on article 19 and the distinction drawn between crimes and delicts, the article and the distinction constituted a basis for the continuation of the Special Rapporteur's work and the elaboration of draft articles for submission to the Commission. There should then be a paragraph 120 *quater* referring to the decision taken by the Commission as reflected in paragraph 9.

22. Mr. ARANGIO-RUIZ (Special Rapporteur) said it seemed that an attempt was being made to prevent him

as Special Rapporteur from proceeding on the basis of the majority view in the Commission. He could see some merit in Mr. Mahiou's proposal but, after adopting as many additional paragraphs as it wished, the Commission must then restate clearly what it wanted the Special Rapporteur to do.

23. Mr. ROSENSTOCK said that there appeared to be broad support for paragraph 120 *bis* and for Mr. Mahiou's proposal for a paragraph 120 *ter*. However, the Commission should not include a further paragraph referring to paragraph 9 because it would then have to repeat the reservations concerning the conclusions mentioned therein.

24. Mr. BENNOUNA said that the Commission was departing from its established procedure for adoption of its reports. The debate should be terminated on that ground and also because it reflected badly on the Commission.

25. Mr. AL-BAHARNA said that any additional paragraphs restating members' views should be placed before paragraph 120 so that they would not cast any doubt on the clear statement of the Special Rapporteur's conclusions and the mandate for his future work contained in that paragraph.

26. Mr. MAHIU said that his proposal would be changed to read: "The Commission concluded as indicated in paragraph 9 above", a more neutral form of wording that corresponded to the Commission's decision as reflected in the summary record of the 2348th meeting. He was prepared to accept paragraph 120 *bis* provided that the word "considerable" was deleted.

27. Mr. GÜNEY said that paragraph 9 already provided the Special Rapporteur with a clear indication of the course he should follow in his further work. There was therefore no need to repeat that indication in the conclusions.

28. Mr. ARANGIO-RUIZ (Special Rapporteur), agreeing with Mr. Mahiou concerning the word "considerable", said that the word "body" should also be deleted. Paragraph 120 *bis* could then be followed by a further paragraph stating certain other views and then by a final—and essential—paragraph which would refer back to paragraph 9.

*The meeting was suspended at 11.30 a.m. and resumed at noon.*

29. The CHAIRMAN said that an informal meeting had been held and the following text had been prepared:

"(e) Views expressed subsequent to the formulation by the Special Rapporteur of his conclusions on the debate

"120 *bis*. Some members expressed the opinion that, in view of the Special Rapporteur's estimation in his summing-up (see para. 103 above), it should be stressed that there was a substantial body of opinion having reservations on the language of article 19 of part one of the draft. If constructive efforts were to be made for part two, it would seem advisable to move on, based on a distinction, not necessarily between

crimes and delicts, but between quantitatively less serious and most serious internationally wrongful acts.

"120 *ter*. Some other members expressed the opposite view, pointing out that, notwithstanding the discussion to which article 19 and the distinction between crimes and delicts had given rise, this article and this distinction provided a basis for the continuation of the Special Rapporteur's work and the elaboration of draft articles to be submitted to the Commission.

"120 *quater*. The Commission concluded as indicated in paragraph 9 above."

30. The authors of paragraph 120 *bis* further proposed that a sentence should be added at the end of that paragraph to read:

"These members also expressed reservations concerning the conclusions indicated in paragraph 9 above."

31. If he heard no objection, he would take it that the Commission wished to adopt the proposed new text.

*Paragraphs 120 bis, 120 ter, and 120 quater, as amended, were adopted.*

Paragraph 121

32. Mr. EIRIKSSON said he understood that, in his absence, the paragraph had been attributed to him. In fact, it did not reflect his views. Indeed, the last sentence conveyed precisely the opposite of what he had actually said, namely, that the Commission should not be afraid to be progressive since, if it erred, States were there to correct it. Also, he had dealt with the matter in the context of the question who determined that a crime had been committed, his view being that, subject to the Commission's decision on part three of the draft articles, it should be the injured State that did so.

33. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete paragraph 121.

*It was so agreed.*

**The law of the non-navigational uses of international watercourses (*continued*)\* (A/CN.4/457, sect. E, A/CN.4/462,<sup>1</sup> 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 ARTICLES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION ON SECOND READING<sup>2</sup> (*continued*)\*

COMMENTARIES (*continued*)\* (A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

COMMENTARY TO ARTICLE 1 (A/CN.4/L.493)

34. Mr. ROSENSTOCK (Special Rapporteur) proposed that a new paragraph (5) should be added to the

\* Resumed from the 2368th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

<sup>2</sup> For the texts of the draft articles provisionally adopted by the Commission on first reading at its forty-third session, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

commentary, in response to comments made by one member. It would read:

“(5) One member objected to the formulation in paragraph (1) of the commentary to article 1 on the ground that the term ‘uses’ is not precisely defined. He urged the elaboration of a homogeneous criterion for identification of the operations or activities comprehended by the term ‘uses’ and the imputability of such undertakings to a watercourse State.”

35. Mr. PAMBOU-TCHIVOUNDA said that fifth in a series of paragraphs was not the proper place for the wording proposed by the Special Rapporteur. He had not himself actually proposed a homogeneous criterion but had simply suggested a series of factors that could form the basis of a material approach to the concept of utilization. He had drafted a text to that effect, which had already been circulated to members and could perhaps replace paragraph (1) to the commentary, reading:

“(1) The term ‘uses’ as employed in article 1 derives from the title of the topic. Indeed, as such it covers all uses other than navigation. It cannot form the subject of a conceptual definition. Since the uses in question are understood in terms of their purpose, the notion of such uses is, as a result, functional and evolutive. The notion is none the less imprecise. In the absence of a homogeneous criterion for identification, the consistency of the uses referred to in this article, in other words, of the operations or activities carried out on a watercourse for non-navigational purposes, could be identifiable in terms of three criteria: their nature (industrial, economic . . . or domestic), the technical character of the works or the means utilized and the linkage of initiating such undertakings to the jurisdiction or control of a watercourse State.”

36. His proposal had been prompted by his concern at noting that the Commission was embarking upon a draft convention on the uses of watercourses without having actually defined the object and purpose of the convention. That was a serious lacuna in the draft. Moreover, the commentary in paragraph (1) was circular in effect. Consequently, while he would not insist on the inclusion of a definition in article 2, he considered that paragraph (1) should be drafted in more substantive terms.

37. The CHAIRMAN asked whether Mr. Pambou-Tchivounda was prepared to consult with the Special Rapporteur in an endeavour to arrive at a mutually acceptable solution.

38. Mr. PAMBOU-TCHIVOUNDA said that he had no objection. His own preference was for the proposal to be inserted after paragraph (1). Contrary to the assertion made by the Special Rapporteur, he had not proposed a homogeneous criterion. Indeed, he had noted that no such criterion was possible.

39. Mr. ROSENSTOCK (Special Rapporteur) said that he would be loath to have paragraphs (1) to (4) of the commentary—which reproduced unchanged the text that had been approved at the forty-third session in 1991—disrupted by the insertion of the paragraph proposed by Mr. Pambou-Tchivounda. Nor did he think it a good idea to include the entire proposal in a paragraph (5). However, if Mr. Pambou-Tchivounda was prepared to accept

a paragraph (5) starting with the words “One member”, followed by some formulation of his own devising, summarizing more accurately his position, he had no objection to that solution.

40. Mr. CALERO RODRIGUES said he did not think that Mr. Pambou-Tchivounda’s proposal to replace the existing paragraph (1) by another text was acceptable. Members were certainly entitled to have their dissenting opinions reflected in the commentary, but, he wondered whether the proposal was of sufficient importance to justify such inclusion, and he urged Mr. Pambou-Tchivounda not to insist.

41. Mr. PAMBOU-TCHIVOUNDA said that he would be reluctant to take the course advocated by Mr. Calero Rodrigues. However, he would be happy to engage in informal consultations with the Special Rapporteur with a view to drafting a fifth paragraph reflecting his concerns.

42. The CHAIRMAN said that, on the understanding that Mr. Pambou-Tchivounda and the Special Rapporteur would formulate a paragraph (5), he would take it that the Commission agreed to adopt the commentary to article 1.

*It was so agreed.*

*The commentary to article 1 was adopted on that understanding.*

#### COMMENTARY TO ARTICLE 2

43. Mr. ROSENSTOCK (Special Rapporteur) said that the addition in article 2, subparagraph (b) of the word “normally” was explained at length in paragraph (6) of the commentary.

44. Mr. YANKOV said that the text of paragraph (6) of the commentary contributed greatly to an understanding of subparagraph (b).

45. Mr. GÜNEY said the commentary should make it clear that the addition of the word “normally” in no way enlarged the geographic scope of the draft articles.

46. Mr. ROSENSTOCK (Special Rapporteur) said he thought that the paragraph was quite clear. The decision to insert the word “normally” had been a compromise between those who had urged simple deletion of the phrase “common terminus”, and those who had urged retention of that notion in order to suggest some limit to the geographic scope of the convention. In some cases, it might indeed extend that geographic scope. The yardstick, as a matter of common sense and practical judgement, was the notion of “unitary wholes”. He did not see how else the arguments could be expressed without destabilizing the paragraph.

47. Mr. GÜNEY said that the purpose of the compromise had not been to extend the geographic scope of the convention. That fact was implied in the wording of paragraph (6), but it could be stated explicitly somewhere in that paragraph, without upsetting what was admittedly a delicate balance.

48. Mr. ROSENSTOCK (Special Rapporteur) said it had been felt that without the addition of the word “normally”, the articles would fail to cover, for example, the Rio Grande, the Irawaddy, the Mekong and the Nile. The

addition expanded the scope of the draft articles, in the sense that it avoided a restriction of their scope; what it did not do was to change two systems into one where they were linked by a canal, or to consider the Rhine and the Danube as a single system. He urged Mr. Güney to propose a brief text consistent with the recognition that the addition of the word “normally” did in a sense change the scope of the articles.

49. Mr. GÜNEY proposed inserting, in the third sentence of paragraph 6, after the word “compromise”, the words “not with the intention of expanding the geographic scope as such of the convention, but . . .”.

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to suspend its action on the commentary to subparagraph (b) pending informal consultations between Mr. Güney and the Special Rapporteur, and to adopt the rest of the commentary to article 2.

*It was so agreed.*

*The commentary to article 2 was adopted on that understanding.*

#### COMMENTARY TO ARTICLE 3

51. Mr. ROSENSTOCK (Special Rapporteur) said that article 3 was the first in which the word “appreciable” had been replaced by the word “significant”. That decision was discussed in paragraphs (13) and (14) of the commentary.

*The commentary to article 3 was adopted.*

#### COMMENTARY TO ARTICLE 4

52. Mr. ROSENSTOCK (Special Rapporteur) said that the commentary to article 4 had not been changed.

53. Mr. AL-BAHARNA said it was very important to insert a comma after the words “programme or use”, in the English text of paragraph 2 of article 4.

54. After a discussion in which Mr. BOWETT (Chairman of the Drafting Committee), Mr. EIRIKSSON, Mr. AL-BAHARNA and Mr. ROSENSTOCK (Special Rapporteur) took part, the CHAIRMAN invited Mr. Al-Baharna not to press his proposal.

*The commentary to article 4 was adopted.*

*The meeting rose at 1.05 p.m.*

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## 2371st MEETING

*Tuesday, 19 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. 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.

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### The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/457, sect. E, A/CN.4/462,<sup>1</sup> 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 ARTICLES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION ON SECOND READING<sup>2</sup> (*continued*)

COMMENTARIES (*continued*) (A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

COMMENTARY TO ARTICLE 1 (*concluded*) (A/CN.4/L.493)

1. The CHAIRMAN said that, at its previous meeting, the Commission had left two matters pending, one concerning the commentary to article 1, and the other concerning paragraph (6) of the commentary to article 2. As to article 1, Mr. Pambou-Tchivounda and the Special Rapporteur had agreed to include a paragraph (5), reading:

“(5) According to one member, in the absence of a homogeneous criterion for identification, the uses of an international watercourse for non-navigational purposes could be identifiable in terms of three criteria: their nature (industrial, economic or private), the technical character of the works or the means utilized and the linkage of initiating such undertakings to the jurisdiction or control of a watercourse State.”

*Paragraph (5) was adopted.*

*The commentary to article 1, as a whole, as amended, was adopted.*

2. The CHAIRMAN said that, with regard to paragraph (6) of the commentary to article 2, Mr. Güney and the Special Rapporteur had agreed to insert, after the word “compromise”, in the third sentence of the paragraph, the phrase: “which is aimed not at enlarging the geographical scope of the draft articles as such but at bridging the gap between on the one hand those who urged simple deletion . . .”; the remainder of the paragraph was unchanged.

*Paragraph (6), as amended, was adopted.*

*The commentary to article 2, as a whole, as amended, was adopted.*

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

## COMMENTARY TO ARTICLE 5

*The commentary to article 5 was adopted.*

## COMMENTARY TO ARTICLE 6

*The commentary to article 6 was adopted.*

## COMMENTARY TO ARTICLE 7

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

3. Mr. BARBOZA said that a new reading of article 7 and of the commentary had raised doubts in his mind about the wisdom of leaving paragraph (2) of the commentary as it was. The first paragraph of the quotation forming paragraph (2) gave an example of what the article was about: one use of a watercourse that was obviously more "reasonable and equitable"—the construction of a dam, which provided electric energy and gave work to many people, than the use that was sacrificed—recreational fishing by a few people in the affected State. Nevertheless, the example went on to say that the State constructing the dam was not relieved of the obligation to exercise due diligence in the utilization of the watercourse in such a way as not to cause significant harm to other watercourse States. What did that mean? The harm was already decided on when the use of the river for the purposes of a dam was preferred to the use of the river by fishermen, and the damage would be effectively caused once that decision was implemented. Due diligence had nothing to do with the damage, which resulted from a decision regarding two conflicting uses of the watercourse. In actual fact, the dam was built on the understanding that such damage would inevitably ensue.

4. Did the commentary mean that due diligence should be employed not to aggravate that damage? That went without saying, but that would be damage different from the one originally contemplated, namely, loss of a certain use. For that reason, the example did not apply to "due diligence".

5. Furthermore, the third paragraph of the quotation envisaged the case of harm done notwithstanding the exercise of due diligence and said that the parties "shall consult". However, if one was talking of the damage caused by the sacrifice of one use of the watercourse for the benefit of an other, those consultations should have taken place before the construction of the dam, in accordance with the procedure established by articles 11 to 19, and the parties, in the light of the factors enumerated in article 6, would either have reached an agreement, in which case there would be no need for further consultations, or would not have reached an agreement, which would give rise to an international dispute that would have to be solved by the procedures established in the corresponding chapter of the draft. He therefore failed to see the need for new consultations.

6. He hoped that the intention of article 7 was not to exempt planned activities from the procedures established in articles 11 to 19, on the pretext that such activ-

ities corresponded to a reasonable and equitable use of the watercourse.

7. Lastly, he believed that the first paragraph of the quotation forming paragraph (2) of the commentary did not adequately illustrate an obligation of due diligence, and that the second and third paragraphs were misleading and might bring about an interpretation that planned activities were exempted from the procedure in articles 11 to 19 if the activities in question came within the concept of reasonable and equitable uses of the watercourse. He would therefore suggest, if his remarks found some echo either with the Special Rapporteur or with other members of the Commission, that paragraph (2) of the commentary to article 7 should be deleted.

8. Mr. BENNOUNA, supported by Mr. MAHIOU, said it was not appropriate for a paragraph of the commentary to a draft article to consist of a quotation, presented as such, from explanations provided by the Chairman of the Drafting Committee. As to the substance, he endorsed the remarks by Mr. Barboza.

9. Mr. ROSENSTOCK (Special Rapporteur) said it was surprising that reservations should be entered at such a late stage. It was on the basis of the explanations reproduced in paragraph (2) of the commentary that article 7 had been adopted. As to the first paragraph of the quotation, it was not a question of illustrating the concept of due diligence, but of showing that an equitable and reasonable utilization of a watercourse could none the less cause significant harm.

10. The CHAIRMAN suggested that consideration of paragraph (2) of the commentary should be postponed.

*It was so agreed.*

*Paragraph (3)*

11. Mr. ELARABY said that other obligations had prevented him from attending the meeting at which article 7 had been adopted. If he had been present, he would not have failed to express serious reservations. He entirely dissociated himself from the text that had been adopted.

12. Mr. AL-KHASAWNEH said it was surprising that the remarks he had made at previous meetings in connection with article 7 were in no way reflected in the commentary. That was true for paragraphs (2) and (4), as well as paragraph (3).

13. Mr. YANKOV, supported by Mr. BENNOUNA and the Chairman, speaking as a member of the Commission, said there seemed to be some confusion. Commentaries were supposed to express the views of the Commission. The opinions of members were set out in the summary records.

*Paragraph (3) was adopted.*

*Paragraph (4)*

14. Mr. ROSENSTOCK (Special Rapporteur) said that the word "only", in the fifth sentence, should be deleted when it occurred the first time, since it was obviously redundant.

15. Mr. TOMUSCHAT said that the sentence “It is an obligation of conduct not an obligation of result” was acceptable only if it was understood in the ordinary meaning of that distinction, and not in the rather artificial meaning attached to it by the Commission in the draft articles on State responsibility.

*Paragraph (4), as amended, was adopted.*

*Paragraphs (5) and (6)*

*Paragraphs (5) and (6) were adopted.*

*Paragraphs (7) and (8)*

16. Mr. EIRIKSSON proposed that the words “of care” should be inserted after “standard” in the first sentence of paragraph (7) and that the first sentence of paragraph (8) should be replaced by “Obligations of conduct have also been formulated in various conventions”.

17. After a discussion on the links between the concept of “due diligence” and the various instruments cited in paragraph (8), the CHAIRMAN suggested that consideration of paragraphs (7) and (8) should be deferred until the next meeting so that the members proposing various amendments in the course of the discussion could agree on a compromise text.

*It was so agreed.*

*Paragraph (9)*

*Paragraph (9) was adopted.*

*Paragraph (10)*

18. Mr. EIRIKSSON proposed that paragraphs (5) and (6) should be placed between paragraphs (9) and (10), so that the paragraphs limiting the concept of “due diligence” did not precede those defining the concept.

*It was so agreed.*

*Paragraph (10) was adopted.*

*Paragraph (11)*

*Paragraph (11) was adopted.*

*Paragraph (12)*

19. Mr. ROSENSTOCK (Special Rapporteur) proposed that the introductory sentence of paragraph (12) should be replaced by: “The process of reaching agreement on uses of watercourses has been dealt with by a commentator as follows:”.

*Paragraph (12), as amended, was adopted.*

*Paragraphs (13) to (22)*

*Paragraphs (13) to (22) were adopted.*

20. The CHAIRMAN suggested that a paragraph (23) should be added to the commentary to article 7, reading:

“(23) Two members expressed reservations concerning article 7 and indicated that they preferred the text which had been adopted for that article on first reading”.

21. Following a discussion as a result of which the words “Two members” were replaced by the words “Some members”, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the text he had suggested.

*It was so agreed.*

*Paragraph (23), as amended, was adopted.*

*The meeting rose at 6 p.m.*

## 2372nd MEETING

*Wednesday, 20 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.*

**The law of the non-navigational uses of international watercourses (concluded)** (A/CN.4/457, sect. E, A/CN.4/462,<sup>1</sup> 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 ARTICLES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION ON SECOND READING<sup>2</sup> (concluded)

COMMENTARIES (concluded) (A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

COMMENTARY TO ARTICLE 7 (concluded) (A/CN.4/L.493)

*Paragraphs (7) and (8) (concluded)*

1. The CHAIRMAN invited the Commission to resume its consideration of the commentary to article 7.

<sup>1</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>2</sup> For the texts of the draft articles provisionally adopted by the Commission on first reading at its forty-third session, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

He understood that an agreement had been reached on paragraphs (7) and (8). In paragraph (7), the opening words "The obligation" should be replaced by "An obligation", and the words "has been formulated in" by "can be deduced from". In paragraph (8), the opening phrase should read: "An obligation of due diligence can also be deduced from various multilateral conventions. Article 194, paragraph 1, of the United Nations Convention on the Law of the Sea provides that . . .".

2. If he heard no objection, he would take it that the Commission agreed to adopt paragraphs (7) and (8), with the editing changes suggested by the secretariat.

*Paragraphs (7) and (8), as amended, were adopted.*

*Paragraph (2) (concluded)*

3. The CHAIRMAN reminded members that paragraph (2) of the commentary had been left pending.

4. Mr. ROSENSTOCK (Special Rapporteur) said that, after consultations with Mr. Eiriksson, Mr. Mahiou, Mr. Barboza and the Chairman of the Drafting Committee, he had elaborated the following text to replace the existing paragraph (2):

"(2) The approach of the Commission was based on three conclusions: (a) that article 5 alone did not provide sufficient guidance for States in cases where harm was a factor; (b) that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm,<sup>67 bis</sup> and (c) that the fact that an activity involved significant harm did not of itself constitute a basis for barring an activity.

<sup>67 bis</sup> The Chairman of the Drafting Committee explained the approach as follows in his report to the plenary: . . .".

5. Mr. BENNOUNA said the proposed text represented some progress, but there was no need for the footnote citing the explanation given by the Chairman of the Drafting Committee. Furthermore, he was not at all sure that conclusion (c), beginning with the words "that the fact that . . .", reflected the meaning of article 7. The basic principle underlying the article was that everything possible must be done to avoid causing harm, and that if harm resulted, it did so in spite of the precautions taken. Consequently, he was opposed to the Special Rapporteur's interpretation of the article in the last part of his proposed text. The phrase in question should be deleted.

6. Mr. ROSENSTOCK (Special Rapporteur) said that the last phrase was essential to a proper understanding of the text and of the rest of the commentary.

7. Mr. GÜNEY said that the question had been discussed at length in the Drafting Committee, and that the statement made by the Chairman of the Drafting Committee had constituted an integral part of the agreement reached. He thus agreed with the Special Rapporteur that the footnote was necessary, and that it constituted the minimum the Commission could accept, given the nature and complexity of the question and the agreement reached in the Committee.

8. Mr. MAHIOU said an effort had clearly been made to find a solution satisfactory to all, but such efforts were

not always successful. He had reservations about the wisdom of departing from established practice by citing the Chairman of the Drafting Committee's explanation in the Commission's commentaries. If that explanation was to be cited as a footnote, the footnote should also state that some members had serious reservations or objections concerning both the substance of paragraph (2) and the form in which it was drafted.

9. The CHAIRMAN, speaking as a member of the Commission, said he was at a loss to understand the opposition voiced by some members to any reference being made, even in a footnote, to the view of the Chairman of the Drafting Committee. That reference was to the report on the work of the Drafting Committee, not to the personal opinions of its Chairman. Why should a reference to his explanation be prohibited, even in a footnote, if it reflected the view of the Drafting Committee? If the explanation did not properly reflect the Committee's view, the report should have been referred back to the Committee by the Commission as unacceptable.

10. Mr. ELARABY said that he saw some inconsistency between the question of ad hoc adjustments designed to eliminate or mitigate harm, referred to in paragraph 2 (b) of article 7, and the reference, at the end of the Special Rapporteur's proposal, to barring an activity. The word "eliminate" implied that the activity could be stopped, whereas the Special Rapporteur's proposed text concluded that the fact that an activity involved significant harm did not of itself constitute a basis for barring an activity.

11. Mr. YANKOV said that, in view of the undoubted pertinence of the report of the Drafting Committee, a reference in a footnote to the summary record of the meeting at which the Chairman of the Drafting Committee had made his statement might be a compromise solution acceptable to all members.

12. Mr. BOWETT (Chairman of the Drafting Committee) said that Mr. Güney was quite right. The problem of the relationship between articles 5 and 7 had perhaps been the most difficult problem facing the Drafting Committee. The Committee had considered it essential to provide a careful explanation of the reasons for the solution it had adopted. Those who now sought to amend the commentary were in effect suppressing those reasons. The form in which those reasons were presented was in a sense irrelevant: what was important was that the reader should have access to them.

13. Mr. MAHIOU said that the Drafting Committee was an organ of the Commission. Once the Commission had endorsed the position of the Drafting Committee, it became the Commission's own position, and there was thus no need to cite either the Drafting Committee or its Chairman. He could recall no instance of the Commission citing the opinions of its organs in its commentaries. If the footnote was retained, he would wish to express objections both to its form and to its substance. Had he been present at the meeting at which the Chairman of the Drafting Committee had presented his explanation (2353rd meeting), he would have raised objections, particularly with regard to the drafting of the first paragraph of the explanation. To say that it was acceptable for an equitable and reasonable activity to cause significant harm was a highly debatable substantive issue.

14. Mr. GÜNEY endorsed the remarks made by the Chairman when speaking in his capacity as a member. To begin with, the explanations advanced by the Chairman of the Drafting Committee had not been personal opinions, but the general view of the Committee. Secondly, the Committee's report had been adopted by the Commission without objections. If the problem was a formal one, some other way could be found of endorsing the explanation of reasons given by the Chairman of the Drafting Committee. That explanation had been an integral part of the negotiations on the subject. Consequently, he, for one, would not be satisfied with the solution suggested by Mr. Yankov.

15. Mr. EIRIKSSON, referring to the issues raised by Mr. Bennouna and Mr. Elaraby, said that the first part of the Special Rapporteur's proposal established a link with article 5; the second part introduced an obligation set forth in paragraph 1 of article 7; while the third part of the proposal set forth the issue to be dealt with in paragraph 2 of article 7, namely, a situation where, despite the exercise of due diligence, significant harm was caused. The real purpose of the third part of the Special Rapporteur's proposal was to introduce the discussion of paragraph 2 of article 7, just as the second part of his proposal introduced the discussion on paragraph 1 of that article.

16. Mr. BENNOUNA said that, since the Chairman claimed to be at a loss to understand the problem, he would endeavour to assist him in understanding it, in the hope that, having understood, he would then perform his duties as Chairman. Mr. Mahiou and he had pointed out that it was not the practice of the Commission to cite the Drafting Committee. If that practice was to be adopted, why should it not be followed in the case of every article? Apparently, the reason was that the explanation given by the Chairman of the Drafting Committee was indissolubly linked with the article itself. Such a procedure was not acceptable: the meaning of the article should be contained in the text of the article itself. Not all members of the Commission were members of the Drafting Committee. Furthermore, members of the Committee were frequently not present at its deliberations, and the Committee sometimes constituted a minority of the Commission. The question should therefore be debated in the Commission itself, not in the Committee. Nor did he agree with Mr. Güney. If there had been a compromise in the Committee, there must also be a compromise in the Commission. He could not accept the commentary in that form, and was prepared to insist on a vote. The interpretation contained in the Special Rapporteur's proposal, namely, that an activity that caused harm was entirely authorized, and that nothing in a draft United Nations convention should prevent an activity that caused harm to another State was totally aberrant for a jurist.

17. Mr. ROSENSTOCK (Special Rapporteur), speaking on a point of order, said that article 7 had been adopted and that its substance was thus not open for discussion.

18. Mr. BENNOUNA said that he was discussing not the substance of article 7, but the Special Rapporteur's commentary, which totally distorted article 7. He wanted

the Commission to take a decision on the last part of the Special Rapporteur's proposal, to which he objected. He also shared Mr. Mahiou's view that it was formally unacceptable to cite the opinion of the Drafting Committee *in extenso* as a footnote.

19. Mr. BARBOZA said that when his opinion concerning the Special Rapporteur's proposed text had been sought, no mention had been made of a footnote. Consequently, he had not given his approval to such a footnote, and did not think that recourse to such a procedure was advisable. Nor was he in favour of creating a precedent by inserting a cross-reference. As he had explained (2371st meeting), the example cited was misleading. If the reader was referred to that example indirectly, the same objective was pursued as when the example was explicitly referred to in the text of the commentary. There was no need to challenge the opinions of the Drafting Committee in the debate; the point was simply that the Commission did not want those opinions to appear as its own opinions. The article had been adopted. There had been reservations concerning it. But it was an unacceptable exaggeration to say that, because some member had not challenged the opinion of the Drafting Committee in the debate, the Commission had therefore adopted the reasoning of the Drafting Committee with all its nuances.

20. Mr. CALERO RODRIGUES said that the statement of the Chairman of the Drafting Committee, currently set out in paragraph (2) of the commentary, should be deleted. The replacement text proposed by the Special Rapporteur was generally satisfactory, except for the last part, which did not accurately represent the Commission's position. He therefore proposed an amended version, reading:

“The approach of the Commission was based on three conclusions: (a) that article 5 alone did not provide sufficient guidance for States in cases where harm was a factor; (b) that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm; and (c) that in certain circumstances ‘equitable and reasonable utilization’ of an international watercourse may still involve some significant harm to another watercourse State.”

The last phrase of the amendment was in fact the same as the first sentence of the statement by the Chairman of the Drafting Committee.

21. Mr. ELARABY said the “ad hoc adjustments” referred to in paragraph 2 (b) of article 7 were designed to attain three goals: elimination of harm, mitigation of harm and, where appropriate, compensation. The Special Rapporteur's proposed text indicated that the Commission had concluded that “the fact that an activity involved significant harm did not of itself constitute a basis for barring an activity”; that statement was not consistent with the meaning of paragraph 2 (b) and might be interpreted to mean that significant harm could not be invoked as a basis for eliminating a particular activity. For that reason, he preferred the version of paragraph (2) proposed by Mr. Calero Rodrigues.

22. Mr. AL-BAHARNA said that he endorsed the text proposed by Mr. Calero Rodrigues.

23. Mr. THIAM said he also endorsed the text proposed by Mr. Calero Rodrigues. The statement by the Chairman of the Drafting Committee was clearly a cause of discord and should be eliminated from the commentary. Placing it in a footnote would not solve the problem.

24. Mr. TOMUSCHAT said that the text proposed by the Special Rapporteur did not give due consideration to the need to balance the rights and interests involved. Accordingly, he would amend the text to read:

“... (c) that the fact that equitable and reasonable utilization of a watercourse may still involve significant harm did not of itself constitute a basis for barring an activity. Generally, in such instances proportionality must apply. The principle of equitable and reasonable utilization cannot be totally set aside. It remains the guiding criterion in balancing the interests at stake.”

25. Mr. ROSENSTOCK (Special Rapporteur) said that while he did not consider Mr. Tomuschat's proposal a necessary addition to his own, it was acceptable, with the exception of the word “proportionality”, which was not the most appropriate choice.

26. It was very curious that some members were so strongly opposed to including the statement of the Chairman of the Drafting Committee, which represented an important part of the background to the issue under consideration. Using the first sentence of that statement alone and ignoring the rest of it only distorted the meaning.

27. Mr. CALERO RODRIGUES said he strongly disagreed with the Special Rapporteur. It had never been his intention to use the words of the Chairman of the Drafting Committee out of context.

28. Mr. ELARABY said that paragraph 2 (b) of article 7 referred to the elimination of harm, which did not necessarily mean that the activity in question would be barred—that was up to the court to decide. Therefore, an activity involving significant harm could constitute a basis for barring that activity.

29. Mr. EIRIKSSON said that Mr. Elaraby's objections might be met by amending the third conclusion mentioned in Mr. Tomuschat's proposal, which would then read:

“... (c) that the fact that in certain circumstances equitable and reasonable utilization of a watercourse may involve some significant harm to another watercourse State did not of itself necessarily constitute a basis for barring an activity.”

30. Mr. CALERO RODRIGUES said that he could accept Mr. Tomuschat's proposal as amended by Mr. Eiriksson. Nevertheless, the word “proportionality” was not as precise as might be desired.

31. Mr. AL-BAHARNA said that the Special Rapporteur's proposal could be altered to read:

“... (c) that the fact that equitable and reasonable utilization of a watercourse may still involve much

less significant harm than that otherwise would have been in barring an activity, did not in itself constitute a basis for barring such an activity”.

32. Mr. ARANGIO-RUIZ said that he preferred Mr. Tomuschat's proposal as amended by Mr. Eiriksson, but the last two sentences could be merged to read: “In such instances the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake.”

33. Following a further discussion in which several members of the Commission took part, Mr. EIRIKSSON read out a suggested amalgamation of the proposals, reading:

“(2) The approach of the Commission was based on three conclusions: (a) that article 5 alone did not provide sufficient guidance for States in cases where harm was a factor; (b) that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm; and (c) that the fact that an activity involves significant harm did not of itself necessarily constitute a basis for barring it. In certain circumstances ‘equitable and reasonable utilization’ of an international watercourse may still involve significant harm to another watercourse State. Generally, in such instances the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake.”

34. Mr. ELARABY suggested that, in the third conclusion, the words “did not” should be replaced by “would not”.

35. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the amalgamated text as amended by Mr. Elaraby.

*It was so agreed.*

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

36. Mr. GÜNEY said that the text just adopted did not reflect either the content or the scope of article 7, paragraph 2, as adopted by the Drafting Committee and by the Commission in the light of the statement made by the Chairman of the Drafting Committee. That statement was an integral part of the agreement reached in the Drafting Committee and reflected the general view therein. It was on that understanding that he accepted the new text, but in the application of the future instrument, article 7 would certainly be interpreted in the light of the statement made by the Chairman of the Drafting Committee.

37. The CHAIRMAN said that by adopting the new text for paragraph (2), the Commission had not revised the report of the Drafting Committee, which would remain part of the Commission's records.

*The commentary to article 7, as a whole, as amended, was adopted.*

*The commentaries to the articles on the law of the non-navigational uses of international watercourses, as a whole, as amended, were adopted.*

**Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/457, sect. F, A/CN.4/L.502)**

[Agenda item 7]

REPORT OF THE PLANNING GROUP

38. Mr. YAMADA (Chairman of the Planning Group) drew attention to the report of the Planning Group (A/CN.4/L.502) and said it should be noted that the two annexes to the report were for the Commission's internal use and would not be included in the report to the General Assembly.

39. The CHAIRMAN said that the purpose of the Commission's review of the report was to determine whether, subject to the required editing changes, it should be included in the last chapter of the Commission's report to the General Assembly.

Paragraphs 1 to 3

40. Mr. BOWETT said that the report appeared to contain little discussion of the Commission's methods of work in response to the request by the General Assembly cited in paragraph 1.

41. Mr. YAMADA (Chairman of the Planning Group) said that at the present session the Planning Group had considered only the methods of work relating to the drafting of commentaries. In previous years it had discussed the questions of the Drafting Committee and the method of preparing the Commission's annual report.

*Paragraphs 1 to 3 were adopted.*

Paragraphs 4 to 11

42. In response to a query by Mr. PELLET, the CHAIRMAN said it was correct to assume that the content of paragraph 8 and of the second sentence of paragraph 10 would not appear in the Commission's report to the General Assembly.

43. Mr. CALERO RODRIGUES, supported by Mr. YANKOV, said that the reference to the Commission's intention with respect to the two new topics referred to in the last sentence of paragraph 7 should be amplified somewhat. A statement should be added at the end of the paragraph to the effect, for instance, that special rapporteurs were to be appointed or that a working group was to be set up.

44. The CHAIRMAN suggested that the Commission should adopt paragraphs 4 to 11 on the understanding that the changes required to reflect Mr. Calero Rodrigues' point would be introduced into paragraph 7 when the Commission's report to the General Assembly was adopted.

*It was so agreed.*

*Paragraphs 4 to 11 were adopted.*

New paragraph 11 bis

45. Mr. YAMADA (Chairman of the Planning Group) said that the following sentence should be added, as paragraph 11 bis:

“11 bis. The Working Group chaired by Mr. Pellet will continue its work on the formulation of recommendations on other contributions by the Commission to the United Nations Decade of International Law to be submitted to the Commission at its next session.”

*Paragraph 11 bis was adopted.*

46. In response to a point raised by Mr. GÜNEY, the CHAIRMAN said that, as stated in footnote 2 of the report of the Planning Group, annex II was intended for the internal use of the Commission only. The annex would not therefore be included in the Commission's report to the General Assembly.

47. Mr. PELLET said he would like to be quite sure that approval of annex II by the Planning Group would not involve any commitment on the part of contributors to the publication. In that connection, he understood that Mr. Jacovides wished to limit his study (A/CN.4/L.502, annex II, item 1) to the role of international law in diplomacy and that Mr. Vargas Carreño would like a question mark to be added after the title of his study (*ibid.*, item 26).

48. Mr. KABATSI and Mr. BENNOUNA said that a question mark should also be added in the English version of the titles of their studies (*ibid.*, items 8 and 9).

49. In response to a point raised by Mr. YANKOV, Mr. PELLET said that all contributors to the publication would have an opportunity to make any alterations they wished to the titles of the studies.

Paragraphs 12 to 16

50. Mr. PELLET, referring to the fifth sentence of paragraph 15, said that the phrase “providing a basis for the elaboration by States of legal codification instruments” was highly ambiguous and should perhaps be qualified by the addition of a reference to international law. He suggested that the Rapporteur should ensure that a clearer form of wording was incorporated in the report of the Commission to the General Assembly.

*It was so agreed.*

*Paragraphs 12 to 16 were adopted on that understanding.*

Paragraphs 17 and 18

51. The CHAIRMAN reminded members that it had been agreed, at the suggestion of Mr. Calero Rodrigues, to replace the title to paragraphs 17 and 18 by the words “Methods of work”.

*Paragraphs 17 and 18 were adopted.*

## Paragraph 19

52. In response to a query by Mr. KABATSI, the CHAIRMAN said he had been advised that the last sentence of the paragraph was useful for the purpose of the Commission's accountability to the United Nations administration.

53. In answer to Mr. PELLET, Mrs. DAUCHY (Secretary to the Commission) said that the forty-seventh session of the Commission would take place from 1 May to 21 July 1995.

54. Mr. PELLET said he found it quite extraordinary that the Commission should commence its session on Labour Day, a public holiday which was of a truly international character and free of any particular religious or national connotation.

55. Mrs. DAUCHY (Secretary to the Commission) said that there was, of course, nothing to prevent the Commission from starting its session on Tuesday, 2 May, but it would then lose one day of the session.

56. Mr. CALERO RODRIGUES said that he would be loath to lose even half a day of the Commission's session. Labour Day, moreover, was not celebrated at the United Nations Office at Geneva and, in the past, the Commission had always worked on that day.

57. The CHAIRMAN suggested that a decision on the matter should be taken when the Commission came to the relevant part of its report.

*It was so agreed.*

*Paragraph 19 was adopted.*

*The report of the Planning Group as a whole, as amended, was 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 (A/CN.4/L.496 and Add.1)

58. The CHAIRMAN said that Chapter II, section B, of the Commission's draft report was divided into two subsections: section B.1, dealing with the draft statute for an international criminal court, and section B.2 dealing with the draft Code of Crimes against the Peace and Security of Mankind. He invited members to consider first section B.2, and to proceed paragraph by paragraph.

59. Mr. THIAM (Special Rapporteur) expressed surprise at the order of presentation adopted for Chapter II of the report. A question of principle was, however, also involved. The draft Code of Crimes against the Peace and Security of Mankind, which contained the basic rules to be applied by the court, had in fact been considered long before the draft statute for an international criminal court had been taken up. He would not insist on the draft Code being considered before the draft statute if

that would create problems, but that was how it should be done.

60. Mr. CALERO RODRIGUES asked which of the two had been discussed first in previous years—the court or the draft Code.

61. The CHAIRMAN said that the Special Rapporteur would be able to answer that question later.

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

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

###### Paragraphs 1 to 7

*Paragraphs 1 to 7 were adopted.*

###### Paragraph 8

62. Mr. THIAM (Special Rapporteur), referring to the French text, proposed that the word *inclus*, in the first sentence, should be replaced by the word *visés*.

*It was so agreed.*

*Paragraph 8, as amended, was adopted.*

###### Paragraph 9

*Paragraph 9 was adopted.*

###### Paragraph 10

63. Mr. PELLET said that the phrase "which might also have a legitimate interest in having the Special Rapporteur lengthen the list", in the third sentence, was utterly incomprehensible.

64. Mr. THIAM (Special Rapporteur), agreeing with Mr. Pellet, said that some form of wording should be found that properly reflected the intention; alternatively, the phrase should be deleted.

65. The CHAIRMAN said that no action would be taken on paragraph 10 until the matter had been clarified.

###### Paragraphs 11 to 15

*Paragraphs 11 to 15 were adopted.<sup>3</sup>*

###### Paragraph 16

66. Mr. PELLET said that the last sentence was not clear. If it meant what he thought it did, it was not necessarily true that the court's only function would be to apply existing conventions. Since a question of substance was involved, the sentence should be re-examined.

67. The CHAIRMAN suggested that the Commission should defer action on the paragraph until the Rapporteur had looked into the matter.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

<sup>3</sup> Subsequently, paragraph 13 was amended; see 2373rd meeting, para. 4.

\* Resumed from the 2370th meeting.

## 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 Mankind<sup>1</sup> (continued)\* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-7,<sup>2</sup> A/CN.4/460 and Corr.1,<sup>3</sup> 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.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

clauses of any treaty that might accompany the statute. Instead, it had amended the note on possible clauses of a treaty to accompany the draft statute. Issues such as reservations and settlement of disputes would be dealt with by an eventual conference. The draft statute also provided the basic structure to give effect to ideas concerning such matters as the court's jurisdiction over genocide, the capacity of the Security Council to refer matters to the court, and the necessary limitations on the operations of the court.

3. He thanked all the members of the Working Group for their cooperation and also the members of the secretariat for their invaluable assistance in a difficult exercise.

#### PREAMBLE AND PART ONE (Establishment of the court)

4. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the wording of the third preambular paragraph had been amended in response to comments made by Mr. Robinson (2357th meeting); the second part of article 2, had been transferred to the commentaries; and paragraph 3, which had originally been placed elsewhere in the draft statute, had been moved to article 3. There were no changes of substance.

5. Mr. TOMUSCHAT proposed that the word "only", in the second preambular paragraph, should be deleted, since it would diminish the value of the articles.

6. Mr. ROSENSTOCK said he would prefer to retain that word as it would enable Governments to adopt a positive approach to the provision and it could also have some slight influence on their reasoning if a case arose which fell under article 35.

7. After a discussion in which Mr. AL-BAHARNA, Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court), Mr. HE and Mr. KABATSI took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to retain the word "only" in the second preambular paragraph of the draft statute.

*It was so agreed.*

8. Mr. PAMBOU-TCHIVOUNDA proposed that the references to the suppression and prosecution of crime, in the first preambular paragraph, should be reversed.

*It was so agreed.*

9. Mr. PELLET said that he maintained his reservations in general and doubted whether the Commission was embarking on the right path. He would like that view to be reflected not only in the summary records but also in the Commission's report. He was unable to accept article 2, but would not stand in the way of its adoption if that was the wish of the majority.

10. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said he agreed entirely that Mr. Pellet's important views should be fully reflected in the commentary.

11. Mr. PAMBOU-TCHIVOUNDA said that he would have preferred the emphasis in the second preambular paragraph to be placed on the object and purpose of the court rather than on its jurisdiction, which was a purely technical matter. However, he would not stand in the way of a consensus.

*The preamble and part one, as amended, were adopted.*

#### PART TWO (Composition and administration of the court)

12. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that comparatively few changes of substance had been made to part two. In article 6, the reference to the lists of judges had been deleted but the idea of the need for a balance between the two kinds of possible qualification, for which there had been strong support, had been retained. The wording of article 19, paragraphs 3 and 4, had been changed, and the principle of control by States parties with respect to the formulation of the rules of the court, on which a number of delegations to the Sixth Committee of the General Assembly at its forty-eighth session in 1993 had insisted, had been reinforced. Such control could be exercised either by States parties giving their approval at a conference or through a system of communication with States parties to ascertain whether they objected. The other changes to part two were all of a drafting nature.

13. Mr. MAHIOU said article 6, paragraph 3, stipulated that there should be 10 judges with criminal trial experience but only 8 with recognized competence in international law. The arguments advanced in defence of that difference had not been convincing. There should be a true balance, with nine judges from each of the two specialties.

14. Mr. PELLET said he saw no reason for the words "due" or *bonne* in the English and French versions respectively, but would not press the point. The phrase "on the basis that they will be available to serve as required", in article 12, paragraph 4, remained ambiguous despite the explanation in the commentary. The meaning might be made clearer if the phrase were replaced by some wording along the lines of: "who will perform their duties when a case is referred to the court".

15. Article 12, paragraph 7, and article 13, paragraph 4, both contained an error of law, since the staff of the procuracy and the registry of the proposed court were not to be equated with that of the United Nations and could not therefore be subject to staff regulations that were more or less in conformity with those of the United Nations.

16. THE CHAIRMAN said he took it that the Commission agreed to delete that phrase, both in article 12, paragraph 7, and in article 13, paragraph 4.

*It was so agreed.*

17. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said the meaning of article 12, paragraph 4, was clear: the prosecutor and deputy prosecutors would serve

as required—in other words, not more and not less than was required.

18. After a discussion in which Mr. ROBINSON, Mr. CRAWFORD (Chairman of the Working Group) and Mr. ROSENSTOCK took part, Mr. PELLET suggested that a written draft of a proposed reformulation of paragraph 4 should be circulated for consideration.

*It was so agreed.*

19. Mr. PELLET said that he continued to maintain his reservation with regard to article 17, paragraph 1, about the provision of an annual allowance to the president. As for article 19, paragraph 4, it was quite unacceptable to introduce provisional rules in penal matters. It was inconceivable to permit a situation in which an accused was subjected to a regime in which the rules were subsequently changed. The paragraph should be deleted.

20. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that he was opposed to the deletion of paragraph 4 of article 19. The article was a compromise between the position taken in the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,<sup>4</sup> in which the judges made the rules and there was no provision for those rules to be approved or disapproved, and a situation in which States parties, not the judges, made the rules. Under the terms of paragraph 1, the judges made the rules, and under the terms of paragraph 2, those rules were then approved by States parties. Paragraph 4 was a concession to the needs of effective operation and efficiency of the court, in a situation where a case was pending and the rules had been made but not yet approved. A change in the rules might even work to the advantage of an accused.

21. Mr. PELLET said that the explanation only served to increase his hostility to paragraph 4. It was quite unacceptable that rules should be provisionally applied, and then lapse after having failed to be approved by States. Such provisional application was extremely dangerous.

22. After a show of hands, the CHAIRMAN declared that article 19, paragraph 4, would be retained.

23. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said he thought that Mr. Pellet had made a legitimate point, albeit one with which he himself disagreed. That point should be reflected in the commentary.

24. Mr. ROBINSON said that, while he appreciated that time was short, he none the less regretted that an indicative vote had been taken so hastily. There was some merit in the contention that paragraph 4 could totally negate the system established in paragraph 2. He hoped that in future sufficient time would be allowed for such important matters to be aired.

25. Mr. MAHIOU said he shared other members' reservations concerning paragraph 4. The creation of a provisional phase could give rise to serious concern on the part of States. In criminal law matters, it should be made absolutely clear whether the rules did or did not apply.

26. The CHAIRMAN said that he had decided to take an indicative vote on paragraph 4 in the belief that article 19 represented a compromise between the various views that had already been expressed at length in plenary and in the Working Group. If he heard no further objection, he would take it that, on the understanding dissenting views would be fully reflected in the commentary, the Commission agreed to adopt all the articles of part two, other than paragraph 4 of article 12, which had been left pending.

*It was so agreed.*

*Part two, as amended, was adopted, on that understanding.*

#### PART THREE (Jurisdiction of the court)

27. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that part three, was obviously the most problematical part of the draft statute. Once again, the text represented a compromise between maximalist and minimalist positions on various issues. However, as compared with the draft previously discussed by the Commission, relatively few changes had been made. Article 20, subparagraph (c), had been reworded so as to avoid confusion with the technical term "grave breaches" in the Geneva Conventions of 12 August 1949 and Additional Protocol I of 1977, and a reference to "customs" had been inserted. The express reference to crimes under customary international law had been deleted from article 20 as part of a delicate compromise on the question whether apartheid should be separately listed under that article. There were many ways in which such a difficult exercise could have been undertaken, but the package proposed by Mr. Robinson (2358th meeting) had eventually been unanimously accepted by the Working Group, for the reasons explained in the commentary.

28. On the question of preconditions to the exercise of jurisdiction, the view had been held that genocide should not be subject to special rules. By a substantial majority, the Working Group had preferred to provide for special treatment in a case of genocide—the solution also preferred by many members of the Commission who were not members of the Working Group. Paragraph 3 of article 21 had been moved, and was now article 54. Article 22 was in principle unchanged, as was article 23, although the wording of paragraph 1 however had been altered, in order to make it clearer that what the Security Council referred was the matter or situation to which Chapter VII of the Charter of the United Nations applied, leaving it up to the court's prosecutor to distinguish the crime and the accused. The Working Group had decided by a significant majority to retain paragraph 3 of article 23, which had been redrafted to make it plain that the Council must actually be taking action under Chapter VII of the Charter, and that it was not enough for the Council to stigmatize a particular situation as one

<sup>4</sup> Document S/25704, annex.

to which Chapter VII applied. Paragraph 3 had also been changed, so that only the commencement of prosecution was affected by paragraph 3 in its more limited form. There had never been any opposition to article 24; indeed, some held that it should be the only article in part three.

29. Mr. PAMBOU-TCHIVOUNDA said he wished to reiterate his reservations concerning article 20. Article 20, subparagraph (d), referred to crimes against humanity. There was certainly such a category of crimes under domestic law, and the Convention on the Prevention and Punishment of the Crime of Genocide defined genocide as a crime against humanity. He was not sure, however, that a global category of "crimes against humanity" existed in international law. What was article 20, subparagraph (d), intended to cover? He was also concerned at the retention of the crime of aggression, particularly in the light of article 23, paragraph 2, which required the Security Council first to determine that a State had committed an act of aggression. Did article 20, subparagraph (b), refer to individuals or to States? He would welcome clarification of those two points.

30. Mr. PELLET said article 21 was both too restrictive and too broad. It should have allowed for an exception to the requirement that complaints could be brought only in cases of systematic or mass violations of human rights. It should also have applied the same general system to all the crimes referred to in article 20, rather than make the crime of genocide a special case. He also objected to the phrase "the State which has custody of the suspect", in article 21, paragraph 1 (b) (i). In international law, the customary language in such a case was "the State on whose territory the person is to be found". Moreover the French version of paragraph 1 (b) (ii) did not correspond to the English.

31. He was entirely opposed to article 22 and would not join any consensus on adopting it. The article would, in a manner of speaking, allow States to have their cake and eat it too: States could become party to the statute and participate in several aspects of the court's functioning without any obligations, save a financial obligation. If the article had to be adopted, he would propose that the words "in article 20", in paragraph 1, should be replaced by "article 20, subparagraphs (b), (c) and (d)". That change would eliminate any reference to the crime of genocide in paragraph 1, thus reflecting the fact that genocide was an exception to the general set of rules regarding the exercise of jurisdiction.

32. Mr. THIAM (Special Rapporteur) said the Working Group had decided that the crimes over which the court had jurisdiction would be set out in article 20 and the definitions of those crimes would be provided in the Code of Crimes against the Peace and Security of Mankind. Like Mr. Pellet, he had strong reservations about article 22. The procedure for State acceptance of the court's jurisdiction seemed highly complex and might hinder the efficient functioning of the court. Once a State became party to the statute, it should then be presumed to have accepted the jurisdiction of the court.

33. Mr. MAHIU said that he endorsed the remarks of the Special Rapporteur on article 22. He also had reservations about article 23, paragraph 3. The Security

Council should not have the possibility of preventing the court from acting.

34. Mr. HE said the question of whether any matter referred by the Security Council to the court could automatically impose an obligation on the court was debatable. Accordingly, the word "Notwithstanding" in article 23, paragraph 1, should be replaced by "Subject to". Furthermore, article 42 was not consistent with the *non bis in idem* principle.

35. Mr. CALERO RODRIGUES said that he endorsed the views of the Special Rapporteur on article 22. He also had reservations about paragraph 3 of article 23: the fact that the Security Council was dealing with a matter should not prevent the court from exercising its jurisdiction.

36. Mr. ARANGIO-RUIZ said that he had the same reservations as Mr. Calero Rodrigues. Furthermore, the existence of an international criminal court was a *sine qua non* for the adoption of the Code of Crimes against the Peace and Security of Mankind. Accordingly, acceptance of the court's jurisdiction should be compulsory for any State becoming a party to the statute and to the Code.

37. Mr. GÜNEY said that he shared the objections to article 22 expressed by Mr. Mahiou and Mr. Calero Rodrigues.

38. Mr. ROBINSON wondered whether it was necessary for members to confirm reservations that they had already made during the debate. If so, he wished simply to confirm all the reservations that he had expressed earlier.

39. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the Working Group shared the concerns about the definition of crimes against humanity and hoped that the matter could be resolved in the context of the draft Code of Crimes against the Peace and Security of Mankind. The term "custodial State", in paragraph 1 (b) (i) of article 21, had replaced the language used in an earlier draft, namely "the State on whose territory the person is to be found". The new text was an improvement because the original wording would have given rise to difficulties in a number of contexts, among them cases involving persons temporarily on the territory of a State, visiting forces, or individuals with personal immunity. He agreed that the French text of the subparagraph needed to be reviewed.

40. While it had been true under previous versions of the draft statute, it was no longer the case that States parties to the statute had no obligations other than financial. Article 54, in tandem with article 53, did impose obligations on States parties, which were independent of acceptance of the jurisdiction of the court under article 22. Paragraph 1 (b) of article 22 referred to article 20 as a whole, rather than to specific subparagraphs, in order to allow a State which was not a party to the Convention on the Prevention and Punishment of the Crime of Genocide to accept the court's jurisdiction over the crime of genocide and to bring a complaint. However, he

was not opposed to the idea of replacing the reference to article 20 with a list of subparagraphs (b) to (e).

41. Members' reservations with regard to article 23 were reflected in the commentary.

42. The CHAIRMAN said that he took it that the Commission agreed to adopt part three, it being understood that all members' reservations were adequately reflected in the summary records and in the commentary.

*Part three, as amended, was adopted on that understanding.*

#### PART FOUR (Investigation and prosecution)

43. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said a number of editing changes had been made in article 26, paragraphs 1, 4 and 5, and article 27, paragraph 1, in order to meet the procedural points rightly raised by Mr. Robinson (2361st meeting).

44. Mr. PAMBOU-TCHIVOUNDA, referring to article 31, paragraph 3, said that he would like clarification as to who would pay the costs of the persons designated to assist in a prosecution.

45. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the costs might be paid by the court or a contribution might be made by the State. The Working Group had felt that maximum flexibility was needed on that point.

46. Mr. PELLET said that he had a strong reservation about the system provided for in article 31, an article which should be deleted.

47. After a discussion in which Mr. CRAWFORD (Chairman of the Working Group), Mr. ROBINSON, Mr. TOMUSCHAT, Mr. PELLET and the CHAIRMAN took part, Mr. CRAWFORD (Chairman of the Working Group) suggested the following new wording for article 31, paragraph 1: "The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2". Consequently, in paragraph 3 "designated" should be replaced by "made available"; the title of the article would also have to be altered.

48. The CHAIRMAN said that he would take it that, subject to the reservations stated by members, the Commission agreed to adopt part four as amended.

*It was so agreed.*

*Part four, as amended, was adopted on that understanding.*

#### PART FIVE (The trial)

49. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that in article 35 the notion of admissibility had been introduced in place of the notion of the discre-

tion of the court. In article 38, paragraph 1, the powers of the trial chamber were now stated without reference to other bodies, and minor consequential changes had been made to the rest of the article. He wished to stress that article 42 was based on a strong majority view in the Working Group. A number of minor drafting changes had been made in article 45.

50. Mr. PELLET said article 33, subparagraph (c), should be deleted, as should article 35, subparagraph (a), for the commentary was ambiguous, and the paragraph appeared to overlap with article 26. He also maintained his strong reservation about the trust fund referred to in article 47, paragraph 3 (c).

51. After a discussion in which Mr. BOWETT, Mr. PELLET, Mr. ROBINSON, Mr. ROSENSTOCK and Mr. CRAWFORD (Chairman of the Working Group) took part, Mr. PELLET withdrew his proposal to delete article 33, subparagraph (c).

52. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that, if article 35, subparagraph (a) was deleted, then subparagraph (b) would have to be deleted as well. The purpose of article 35 was to avoid unnecessary prosecutions and it did not overlap with article 25 or article 26.

53. After a show of hands, the CHAIRMAN said that the Commission appeared to be opposed to the proposal to delete article 35, subparagraph (a). He would take it that, subject to the reservations stated by members, the Commission agreed to adopt part five.

*Part five, was adopted on that understanding.*

*The meeting rose at 1.05 p.m.*

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## 2375th MEETING

*Thursday, 21 July 1994, at 3.05 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. 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.

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**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>2</sup> A/CN.4/460,<sup>3</sup> 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 Commission to continue its consideration of 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).

**PART TWO (Composition and administration of the court) (concluded)**

2. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court), reporting on the consultations on the points left pending since the preceding meeting, said that, in the French version of article 6, paragraph 2, the words *et aptes* should be deleted. The last part of article 12, paragraph 4, should be reworded to read: "... on the basis that they are willing to serve as required" and the last part of article 13, paragraph 2, should be reworded to read: "... on the basis that the Deputy Registrar is willing to serve as required".

3. The CHAIRMAN said that he would take it that the Commission agreed to adopt part two as amended.

*It was so agreed.*

*Part two, as amended, was adopted.*

**PART SIX (Appeal and review)**

4. Mr. PELLET, referring to article 48, said that the words "on grounds of procedural unfairness" were awkward and should be replaced by the words "on grounds of procedural error". It was also inappropriate to introduce the idea of unfairness in article 49.

5. The CHAIRMAN said that he would take it that the Commission agreed to adopt part six as amended.

*It was so agreed.*

*Part six, as amended, was adopted.*

**PART SEVEN (International cooperation and judicial assistance)**

6. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court), introducing the changes made by the Working Group to part seven of the draft statute, drew attention in particu-

lar to article 54, which had formerly been article 21, paragraph 3.

7. Following a discussion on the concept of custody as introduced in article 54 and of its precise content, the different situations to which it could apply and the problems of translating it into other languages, in which the CHAIRMAN, Mr. CRAWFORD (Chairman of the Working Group), Mr. PELLET, Mr. TOMUSCHAT, Mr. ROSENSTOCK, Mr. CALERO RODRIGUES and Mr. MAHIOU took part, the CHAIRMAN suggested that the translation into French of the word "custody", as contained in the International Covenant on Civil and Political Rights, namely, *détention*, should be used and that an explanation of the concept should be included in the commentary to the article.

*It was so agreed.*

8. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) proposed that the words "requested by the Court" at the end of article 53, paragraph 6, should be replaced by the words "necessary to ensure that the accused remains in its custody or control pending the decision of the Court".

*It was so agreed.*

9. Mr. PELLET said that article 56 seemed to involve too many formalities, since it limited the possibilities of cooperation by requiring, for example, a declaration or an arrangement. Instead of the words "States not parties to this Statute may assist ...", he would have preferred the words "The Court may request the States not parties to assist ...".

10. Mr. YANKOV said that the wording proposed by Mr. Pellet was too vague. If there was to be cooperation, it could not be achieved in the abstract. In his view, the modalities should be spelt out, particularly since the words "or other agreement with the Court" at the end of the article precluded any risk of limitation.

11. Following a discussion in which Mr. CRAWFORD (Chairman of the Working Group), Mr. ROSENSTOCK, Mr. GÜNEY, Mr. BOWETT, Mr. ROBINSON, Mr. MAHIOU, Mr. AL-BAHARNA and Mr. CALERO RODRIGUES took part, the CHAIRMAN noted that the majority view was that article 56 should remain as drafted.

*It was so agreed.*

*Part seven, as amended, was adopted.*

**PART EIGHT (Enforcement)**

12. Mr. PELLET said that he did not understand the meaning of the expression "recognition of judgements" in article 58. In his view, it would be clearer to provide that the States parties undertook to accept the legal consequences of the judgements of the court so far as they were concerned.

13. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that recognition of judgements was a civil

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *Ibid.*

law concept. Although the statute dealt with criminal matters, provision should be made for States to be under some form or other of obligation to recognize that a person had been found guilty, regardless of the consequences.

14. The CHAIRMAN said that article 58 was the outcome of a compromise which had been obtained only with great difficulty in the Working Group. Many members had raised objections, but the majority in the Working Group had finally supported its wording.

15. Mr. ROSENSTOCK said that the objections raised in the Working Group and in plenary should be reflected in the commentary.

*Part eight was adopted.*

#### ANNEX

*The annex was adopted.*

*The draft statute for an international criminal court, as a whole, as amended, was adopted.*

#### DRAFT COMMENTARIES TO THE ARTICLES OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

16. The CHAIRMAN invited the Commission to consider 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).

17. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) proposed that the secretariat should be requested, in consultation with the Chairman of the Working Group, to incorporate the necessary changes in the commentaries to reflect the decisions on the articles of the statute taken at the preceding meeting. Once the draft commentaries had been adopted, the secretariat would replace the term "Working Group" by the word "Commission".

*It was so agreed.*

18. Mr. PELLET said that he would like his many reservations on the various provisions of the statute and his objection to article 22 to be reflected not only in the relevant summary records, but also in the report of the Commission.

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

Commentary to the preamble

*The commentary to the preamble was adopted.*

Commentary to part one

19. Mr. PELLET said that the commentary to article 2 involved two problems of translation. In paragraph (2), the words "One view" were translated into French by the words *Un membre*. In paragraph (7) of the commentary to that article, the words "overall willingness of States" were rendered by the words *les États sont tous*

*disposés*, whereas what was meant was a large or very large number of States, not all States. Also, paragraph (2) of the commentary to article 4 stated that the court *est censée bénéficier*, whereas it should have stated *la Cour doit*.

20. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) proposed that Mr. Pellet's proposed change should also be incorporated in the English version of paragraph (2) of the commentary to article 4 by replacing the words "The Court is intended" by the words "The Court should".

*It was so agreed.*

Commentary to part two

21. Mr. de SARAM proposed that the end of the last sentence of paragraph (2) of the commentary to article 12 should be deleted and that it should end with the words "or any other source". As the prosecutor was independent, he could not act as a representative of the international community or even of States parties.

*It was so agreed.*

Commentary to part three

22. Mr. EIRIKSSON said that, in his view, paragraph (3) of the commentary to article 21 should be amended to take account of the importance which was attached in that article to genocide and which was the main difference as compared to the corresponding provision of the draft statute at the forty-fifth session in 1993.<sup>4</sup> He therefore proposed that the following sentence should be added after the first sentence: "First, it treats genocide separately (see para. (6) below)". The second sentence would start with the following words: "Secondly, it focuses, in paragraph 1 (b), on the custodial State ...". The third sentence would be reworded to read: "Thirdly, that subparagraph requires acceptance by the State on whose territory the crime was committed, thus applying to all crimes, other than genocide, the requirement in the 1993 draft statute for crimes under general international law". The last sentence would start with the following words: "Fourthly, it also requires, in such cases, the acceptance ...".

*It was so agreed.*

23. Mr. EIRIKSSON, referring to the second sentence of paragraph (1) of the commentary to article 23, proposed that the word "instead", in the fifth line, should be deleted and that the phrase "for example, in circumstances where it might have authority to establish an ad hoc tribunal under Chapter VII of the Charter of the United Nations" should be placed at the end of the sentence, the word "it" in that phrase being replaced by the words "the Council".

*It was so agreed.*

24. Mr. PELLET, referring to paragraph (15) of the commentary to article 20, said that, in his view, the sixth

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

sentence, starting with the words “Also such a listing”, should be amended. The view it reflected was too unilateral, inasmuch as multilateral treaties merely codified principles of customary international law.

25. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) proposed that the sentence should be reworded to read: “Also such a listing raised the difficult question as to the relationship between multilateral treaty norms and customary international law.”

*It was so agreed.*

26. Mr. PELLET said that, in his view, the commentary to article 22 was not nearly “incisive” enough compared to the debates that had taken place in the Commission. The Chairman of the Working Group had stated that he was going to amend the commentary. It was to be hoped that, when he did so, he would note that several members of the Commission had expressed reservations on article 22 itself and that he would indicate the reasons for those reservations, as well as the fact that one member had stated that he could not agree to the article, since, in his view, it would enable States to have the benefit of being parties to the statute without really assuming any obligations.

27. Mr. MAHIU, noting that the members of the Commission had been opposed to paragraph 3 of article 23, proposed that the words “Some members of the Working Group” in paragraph (13) of the commentary to that article should be replaced by the words “Several members of the Commission”.

*It was so agreed.*

28. Mr. ROBINSON said that the Commission had adopted a compromise proposal on article 20 in which it had been decided not to refer expressly to crimes under general international law. He noted, however, that the commentary to article 20 had not been amended accordingly.

29. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that Mr. Robinson’s point was well taken. He proposed that, to take account of that point, the side headings before paragraph (3) and paragraph (18) of the commentary to article 20 should be deleted and that, in paragraph (18), the words “The bulk” should be replaced by the words “The remainder”.

*It was so agreed.*

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

Commentary to part four

30. Mr. PELLET said that he was surprised to find a reference to Article 100 of the Charter of the United Nations in paragraph (2) of the commentary to article 31. That reference seemed to confirm the position which he had taken in the matter, but which had been criticized by members of the Commission. He was surprised at such a lack of consistency.

31. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal

court) proposed that the last sentence of paragraph (2) of the commentary to article 31 should be deleted.

*It was so agreed.*

Commentary to part five

32. Mr. MAHIU said that it would be advisable, with regard to the applicable law, the subject of article 33, to refer in the commentary to the link between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind, as in the commentary to article 20. He therefore proposed that a new paragraph (4) should be added to the commentary to article 33, reading:

“(4) As in the case of article 20, several members noted that a link should be established between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind, since, in their view, the law to be applied by the Court should derive from the Code.”

*It was so agreed.*

33. Mr. PELLET, noting that the commentary to article 33 was one of those the Chairman of the Working Group would have to recast, said it was to be hoped that, in doing so, he would also indicate that some members had expressed strong reservations about subparagraph (c) of article 33 and make it clear, in paragraph (3) of the commentary, that, in the view of some members, the references made by international law to national law did not require the court to apply provisions of national law. He might also wish to add that one member had regretted that the principle set forth in the last sentence of paragraph (3) of the commentary was not embodied in article 33 itself.

34. In his view, the idea expressed in paragraph (5) of the commentary to article 47 was unacceptable, even irrational. He therefore suggested that a sentence should be added to paragraph (5) reading: “Other members considered that, since the Court had jurisdiction only to try particularly serious crimes, that idea should not be adopted.”

*It was so agreed.*

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

#### **CHAPTER I. Organization of the session (A/CN.4/L.495/Rev.1)**

35. The CHAIRMAN invited the Commission to consider chapter I of the draft report (A/CN.4/L.495/Rev.1).

- A. Membership
- B. Officers
- C. Drafting Committee
- D. Working Group on a draft statute for an international criminal court

\* Resumed from the 2373rd meeting.

## 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 Mankind<sup>1</sup> (concluded) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,<sup>2</sup> A/CN.4/460,<sup>3</sup> 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.*

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

<sup>2</sup> Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

<sup>3</sup> *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.*

## Paragraph (6)

9. Mr. TOMUSCHAT said that it was not wise to refer to the *Trail Smelter* case in connection with risk since harm had actually been caused in that case. The question of risk arose before harm took place. The same comment applied to the reference to the *Lake Lanoux* case and, in that connection, the words “has been” in the third sentence should be replaced by the words “can be”.

10. Mr. BARBOZA (Special Rapporteur) said that the purpose of paragraph (6) was to indicate that, over 60 years earlier, an arbitral tribunal had considered it necessary to set a threshold and had used the words “serious consequences” in order to do so.

11. Mr. ROSENSTOCK proposed that the second sentence should be replaced by the following sentence: “The idea of a threshold is illustrated by the threshold chosen in the *Trail Smelter* award, which used the words ‘serious consequences’.”

12. Following a discussion in which Mr. de SARAM, Mr. PELLET, Mr. ROSENSTOCK and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN proposed that the Special Rapporteur should be requested, with the secretariat’s assistance, to reword the second and third sentences on the basis of the proposals by Mr. Rosenstock and Mr. Tomuschat.

*It was so agreed.*

*Paragraph (6) was adopted on that understanding.*

## Paragraphs (7) and (8)

*Paragraphs (7) and (8) were adopted.*

## Paragraph (9)

13. Mr. BARBOZA (Special Rapporteur) proposed that the beginning of the first sentence should be amended to read: “In paragraph (c), the term ‘State of origin’ is introduced to refer to the State in the territory . . . .” The last two sentences of the paragraph would be deleted and replaced by the following: “See commentary to article 1, paragraphs (4) to (20).”

*It was so agreed.*

*Paragraph (9), as amended, was adopted.*

*The commentary to article 2, as amended, was adopted.*

## Commentary to article 11 (Prior authorization) (A/CN.4/L.503/Add.1)

14. The CHAIRMAN said that it should be explained why the Commission was jumping from article 2 to 11.

15. Mr. YANKOV proposed that one or two sentences should be included for that purpose in paragraph 6 of the introduction to chapter V of the report.

*It was so agreed.*

## Paragraph (1)

16. Mr. ROSENSTOCK said that the last two sentences of paragraph (9) of the commentary to article 12

were extremely important and also applied to article 11 and subsequent articles. He therefore proposed that those sentences should be a separate paragraph of the commentary to article 11.

17. Mr. EIRIKSSON said that the two sentences in question related to the scope of the draft articles and that they therefore belonged in the commentary to article 1. He proposed that they should be included before the last sentence of paragraph (2) of the commentary to article 1 and that the last sentence of that paragraph should be reworded to read: “The definition of scope now contained in the article introduces four criteria.”

*It was so agreed.*

*Paragraph (1) was adopted.*

## Paragraph (2)

18. Mr. EIRIKSSON proposed that the beginning of the first sentence should be amended to read: “In the *Corfu Channel* case, the International Court of Justice held that a State.”

*It was so agreed.*

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

## Paragraph (3)

19. Mr. BARBOZA (Special Rapporteur) proposed that the words “for consistency” at the end of the first sentence should be deleted and that the second sentence should be amended to read: “The expression ‘activities referred to in article 1’ introduces all the requirements of that article for an activity to fall within the scope of these articles.”

*It was so agreed.*

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

*Paragraph (4) was adopted.*

*The commentary to article 11, as amended, was adopted.*

## Commentary to article 12 (Risk assessment)

## Paragraph (1)

*Paragraph (1) was adopted.*

## Paragraph (2)

20. Mr. TOMUSCHAT proposed that paragraph (2) should be deleted because there had not been any prior risk assessment in the *Trail Smelter* case.

21. Following a discussion in which Mr. BARBOZA (Special Rapporteur), Mr. PELLET, Mr. de SARAM, Mr. ROSENSTOCK and Mr. YANKOV took part, Mr. YANKOV proposed that paragraph (2) of the commentary to article 12 should be replaced by the following text:

“(2) Although the impact assessment in the *Trail Smelter* case may not directly relate to liability for

risk, it however emphasized the importance of an assessment of the consequences of an activity causing significant risk. The arbitral tribunal in that case indicated that the study undertaken by 'well-established and known scientists was 'probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke'.'

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

Paragraph (3)

22. Mr. PELLET said that the word "compatible" in the first sentence was too weak and proposed that it should be replaced by the word "consonant".

*It was so agreed.*

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

23. Mr. TOMUSCHAT proposed that the second sentence should be deleted. Practices in that regard varied widely and the sentence was a generalization that might be quite wrong.

*It was so agreed.*

24. Mr. YANKOV proposed that the words "or under applicable international instruments" should be added at the end of the third sentence.

*It was so agreed.*

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

25. Mr. BARBOZA (Special Rapporteur) proposed that the last sentence should be deleted.

*It was so agreed.*

26. Mr. ROSENSTOCK proposed that the words "However, the Commission feels that" at the beginning of the second sentence should be deleted.

*It was so agreed.*

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

27. Mr. PELLET, referring to the first sentence, said that there could be no obligations for States "to be aware". The sentence might, for example, read: "obliges a State to conduct investigations into the possible exercise in its territory ...".

28. Mr. TOMUSCHAT proposed that the Commission might use the word "ascertain", as in the draft articles

on the law of the non-navigational uses of international watercourses.

*It was so agreed.*

29. Mr. TOMUSCHAT proposed that the word "more" in the second sentence should be deleted and that the words "is compatible with" in the last line should be replaced by the word "reflects".

*It was so agreed.*

30. Mr. ROSENSTOCK said that, in the third sentence it would be better to cite the award in the *Trail Smelter* case than to paraphrase it. He therefore proposed that the beginning of the third sentence should be amended to read: "The Commission takes note in this respect that, in the *Trail Smelter* case, the arbitral tribunal stated that the Canadian Government had 'the duty . . . to see to it'", the rest of the sentence remaining unchanged.

*It was so agreed.*

31. The CHAIRMAN recalled that the Commission had agreed that paragraph (8) should come after paragraph (1) of the commentary to article 11.

*Paragraph (8) of the commentary to article 12, as amended, was adopted and inserted after paragraph (1) of the commentary to article 11.*

Paragraph (9)

*Paragraph (9) was adopted.*

*The commentary to article 12, as amended, was adopted.*

*Commentary to article 13 (Pre-existing activities)*

Paragraph (1)

32. Mr. CALERO RODRIGUES proposed that, in the first sentence, the words "by a State" should be replaced by the words "in a State".

*It was so agreed.*

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

33. Mr. BARBOZA (Special Rapporteur) proposed that, in the first sentence, the words "before these articles come into force for it" should be replaced by the words "when it assumes the obligations under these articles".

*It was so agreed.*

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

Paragraph (3)

34. Mr. BARBOZA (Special Rapporteur) proposed that the last sentence should be deleted.

*It was so agreed.*

35. Mr. TOMUSCHAT suggested that, in the fifth sentence, the words “to take no action to identify such activities or merely” should be deleted.

*It was so agreed.*

36. Mr. PELLET proposed that, throughout the paragraph, the words “when becoming parties to these articles” should be replaced by the words “when assuming the obligations under these articles”.

*It was so agreed.*

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

37. Mr. PELLET proposed that, in the last sentence, the word “other” should be deleted.

*It was so agreed.*

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

38. Mr. de SARAM proposed that the following text should be added as a new paragraph after paragraph (5):

“(6) The view was expressed by one member of the Commission that the last sentence of article 13 [reading ‘Pending authorization, the State may permit the continuation of the activity in question at its own risk.’] should be deleted; and if this were done, the words, having assumed the obligations contained in these articles’ at the beginning of article 13 would not be necessary. The words in question touched on the difficult question of liability, which had still to be considered by the Commission; and moreover seemed to predetermine whether the principles being formulated ought or ought not to be in treaty form. It had already been agreed by the Commission that the treaty or other form to be given to the principles should be considered at a later date.”

The subsequent paragraph would be renumbered.

*It was so agreed.*

*New paragraph (6) was adopted.*

Paragraph (6)

39. Mr. BARBOZA (Special Rapporteur) proposed that, at the end of the paragraph, the words “and therefore the second sentence of article 13 becomes applicable” should be replaced by the words “and the Commission has not yet explored the consequences of this situation. See paragraph (4) above”.

*It was so agreed.*

*Paragraph (6), as amended, was adopted.*

*The commentary to article 13, as amended, was adopted.*

*Commentary to article 14 (Measures to prevent or minimize the risk)*

Paragraph (1)

40. Mr. PELLET proposed that, throughout the French text, the words *diligence requise* and *diligence voulue* should be replaced by the words *diligence due*.

*It was so agreed.*

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

41. Mr. BARBOZA (Special Rapporteur) proposed that the first sentence should be amended to read: “An obligation of due diligence has been widely used and can be deduced from a number of international conventions, as well as from resolutions and reports . . .”

*It was so agreed.*

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

Paragraphs (3) to (8)

*Paragraphs (3) to (8) were adopted.*

Paragraph (9)

42. Mr. ROSENSTOCK suggested that the word “possible” at the end of the paragraph should be deleted.

*It was so agreed.*

*Paragraph (9), as amended, was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

43. Mr. de SARAM proposed that the following new paragraph (11) should be added to the commentary to article 14:

“(11) The reference made to the ‘due diligence’ criterion in the preceding paragraphs of the commentary to article 14 gave rise to concern on the part of one member of the Commission. It was, in his view, a difficult criterion to apply, particularly when facts were complex, and could lead to the unfortunate result that certain risks of transboundary harm, which would be included if the ‘all appropriate measures’ standard provided for in the text of article 14 was applied, may be excluded by the State of origin under the ‘due diligence’ criterion. The question of the appropriateness of the ‘due diligence’ criterion would need to be further examined in the course of the second reading of the articles by the Commission.”

*It was so agreed.*

*The commentary to article 14, as amended, was adopted.*

*Commentary to article 14 bis [20 bis] (Non-transference of risk)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

## Paragraph (4)

44. Mr. BARBOZA (Special Rapporteur) proposed that the beginning of paragraph (4) should be amended to read: "The expression 'simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another' is designed to preclude . . ." and that the following sentence should be added at the end of the sentence: "(see principle 13 of the Principles for Assessment and Control of Marine Pollution adopted by the Stockholm Conference in 1972)".

*It was so agreed.*

*Paragraph (4), as amended, was adopted.*

## Paragraph (5)

45. Mr. EIRIKSSON proposed that, in the second and third sentences, the words "is taken from" and "are also taken from" should be replaced by the words "is used in" and "are also used in".

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

*The commentary to article 14 bis [20 bis], as amended, was adopted.*

## Commentary to article 15 (Notification and information)

## Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

## Paragraph (3)

46. Mr. PELLET proposed that, in the second sentence, the words "This principle is well developed" should be replaced by the words "This principle is recognized" or "This principle has been applied".

*It was so agreed.*

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

47. Mr. PELLET proposed, as he had done for paragraph (3), that the words "is well developed" should be replaced by the words "is recognized" or "has been applied".

*It was so agreed.*

*Paragraph (4), as amended, was adopted.*

## Paragraph (5)

48. Mr. BARBOZA (Special Rapporteur) suggested that the words "Principle on" in the last sentence of the English text, should be deleted.

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

## Paragraphs (6) to (8)

*Paragraphs (6) to (8) were adopted.*

## Paragraph (9)

49. Mr. PELLET suggested that, for the sake of logic, the words "during the process of authorization or" in the first sentence should be deleted.

*It was so agreed.*

*Paragraph (9), as amended, was adopted.*

*The commentary to article 15, as amended, was adopted.*

## Commentary to article 16 (Exchange of information)

*The commentary to article 16 was adopted.*

## Commentary to article 16 bis (Information to the public) (A/CN.4/L.503/Add.2)

## Paragraph (1)

50. Mr. PELLET said that the words *leur propre public*, as used not only in that paragraph, but also throughout the body of article 16 bis, did not mean anything. He therefore proposed, if the Commission agreed, to try to find better wording.

*It was so agreed.*

*Paragraph (1), as amended, was adopted.*

## Paragraphs (2) to (5)

*Paragraphs (2) to (5) were adopted.*

## Paragraph (6)

51. Mr. TOMUSCHAT suggested that the word "only" in the last sentence should be deleted.

*It was so agreed.*

*Paragraph (6), as amended, was adopted.*

## Paragraphs (7) and (8)

*Paragraphs (7) and (8) were adopted.*

*The commentary to article 16 bis, as amended, was adopted.*

## Commentary to article 17 (National security and industrial secrets)

*The commentary to article 17 was adopted.*

## Commentary to article 18 (Consultations on preventive measures)

## Paragraph (1)

*Paragraph (1) was adopted.*

## Paragraph (2)

52. Mr. ROSENSTOCK suggested that, in the third sentence, the word "adequate" should be replaced by the word "appropriate".

*It was so agreed.*

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

Paragraphs (3) to (6)

*Paragraphs (3) to (6) were adopted.*

Paragraph (7)

53. Mr. BARBOZA (Special Rapporteur) suggested that, in the second sentence, the word "sentence" should be replaced by the word "clause".

*It was so agreed.*

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) to (11)

*Paragraphs (8) to (11) were adopted.*

Paragraph (12)

54. Mr. ROSENSTOCK said that he would like paragraph (12) or an additional paragraph to reflect the objection which had been raised with regard to the words "at its own risk" and which applied in the present case as well.

55. The CHAIRMAN said that the secretariat would ensure that that was done.

*Paragraph (12) was adopted on that understanding.*

*The commentary to article 18, as amended, was adopted.*

*Commentary to article 19 (Rights of the State likely to be affected)*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

Paragraph (8)

56. Mr. BARBOZA (Special Rapporteur) said that the third sentence should be amended in the following way to bring it into line with the text of the article: "For that reason the affected State may claim 'an equitable share' of the cost of the assessment."

*It was so agreed.*

*Paragraph (8), as amended, was adopted.*

*The commentary to article 19, as amended, was adopted.*

*Commentary to article 20 (Factors involved in an equitable balance of interests)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

57. Mr. BARBOZA (Special Rapporteur) suggested that, in the first sentence, the word "significant" should be added before the word "harm".

*It was so agreed.*

58. Mr. TOMUSCHAT proposed that the second sentence should be amended to read: "the Commission emphasized the particular importance of the protection of the environment".

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) to (8)

*Paragraphs (6) to (8) were adopted.*

Paragraph (9)

59. Mr. BARBOZA (Special Rapporteur) proposed that the beginning of the penultimate sentence should be amended to read: "These regulations might be much stricter than those applied in a State of origin which, because of its stage of development, might not have adopted."

*It was so agreed.*

*Paragraph (9), as amended, was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

*The commentary to article 20, as amended, was adopted.*

*The commentaries to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, as a whole, as amended, were adopted.*

*Section C.2, as amended, was adopted.*

*Chapter V, as a whole, as amended, was adopted.*

*The draft report of the Commission on the work of its forty-sixth session, as a whole, as amended, was adopted.*

### Closure of the session

60. After the usual exchange of courtesies, the CHAIRMAN declared the forty-sixth session of the International Law Commission closed.

*The meeting rose at 6 p.m.*





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