

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1995

*Volume I*

*Summary records  
of the meetings  
of the forty-seventh session  
2 May-21 July 1995*

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UNITED NATIONS





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UNITED NATIONS  
New York and Geneva, 1997



## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook . . .*, followed by the year (for example, *Yearbook . . . 1994*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

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

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

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.2378-A/CN.4/SR.22425), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/1995
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UNITED NATIONS PUBLICATION
<i>Sales No. E.97.V.1</i> ISBN 92-1-133517-5
<i>Complete set of two volumes:</i> ISBN 92-1-133520-5
ISSN 0082-8289



## CONTENTS

	Page		Page
<b>Members of the Commission .....</b>	<b>vii</b>	<b>2385th meeting</b>	
<b>Officers .....</b>	<b>vii</b>	<i>Wednesday, 17 May 1995, at 10.10 a.m.</i>	
<b>Agenda .....</b>	<b>viii</b>	Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> )	
<b>Abbreviations .....</b>	<b>ix</b>	Thirteenth report of the Special Rapporteur ( <i>continued</i> )	42
<b>Multilateral instruments cited in the present volume .....</b>	<b>x</b>	State succession and its impact on the nationality of natural and legal persons	
<b>Check-list of documents of the forty-seventh session .....</b>	<b>xv</b>	First report of the Special Rapporteur .....	46
<b>SUMMARY RECORDS OF THE 2378th TO 2425th MEETINGS</b>			
<b>2378th meeting</b>		<b>2386th meeting</b>	
<i>Tuesday, 2 May 1995, at 10.25 a.m.</i>		<i>Thursday, 18 May 1995, at 10.15 a.m.</i>	
Opening of the session .....	1	Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> )	
Tribute to the memory of Mr. Roberto Ago .....	1	Thirteenth report of the Special Rapporteur ( <i>continued</i> )	51
Election of officers .....	1	<b>2387th meeting</b>	
Adoption of the agenda .....	1	<i>Friday, 19 May 1995, at 10.30 a.m.</i>	
Filling of a casual vacancy (article 11 of the statute) .....	2	Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> )	
Organization of the work of the session .....	2	Thirteenth report of the Special Rapporteur ( <i>concluded</i> )	52
<b>2379th meeting</b>		State succession and its impact on the nationality of natural and legal persons ( <i>continued</i> )	
<i>Wednesday, 3 May 1995, at 10.05 a.m.</i>		First report of the Special Rapporteur ( <i>continued</i> ) .....	53
Draft Code of Crimes against the Peace and Security of Mankind		<b>2388th meeting</b>	
Thirteenth report of the Special Rapporteur .....	2	<i>Tuesday, 23 May 1995, at 10.05 a.m.</i>	
Election of officers ( <i>concluded</i> ) .....	9	State succession and its impact on the nationality of natural and legal persons ( <i>continued</i> )	
Organization of the work of the session ( <i>continued</i> ) .....	9	First report of the Special Rapporteur ( <i>continued</i> ) .....	55
<b>2380th meeting</b>		<b>2389th meeting</b>	
<i>Thursday, 4 May 1995, at 10.10 a.m.</i>		<i>Wednesday, 24 May 1995, at 10.10 a.m.</i>	
Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> )		State succession and its impact on the nationality of natural and legal persons ( <i>continued</i> )	
Thirteenth report of the Special Rapporteur ( <i>continued</i> )	10	First report of the Special Rapporteur ( <i>continued</i> ) .....	63
<b>2381st meeting</b>		<b>2390th meeting</b>	
<i>Friday, 5 May 1995, at 10.10 a.m.</i>		<i>Friday, 26 May 1995, at 10.05 a.m.</i>	
Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> )		State succession and its impact on the nationality of natural and legal persons ( <i>continued</i> )	
Thirteenth report of the Special Rapporteur ( <i>continued</i> )	14	First report of the Special Rapporteur ( <i>continued</i> ) .....	68
<b>2382nd meeting</b>		Organization of the work of the session ( <i>continued</i> ) .....	74
<i>Wednesday, 10 May 1995, at 10.05 a.m.</i>		<b>2391st meeting</b>	
Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> )		<i>Tuesday, 30 May 1995, at 10.10 a.m.</i>	
Thirteenth report of the Special Rapporteur ( <i>continued</i> )	19	State succession and its impact on the nationality of natural and legal persons ( <i>continued</i> )	
<b>2383rd meeting</b>		First report of the Special Rapporteur ( <i>concluded</i> ) .....	76
<i>Thursday, 11 May 1995, at 10.05 a.m.</i>		Cooperation with other bodies	
Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> )		Statement by the Observer for the Asian-African Legal Consultative Committee .....	78
Thirteenth report of the Special Rapporteur ( <i>continued</i> )	27	State responsibility	
<b>2384th meeting</b>		Seventh report of the Special Rapporteur .....	81
<i>Tuesday, 16 May 1995, at 10.05 a.m.</i>		<b>2392nd meeting</b>	
Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> )		<i>Wednesday, 31 May 1995, at 10.10 a.m.</i>	
Thirteenth report of the Special Rapporteur ( <i>continued</i> )	32	State responsibility ( <i>continued</i> )	
		Seventh report of the Special Rapporteur ( <i>continued</i> ) .....	88

	Page
<b>2393rd meeting</b>	
Thursday, 1 June 1995, at 10.20 a.m.	
Organization of the work of the session ( <i>continued</i> ) .....	96
State responsibility ( <i>continued</i> ) .....	
Seventh report of the Special Rapporteur ( <i>continued</i> ) .....	96
<b>2394th meeting</b>	
Friday, 2 June 1995, at 10.05 a.m.	
State responsibility ( <i>continued</i> ) .....	
Seventh report of the Special Rapporteur ( <i>continued</i> ) .....	102
<b>2395th meeting</b>	
Tuesday, 6 June 1995, at 10.05 a.m.	
State responsibility ( <i>continued</i> ) .....	
Seventh report of the Special Rapporteur ( <i>continued</i> ) .....	109
<b>2396th meeting</b>	
Wednesday, 7 June 1995, at 10.10 a.m.	
State responsibility ( <i>continued</i> ) .....	
Seventh report of the Special Rapporteur ( <i>continued</i> ) .....	120
<b>2397th meeting</b>	
Thursday, 8 June 1995, at 10.10 a.m.	
State responsibility ( <i>continued</i> ) .....	
Seventh report of the Special Rapporteur ( <i>continued</i> ) .....	128
International liability for injurious consequences arising out of acts not prohibited by international law .....	
Tenth and eleventh reports of the Special Rapporteur .....	135
<b>2398th meeting</b>	
Friday, 9 June 1995, at 10.25 a.m.	
State responsibility ( <i>continued</i> ) .....	
Seventh report of the Special Rapporteur ( <i>continued</i> ) .....	138
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>continued</i> ) .....	
Tenth and eleventh reports of the Special Rapporteur ( <i>continued</i> ) .....	139
Closure of the International Law Seminar .....	143
Other business .....	143
<b>2399th meeting</b>	
Tuesday, 13 June 1995, at 10.05 a.m.	
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>continued</i> ) .....	
Tenth and eleventh reports of the Special Rapporteur ( <i>concluded</i> ) .....	144
<b>2400th meeting</b>	
Wednesday, 14 June 1995, at 10.15 a.m.	
The law and practice relating to reservations to treaties .....	
First report of the Special Rapporteur .....	147
<b>2401st meeting</b>	
Friday, 16 June 1995, at 10.10 a.m.	
The law and practice relating to reservations to treaties ( <i>continued</i> ) .....	
First report of the Special Rapporteur ( <i>continued</i> ) .....	153
Organization of the work of the session ( <i>continued</i> ) .....	155
<b>2402nd meeting</b>	
Tuesday, 20 June 1995, at 10.10 a.m.	
The law and practice relating to reservations to treaties ( <i>continued</i> ) .....	
First report of the Special Rapporteur ( <i>continued</i> ) .....	156
<b>2403rd meeting</b>	
Wednesday, 21 June 1995, at 10.05 a.m.	
The law and practice relating to reservations to treaties ( <i>continued</i> ) .....	
First report of the Special Rapporteur ( <i>continued</i> ) .....	162
Organization of the work of the session ( <i>continued</i> ) .....	164

	Page
<b>2404th meeting</b>	
Thursday, 22 June 1995, at 10.15 a.m.	
The law and practice relating to reservations to treaties ( <i>continued</i> ) .....	
First report of the Special Rapporteur ( <i>continued</i> ) .....	165
Organization of the work of the session ( <i>continued</i> ) .....	172
<b>2405th meeting</b>	
Tuesday, 27 June 1995, at 10.10 a.m.	
State responsibility ( <i>continued</i> ) .....	
Seventh report of the Special Rapporteur ( <i>continued</i> ) .....	173
<b>2406th meeting</b>	
Wednesday, 28 June 1995, at 10.30 a.m.	
State responsibility ( <i>continued</i> ) .....	
Seventh report of the Special Rapporteur ( <i>concluded</i> ) .....	181
The law and practice relating to reservations to treaties ( <i>continued</i> ) .....	
First report of the Special Rapporteur ( <i>continued</i> ) .....	186
<b>2407th meeting</b>	
Thursday, 29 June 1995, at 10.15 a.m.	
The law and practice relating to reservations to treaties ( <i>continued</i> ) .....	
First report of the Special Rapporteur ( <i>continued</i> ) .....	188
Cooperation with other bodies ( <i>concluded</i> ) .....	
Statement by the Observer for the Inter-American Juridical Committee .....	193
<b>2408th meeting</b>	
Friday, 30 June 1995, at 10.15 a.m.	
Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> ) .....	
Draft articles proposed by the Drafting Committee on second reading .....	196
<b>2409th meeting</b>	
Monday, 3 July 1995, at 3.15 p.m.	
Statement by the Secretary-General .....	206
Draft Code of Crimes against the Peace and Security of Mankind ( <i>continued</i> ) .....	
Draft articles proposed by the Drafting Committee on second reading ( <i>continued</i> ) .....	207
<b>2410th meeting</b>	
Tuesday, 4 July 1995, at 10.15 a.m.	
Draft Code of Crimes against the Peace and Security of Mankind ( <i>concluded</i> ) .....	
Draft articles proposed by the Drafting Committee on second reading ( <i>concluded</i> ) .....	208
<b>2411th meeting</b>	
Wednesday, 5 July 1995, at 10.10 a.m.	
Visit by a member of the International Court of Justice .....	213
State succession and its impact on the nationality of natural and legal persons ( <i>continued</i> ) .....	
Report of the Working Group .....	213
<b>2412th meeting</b>	
Thursday, 6 July 1995, at 10.15 a.m.	
Visit by a member of the International Court of Justice .....	220
The law and practice relating to reservations to treaties ( <i>continued</i> ) .....	
First report of the Special Rapporteur ( <i>concluded</i> ) .....	220
<b>2413th meeting</b>	
Friday, 7 July 1995, at 10.15 a.m.	
State succession and its impact on the nationality of natural and legal persons ( <i>concluded</i> ) .....	
Report of the Working Group ( <i>concluded</i> ) .....	228
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>continued</i> ) .....	
Consideration of the draft articles proposed by the Drafting Committee at the forty-seventh session .....	232

	Page
<b>2414th meeting</b>	
<i>Tuesday, 11 July 1995, at 10.10 a.m.</i>	
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>continued</i> )	
Consideration of the draft articles proposed by the Drafting Committee at the forty-seventh session ( <i>continued</i> ) .....	236
<b>2415th meeting</b>	
<i>Wednesday, 12 July 1995, at 10.15 a.m.</i>	
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>continued</i> )	
Consideration of the draft articles proposed by the Drafting Committee at the forty-seventh session ( <i>concluded</i> ) .....	242
<b>2416th meeting</b>	
<i>Thursday, 13 July 1995, at 10.10 a.m.</i>	
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>concluded</i> )	
Report of the Working Group on the identification of dangerous activities .....	249
The law and practice relating to reservations to treaties ( <i>concluded</i> ) .....	250
Programme, procedures and working methods of the Commission, and its documentation	
Report of the Planning Group .....	250
<b>2417th meeting</b>	
<i>Friday, 14 July 1995, at 10.15 a.m.</i>	
State responsibility ( <i>continued</i> )	
Draft articles proposed by the Drafting Committee .....	252
<b>2418th meeting</b>	
<i>Monday, 17 July 1995, at 10.10 a.m.</i>	
Draft report of the Commission on the work of its forty-seventh session .....	263
Chapter II. Draft Code of Crimes against the Peace and Security of Mankind	
A. Introduction .....	263
B. Consideration of the topic at the present session ...	263
<b>2419th meeting</b>	
<i>Monday, 17 July 1995, at 3.15 p.m.</i>	
Draft report of the Commission on the work of its forty-seventh session ( <i>continued</i> )	
Chapter IV. International liability for injurious consequences arising out of acts not prohibited by international law .....	269
A. Introduction .....	269
B. Consideration of the topic at the present session ...	269
C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law .....	269
Chapter V. State succession and its impact on the nationality of natural and legal persons	
A. Introduction .....	269
B. Consideration of the topic at the present session ...	269
Chapter II. Draft Code of Crimes against the Peace and Security of Mankind ( <i>concluded</i> )	
B. Consideration of the topic at the present session ( <i>concluded</i> ) .....	272
Chapter III. State responsibility	
A. Introduction .....	273
B. Consideration of the topic at the present session ...	273
<b>2420th meeting</b>	
<i>Tuesday, 18 July 1995, at 10.10 a.m.</i>	
State responsibility ( <i>continued</i> )	
Draft articles proposed by the Drafting Committee ( <i>continued</i> ) .....	274

	Page
<b>2421st meeting</b>	
<i>Tuesday, 18 July 1995, at 3.15 p.m.</i>	
State responsibility ( <i>concluded</i> )	
Draft articles proposed by the Drafting Committee ( <i>concluded</i> ) .....	280
Draft report of the Commission on the work of its forty-seventh session ( <i>continued</i> )	
Chapter III. State responsibility ( <i>continued</i> )	
B. Consideration of the topic at the present session ( <i>continued</i> ) .....	282
<b>2422nd meeting</b>	
<i>Wednesday, 19 July 1995, at 3.25 p.m.</i>	
Draft report of the Commission on the work of its forty-seventh session ( <i>continued</i> )	
Chapter VI. The law and practice relating to reservations to treaties .....	285
A. Introduction .....	285
B. Consideration of the topic at the present session ...	285
Chapter I. Organization of the session .....	288
A. Membership	
B. Officers	
C. Drafting Committee	
D. Working group on State succession and its impact on the nationality of natural and legal persons	
E. Working group on the identification of dangerous activities under the topic "International liability for injurious consequences of acts not prohibited by international law"	
F. Secretariat	
G. Agenda	
H. General description of the work of the Commission at its forty-seventh session .....	288
Chapter VII. Other decisions and recommendations of the Commission	
A. Programme, procedures and working methods of the Commission, and its documentation .....	288
B. Cooperation with other bodies	
C. Date and place of the forty-eighth session	
D. Representation at the fiftieth session of the General Assembly	
E. International Law Seminar .....	289
Visit by a member of the International Court of Justice .....	289
Organization of the work of the session ( <i>continued</i> ) .....	289
<b>2423rd meeting</b>	
<i>Thursday, 20 July 1995, at 3.20 p.m.</i>	
Draft report of the Commission on the work of its forty-seventh session ( <i>continued</i> )	
Chapter IV. International liability for injurious consequences arising out of acts not prohibited by international law ( <i>continued</i> ) .....	290
B. Consideration of the topic at the present session ( <i>concluded</i> )	
Establishment of a working group on the identification of dangerous activities .....	290
Chapter III. State responsibility ( <i>continued</i> )	
C. Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session	
Draft commentaries to articles 13 and 14 of part two .....	291
Commentary to article 13 .....	291
Commentary to article 14 .....	294
<b>2424th meeting</b>	
<i>Friday, 21 July 1995, at 10.20 a.m.</i>	
Draft report of the Commission on the work of its forty-seventh session ( <i>continued</i> )	
Chapter III. State responsibility ( <i>continued</i> ) .....	296
B. Consideration of the topic at the present session ( <i>continued</i> )	
Consideration by the Commission of the texts adopted by the Drafting Committee for inclusion in part three of the draft on State responsibility ....	296

	<i>Page</i>		<i>Page</i>
C. Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session ( <i>continued</i> )		Commentary to article 1 .....	305
Draft commentaries to articles 13 and 14 of part two ( <i>continued</i> )		Commentary to article 2 .....	306
Commentary to article 14 ( <i>continued</i> ) .....	296	Commentary to article 3 .....	306
Organization of the work of the session ( <i>concluded</i> ) .....	302	Commentary to article 4 .....	306
		Commentary to article 5 .....	306
<b>2425th meeting</b>		Commentary to article 6 .....	307
<i>Friday, 21 July 1995, at 3.15 p.m.</i>		Commentary to article 7 .....	307
Draft report of the Commission on the work of its forty-seventh session ( <i>concluded</i> )		Annex	
Chapter III. State responsibility ( <i>concluded</i> )		Commentary to article 1 .....	307
C. Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session ( <i>continued</i> )		Commentary to article 2 .....	307
Draft commentaries to articles 13 and 14 of part two ( <i>concluded</i> )		Chapter IV. International liability for injurious consequences arising out of acts not prohibited by international law ( <i>concluded</i> )	
Commentary to article 14 ( <i>concluded</i> ) .....	303	C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law	
Draft articles, with commentaries, adopted by the Commission for inclusion in part three and the annex thereto		1. Text of the draft articles provisionally adopted so far by the Commission on first reading .....	308
Introduction .....	303	2. Text of draft articles A [6], B [8 and 9], C [9 and 10] and D [7], with commentaries thereto, provisionally adopted by the Commission at its forty-seventh session	
		Commentary to article A [6] .....	308
		Commentary to article B [8 and 9] .....	308
		Commentary to article C [9 and 10] .....	309
		Commentary to article D [7] .....	310
		Closure of the session .....	311

## 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. Igor IVANOVICH LUKASHUK	Russian Federation
Mr. Gaetano ARANGIO-RUIZ	Italy	Mr. Ahmed MAHIOU	Algeria
Mr. Julio BARBOZA	Argentina	Mr. Vaclav MIKULKA	Czech Republic
Mr. Mohamed BENNOUNA	Morocco	Mr. Guillaume PAMBOU-TCHIVOUNDA	Gabon
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Mr. Andreas JACOVIDES	Cyprus	Mr. Chusei YAMADA	Japan
Mr. Peter KABATSI	Uganda	Mr. Alexander YANKOV	Bulgaria

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## OFFICERS

*Chairman:* Mr. Pemmaraju Sreenivasa RAO  
*First Vice-Chairman:* Mr. Guillaume PAMBOU-TCHIVOUNDA  
*Second Vice-Chairman:* Mr. Mehmet GÜNEY  
*Chairman of the Drafting Committee:* Mr. Alexander YANKOV  
*Rapporteur:* Mr. Francisco VILLAGRÁN KRAMER

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*Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General and Ms. 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 2378th meeting, held on 2 May 1995:

1. Filling of a casual vacancy (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. International liability for injurious consequences arising out of acts not prohibited by international law.
6. The law and practice relating to reservations to treaties.
7. State succession and its impact on the nationality of natural and legal persons.
8. Programme, procedures and working methods of the Commission, and its documentation.
9. Cooperation with other bodies.
10. Date and place of the forty-eighth session.
11. Other business.

## ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organisation
IMO	International Maritime Organization
OAS	Organization of American States
OAU	Organization of African Unity
OSCE	Organization on Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNHCR	Office of the United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research
WTO	World Trade Organization

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

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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.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	<i>Ibid.</i> , vol. 660, p. 195.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (23 March 1976)	<i>Ibid.</i>
Second Optional Protocol to the International Covenant on Civil and Political Rights (15 December 1989)	<i>Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49, resolution 44/128, annex.</i>
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, p. 243.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, p. 13.
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>
Inter-American Convention on Forced Disappearance of Persons (Belen, 9 June 1994)	OAS, document OEA/Ser.A/55 (SEPF).

### NATIONALITY AND STATELESSNESS

Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930)	League of Nations, <i>Treaty Series</i> , vol. CLXXIX, p. 89.
Protocol relating to a Certain Case of Statelessness	<i>Ibid.</i> , p. 115.
Protocol relating to Military Obligations in Certain Cases of Dual Nationality	United Nations, <i>Legislative Series, Laws concerning Nationality</i> (Sales No. 1954.V.1), p. 572.
Special Protocol concerning Statelessness	<i>Ibid.</i> , p. 577.



- Convention on Nationality (Cairo, 23 September 1952) League of Arab States, document of the Sixteenth Regular Session.
- Convention relating to the Status of Stateless Persons (New York, 28 September 1954) United Nations, *Treaty Series*, vol. 360, p. 117.
- Convention on the Reduction of Statelessness (New York, 30 August 1961) Ibid., vol. 989, p. 176.
- Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 6 May 1963) Ibid., vol. 634, p. 221.

#### PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS

- Convention regarding Diplomatic Officers (Havana, 20 February 1928) League of Nations, *Treaty Series*, vol. CLV, p. 259.
- Convention regarding Consular Agents (Havana, 20 February 1928) Ibid., p. 289.
- Convention on Rights and Duties of States (Montevideo, 26 December 1933) Ibid., vol. CLXV, p. 19.
- Convention on the Privileges and Immunities of the United Nations (London and New York, 13 February 1946) United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).
- 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 Special Missions (New York, 8 December 1969) Ibid., vol. 1400, p. 231.
- 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.
- Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

#### ENVIRONMENT AND NATURAL RESOURCES

- Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991) ECE, *Environmental Conventions*, United Nations publication, 1992, p. 95.
- Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992) *International Legal Materials* (Washington, D.C.), vol. XXXI, No. 6 (November 1992), p. 1335.

#### LAW OF THE SEA

- Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 516, p. 205.

Convention on the High Seas (Geneva, 29 April 1958)	Ibid., vol. 450, p. 11.
Convention on the Continental Shelf (Geneva, 29 April 1958)	Ibid., vol. 499, p. 311.
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)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (Sales No. E.84.V.3), p. 151, document A/CONF.62/122.A/CONF.129/15.

#### LAW APPLICABLE IN ARMED CONFLICT

Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 2 September 1947)	United Nations, <i>Treaty Series</i> , vol. 21, p. 77.
Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) (San José, 26 July 1965)	OAS, <i>Treaty Series</i> , Nos. 46 and 61.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, pp. 31 <i>et seq.</i>
and Protocols I and II (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 <i>et seq.</i>
International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)	<i>Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49</i> , resolution 44/34, annex.

#### LAW OF TREATIES

Convention on Treaties (Havana, 20 February 1928)	OAS, <i>Law and Treaty Series</i> , No. 34.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, <i>Treaty Series</i> , vol. 1155, p. 331.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	<i>Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978</i> , vol. III (United Nations publication, Sales No. E.79.V.10).
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, <i>Juridical Yearbook 1983</i> (Sales No. E.90.V.1), p.139.

- 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.

## LIABILITY

- Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) United Nations, *Treaty Series*, vol. 956, p. 251.  
and Additional Protocol (Paris, 28 January 1964) Ibid., p. 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, D.C., 29 March 1972) Ibid., vol. 961, p. 187.
- 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.

## DISARMAMENT

- Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow, Washington, D.C., 1 July 1968) United Nations, *Treaty Series*, vol. 729 p. 161.
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (London, Moscow and Washington, D.C., 10 April 1972) Ibid., vol. 1015, p. 163.
- Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976) Ibid., vol. 1108, p. 151.
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Paris, 13 January 1993) *International Legal Materials* (Washington, D.C.), vol. XXXII, No. 3 (May 1993), p. 804.

## CIVIL AVIATION

- Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 7 October 1952) United Nations, *Treaty Series*, vol. 310, p. 181.

## PEACEFUL SETTLEMENT OF DISPUTES

- General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928) League of Nations, *Treaty Series*, vol. XCIV, p. 57.
- Revised General Act for the Pacific Settlement of International Disputes (New York, 28 April 1949) United Nations, *Treaty Series*, vol. 71, p. 101.

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

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.

GENERAL INTERNATIONAL LAW

Convention on Private International Law (Havana, 20 February 1928) League of Nations, *Treaty Series*, vol. LXXXVI, p. 111.

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

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/463	Provisional agenda	Mimeographed. For agenda as adopted, see p. [viii] above.
A/CN.4/464 and Add.1-2	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-ninth session of the General Assembly	Mimeographed.
A/CN.4/465	Filling of a casual vacancy: note by the Secretariat	Reproduced in <i>Yearbook</i> . . . 1995, vol. II (Part One).
A/CN.4/465/Add.1	<i>Idem</i> : addenda to the note by the Secretariat: candidate's curriculum vitae	Mimeographed.
A/CN.4/466 [and Corr.1]	Thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in <i>Yearbook</i> . . . 1995, vol. II (Part One).
A/CN.4/467	First report on State succession and its impact on the nationality of natural and legal persons, by Mr. Vaclav Mikulka, Special Rapporteur	<i>Idem</i> .
A/CN.4/468	Eleventh 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.4/469 [and Corr.1] and Add.1-2	Seventh report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem</i> .
A/CN.4/470 [and Corr.1 and 2]	First report on the law and practice relating to reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem</i> .
A/CN.4/471	Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law: Study prepared by the Secretariat	<i>Idem</i> .
A/CN.4/L.505	Draft Code of Crimes against the Peace and Security of Mankind. Proposal by Mr. E. Vargas Carreño: article 21	Mimeographed.
A/CN.4/L.506 and [Corr.1]	Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Drafting Committee on second reading: Parts One (arts. 1, 2, 4, 5, 5 <i>bis</i> , 6, 6 <i>bis</i> , and 8-13) and Two (arts. 15-19)	See summary record of the 2408th meeting (para. 1).
A/CN.4/L.507	Report of the Working Group on State succession and its impact on the nationality of natural and legal persons	Reproduced in <i>Yearbook</i> . . . 1995, vol. II (Part Two), annex.
A/CN.4/L.508	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-seventh session of the Commission: articles A [6], B [7], C [8 and 9] and D [9 and 10]	Mimeographed.
A/CN.4/L.509 [and Corr.1]	Draft report of the International Law Commission on the work of its forty-seventh session: chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem</i> . For the adopted text see <i>Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10)</i> . The final text appears in <i>Yearbook</i> . . . 1995, vol. II (Part Two).
A/CN.4/L.510	International liability for injurious consequences arising out of acts not prohibited by international law: Report of the Working Group on dangerous activities	Mimeographed.
A/CN.4/L.511 and Add.1	Draft report of the International Law Commission on the work of its forty-seventh session: chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> . For the adopted text see <i>Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10)</i> . The final text appears in <i>Yearbook</i> . . . 1995, vol. II (Part Two).

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.512 and Add.1	<i>Idem</i> : chapter III (State responsibility)	<i>Idem</i> .
A/CN.4/L.513	State responsibility. Titles and texts of articles adopted by the Drafting Committee: Part Three and annex	See summary record of the 2417th meeting (para. 1).
A/CN.4/L.514	Draft report of the International Law Commission on the work of its forty-seventh session: chapter V (State succession and its impact on the nationality of natural and legal persons)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10)</i> . The final text appears in <i>Yearbook... 1995</i> , vol. II (Part Two).
A/CN.4/L.515	Report of the Planning Group: Programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.516	Draft report of the International Law Commission on the work of its forty-seventh session: chapter VI (The law and practice relating to reservations to treaties)	<i>Idem</i> . For the adopted text see <i>Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10)</i> . The final text appears in <i>Yearbook... 1995</i> , vol. II (Part Two).
A/CN.4/L.517	<i>Idem</i> : chapter I (Organization of the session)	<i>Idem</i> .
A/CN.4/L.518	<i>Idem</i> : chapter VII (Other decisions and recommendations of the Commission)	<i>Idem</i> .
A/CN.4/L.519	<i>Idem</i> : chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.520	<i>Idem</i> : chapter III (State responsibility): Draft articles, with commentaries, adopted by the Commission for inclusion in part three and the annex thereto	<i>Idem</i> .
A/CN.4/L.521 and Add.1	<i>Idem</i> : Draft commentaries to articles 11, 13 and 14 of part two	<i>Idem</i> .
A/CN.4/SR.2378- A/CN.4/SR.2425	Provisional summary records of the 2378th to 2425th meetings	<i>Idem</i> . The final text appears in the present volume.

# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FORTY-SEVENTH SESSION

*Held at Geneva from 2 May to 21 July 1995*

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### 2378th MEETING

*Tuesday, 2 May 1995, at 10.25 a.m.*

*Acting Chairman:* Mr. Chusei YAMADA

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

#### Opening of the session

1. The ACTING CHAIRMAN declared open the forty-seventh session of the International Law Commission, welcomed the members to Geneva and expressed the hope that the session would be a successful one.

#### Tribute to the memory of Mr. Roberto Ago

2. The ACTING CHAIRMAN said it was his sad duty to speak of the loss of a towering figure in international law whose contribution to the law of State responsibility continued to dominate the Commission's work on the topic. The death of Mr. Ago in March 1995 had left a great void in the international legal community, but his legacy would continue to inspire other specialists in international law and his influence would be felt for many years to come.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. Roberto Ago.*

3. The ACTING CHAIRMAN 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 10.30 a.m. and resumed at 11.30 a.m.*

#### Election of officers

*Mr. Sreenivasa Rao was elected Chairman by acclamation.*

*Mr. Sreenivasa Rao took the Chair.*

4. The CHAIRMAN expressed his thanks to the members of the Commission for the honour and responsibility conferred on him and expressed the hope that he could count on their commitment to the Commission's collective effort.

*Mr. Pambou-Tchivounda was elected First Vice-Chairman by acclamation.*

*Mr. Güney was elected Second Vice-Chairman by acclamation.*

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

5. The CHAIRMAN suggested that the election of the Rapporteur should be deferred to a later meeting.

*It was so agreed.*

#### Adoption of the agenda (A/CN.4/463)

6. The CHAIRMAN suggested that the provisional agenda (A/CN.4/463) 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 49/51, the availability of documentation and the plans of Special Rapporteurs. In addition, the requests in paragraph 8 of that resolution should be considered under agenda item 8

(Programme, procedures and working methods of the Commission, and its documentation).

*It was so agreed.*

*The agenda (A/CN.4/463) was adopted.*

**Filling of a casual vacancy (article 11 of the statute) (A/CN.4/465 and Add.1)<sup>1</sup>**

[Agenda item 1]

7. The CHAIRMAN, responding to suggestions by Mr. EIRIKSSON, Mr. YANKOV and Mr. JACOVIDES, suggested that, before suspending the meeting to enable the Enlarged Bureau to meet, the Commission should proceed to fill the casual vacancy created by the election of Mr. Vladlen Vereshchetin to ICJ. As of 21 April 1995, the name of one candidate had been submitted: Mr. Igor Ivanovich Lukashuk, of the Russian Federation, whose curriculum vitae had been circulated (A/CN.4/465/ Add.1, annex).

8. Mr. YANKOV said he warmly supported the candidacy of Mr. Lukashuk, who had established a law school in Kiev. Many of its graduates now held important positions in the field of international law. Mr. Lukashuk's personal qualities and high intellectual and professional qualifications were such that the Commission would greatly benefit from having him among its members.

9. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to elect Mr. Lukashuk to fill the casual vacancy created by the election of Mr. Vereshchetin to ICJ at the forty-ninth session of the General Assembly.

*It was so agreed.*

*The meeting was suspended at 12.05 p.m. and resumed at 12.50 p.m.*

**Organization of the work of the session**

[Agenda item 2]

10. The CHAIRMAN announced that the Enlarged Bureau had decided to recommend that the Commission should consider the topic of the Draft Code of Crimes against the Peace and Security of Mankind from 3 to 16 May. The period from 17 to 25 May would be given over to the new topic on State succession and its impact on the nationality of natural and legal persons. The topic of State responsibility would be considered from 29 May to mid-June followed by international liability for injurious consequences arising out of acts not prohibited by international law. In late June, the Commission would take up the new topic of the law and practice relating to reservations to treaties.

11. Mr. YANKOV (Chairman of the Drafting Committee) announced that consultations would be carried out with a view to determining the composition of the Drafting Committee as soon as possible, to enable it to

begin its work. In establishing the Committee's membership, due attention would be paid to the desirability of having one group of members concentrate on the Draft Code of Crimes against the Peace and Security of Mankind and on State responsibility, while the remainder would focus on the issue of international liability.

12. Mr. PELLET suggested that, for even greater flexibility, separate subgroups of the Drafting Committee should be designated to focus on the Draft Code and on State responsibility.

13. Mr. YANKOV (Chairman of the Drafting Committee) said that that comment would be taken into account in determining the composition of the Drafting Committee.

*The meeting rose at 1.10 p.m.*

**2379th MEETING**

*Wednesday, 3 May 1995, at 10.05 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, 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<sup>1</sup> (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)**

[Agenda item 4]

**THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR**

1. Mr. THIAM (Special Rapporteur), introducing his thirteenth report (A/CN.4/466), said that, since the Commission was working on its second reading of the draft articles, he did not intend to launch a general, theoretical discussion. He was proposing two types of changes: first, in the content *ratione materiae* of the draft articles; and, secondly, more specific changes in either the sub-

<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 . . . 1995*, vol. II (Part One).

<sup>1</sup> Reproduced in *Yearbook . . . 1995*, vol. II (Part One).



stance or the form of the articles. With regard to the content *ratione materiae* of the draft Code of Crimes against the Peace and Security of Mankind, he recalled that there had long been a divergence of opinions within the Commission between a maximalist trend, favouring incorporation of a great number of offences, and a more restrictive tendency that wanted the scope of the Code to be as narrow as possible. In the end, and in the light of the comments and criticisms made, he had tried to restrict the Code's scope to crimes whose designation as crimes against the peace and security of mankind could hardly be disputed. The number of crimes retained had thus been reduced, perhaps provisionally, to six. The decision to abandon some of the offences originally included had been motivated by the reservations, and even opposition, expressed by the Governments that had transmitted their observations on the draft Code, though it should be noted that third world countries had generally not expressed their views.

2. Turning to the specific changes he was proposing for the draft articles, the first involved the definition of aggression (art. 15). The original wording, which had been virtually copied from the Definition of Aggression,<sup>3</sup> had been deemed to be too political and lacking the necessary legal precision and rigour. That wording had thus been revised. The new version was better, though still not fully satisfactory.

3. As to genocide (art. 19), although a number of changes had been suggested, he considered it preferable not to depart from the text of the Convention on the Prevention and Punishment of the Crime of Genocide, for it had won the greatest consensus among Governments.

4. On crimes against humanity (art. 21), the Commission, through its Drafting Committee, had formulated a new draft article entitled "Systematic or mass violations of human rights". Upon reflection and after an analysis of the relevant legal doctrine and case law, he was proposing that the Commission should revert to the earlier title of "Crimes against humanity", which corresponded to an expression used both in international law and in domestic law, because the justification for the change and particularly the requirement that the crime should be "massive" in nature were highly debatable. According to numerous authorities, including Paul Reuter, even a crime perpetrated against a single victim could constitute a crime against humanity on the basis of its perpetrator's motives and its cruelty.

5. With regard to war crimes (art. 22), the reason for the proposed definition was that any listing was unsatisfactory, as it could never be exhaustive. The definition was drawn from the text proposed by the Security Council<sup>4</sup> for 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> which was based on the distinction between "grave breaches", defined re-

strictively, and serious violations of the laws of war, which were the subject of a non-restrictive listing.

6. The advisability of including an article on international terrorism (art. 24) had been questioned by some members of the Commission who feared that consensus would never be reached on a general definition of terrorism and believed that the international community should instead continue to elaborate specific treaties such as the International Convention against the Taking of Hostages or the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. That approach was feasible, but it did not preclude trying to find a general definition of international terrorism and devoting an article to that concept.

7. He had retained the article on illicit traffic in narcotic drugs (art. 25) largely because of the arguments advanced by the Government of Switzerland. Referring to what was known as "narcoterrorism", that Government had stressed the harmful effects of international drug trafficking on health and well-being, its destabilizing effect on some countries and the fact that it was an impediment to harmonious international relations. All of that justified describing such activities as a crime against the peace and security of mankind.

8. Mr. EIRIKSSON said that, in general terms, he agreed with the approach taken by the Special Rapporteur, which was to continue efforts to restrict the Code's contents to the most serious crimes and to ensure maximum acceptability of the draft. He therefore deferred to the Special Rapporteur's judgement in proposing the deletion of a number of articles, with the exception of article 26 (Wilful and severe damage to the environment), and would support a proposal that the work of the Drafting Committee should be confined to a study of articles 15, 19, 21, 22, 24 and 25—although article 26 should be included as well.

9. On article 15 (Aggression), he agreed with the Special Rapporteur's idea of limiting the substantive portion of the text essentially to paragraph 2 of the version adopted on first reading. He sympathized particularly with the view that the Definition of Aggression was not suitable for the purposes of the Code, and did not think that the concept of a "war of aggression" should be introduced. On a minor point, the new version of paragraph 1 proposed by the Special Rapporteur no longer referred to an individual who "committed" an act of aggression. That change highlighted the possible inconsistency between the acts of individuals and those of States, and should be re-examined.

10. On article 19 (Genocide), he, like the Special Rapporteur, would advocate staying as close as possible to the definition in the Convention on the Prevention and Punishment of the Crime of Genocide, but he did not think that it was necessary to include paragraph 3 of the new text proposed by the Special Rapporteur on the crime of "incitement to commit genocide". The question of "attempts" had been dealt with in paragraph 3 of article 3 (Responsibility and punishment), adopted on first reading. It had been decided at that time that a decision on the crimes which it would be an offence to attempt to commit should be taken only at the stage of the

<sup>3</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>4</sup> See Security Council resolution 827 (1993) of 25 May 1993.

<sup>5</sup> Hereinafter the "International Tribunal for the Former Yugoslavia". Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

consideration of the various crimes. It would be preferable to return to that issue after the definitive list of crimes had been established.

11. On article 21 (Systematic or mass violations of human rights), he was in favour of the title adopted on first reading, which was, in his opinion, not the same as "Crimes against humanity". As to whether acts must be "massive", the version adopted on first reading, requiring that certain acts—the first four mentioned in the text—should be committed either in a systematic manner or on a mass scale, was more appropriate than that proposed by the Special Rapporteur in his thirteenth report. The crime should not be confined to perpetrators who were agents or representatives of States, not even in the case of torture, as provided for in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The idea of having a general category of "all other inhumane acts" should be scrutinized very carefully. He would not object to a definition of torture as proposed by the Special Rapporteur in square brackets, although he considered that the second part of that definition was not necessary. In all other respects, he could generally support the text as adopted on first reading.

12. As for draft article 22 (Exceptionally serious war crimes), he continued to believe that the Commission should develop what had been called a new category of crimes, distinct from "serious breaches" of the Geneva Conventions of 12 August 1949, 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). The situation is different from that of the drafters of the statute of the International Tribunal for the Former Yugoslavia, who had been confronted with the pre-existing law in the former Yugoslavia. Moreover, it would be difficult to say whether the definition used was of a tautological nature since it incorporated the important qualification of "violation of the principles and rules of international law applicable in armed conflict". It is for that reason that the future work should be based on the text adopted on first reading.

13. On article 24 (International terrorism), he agreed with the Special Rapporteur's proposal that the scope of the crime as defined in the text adopted on first reading should be expanded to cover acts of individuals who were not serving as agents or representatives of a State. He noted, however, that the Special Rapporteur's new text still referred to acts directed against "another State", and that required further thought. In principle, he would be prepared to consider other refinements proposed by the Special Rapporteur, such as a reference to "acts of violence". But, in general terms, he thought work should focus on the text adopted on first reading.

14. He agreed that article 25 (Illicit traffic in narcotic drugs) should be retained. The changes proposed by the Special Rapporteur were concerned primarily with drafting and could be considered along with the text as adopted on first reading.

15. Article 26 should be retained, but the Drafting Committee should, of course, consider the observations on that article made by Governments.

16. Lastly, he expected the Drafting Committee to review the question of applicable penalties, which had been left open in the draft adopted on first reading.

17. Mr. PELLET said that he intended to take up three points one after the other: the list of crimes and the criterion or criteria for drawing up the list; the question of applicable penalties; and the definitions proposed by the Special Rapporteur for the six crimes which he had included.

18. On the first point, the Commission had been requested to draft a code, that is to say, a set of systematic rules, but a code dealing exclusively with one category of crimes, crimes against the peace and security of mankind. It was not a question either of enumerating all the internationally defined offences which could bring the international responsibility of the individual into play or of drafting an international criminal code, but rather of selecting the crimes against the peace and security of mankind which truly met the Commission's definition of such crimes. The definition appeared in draft article 1, which the Commission had considered at its forty-sixth session and referred to the Drafting Committee.<sup>6</sup> Two conclusions must be drawn from the definition. First, a crime against the peace and security of mankind was an act committed by an individual and an act which posed a serious and immediate threat to the peace and security of mankind. Secondly, according to article 1, paragraph 2,<sup>7</sup> the list of crimes defined in the Code was not necessarily restrictive. The task was not therefore to reopen the debate on the definition of a crime against the peace and security of mankind, but to determine the criteria for distinguishing between the crimes to be included in the Code and those which should be left out.

19. The Special Rapporteur's approach had been to ask what was today generally acceptable to States, that is to say, basically to reflect the views of the "international community as a whole". That approach was justified in theory because it was consistent with the definitions of notions close to the notion of crime against the peace and security of mankind, such as the notions of *jus cogens* (art. 53 of the Vienna Convention on the Law of Treaties) and of international State crime (art. 19 of part one of the draft articles on State responsibility).<sup>8</sup> The approach was also politically wise because it reflected the emerging consensus in international society concerning a minimum of international public order. The members of the Commission were codifiers and not legislators while the function of progressive development did introduce a degree of flexibility. But States had the last word and one of the great merits of the work done by the Commission lay in the constant interaction between political and legal matters, between the possible and the desirable.

20. In the draft Code adopted on first reading, a fairly large number of wrongful acts had been described as crimes against the peace and security of mankind, but many States had expressed the opinion in their written comments on the draft text or in the debates in the Sixth Committee that some of the crimes should not have been

<sup>6</sup> See *Yearbook . . . 1994*, vol. II (Part Two), para. 96.

<sup>7</sup> *Ibid.*, para. 110.

<sup>8</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 75.

included. The Special Rapporteur had been wise to invite the Commission to defer to that view and not to “codify” certain offences which it had till then regarded as crimes against the peace and security of mankind. The Commission must in fact stick to the most serious crimes at the extremity of a continuum beginning with the international delicts covered in part one of the draft articles on State responsibility,<sup>9</sup> then embracing crimes regarded by the international community as a whole as violations of an obligation essential to the protection of fundamental interests, and ending with crimes which posed a serious and imminent threat to the peace and security of mankind. He would have preferred to retain, for example, colonial or foreign domination, perhaps apartheid, probably terrorism and certainly aggression, but the Commission must not act against the wishes of what would be a large number of States representatives of the international community as a whole; that also applied to deliberate and serious harm to the environment, a prime example of a crime which was not a crime against the peace and security of mankind. The Special Rapporteur ought perhaps to have pursued his reasoning to the end by drawing the same conclusions from the reluctance of States to include terrorism and drug trafficking; the question of aggression was slightly different, since the reluctance of States seemed in that case to stem from misunderstandings.

21. The Special Rapporteur regretted the silence of Governments on the question of applicable penalties and the fact that the draft statute for an international criminal court should determine the applicable penalties when that would normally have been a matter for the draft Code. The dividing line between the two texts—Code and Court—was certainly not easy to draw, but it did not seem that there was any “normality” in the matter, since the idea that the Code would be a kind of “criminal legislation” which the court would have to apply was only one of several possibilities and an increasingly improbable one. In the case of the draft statute for an international criminal court<sup>10</sup> or the statute of the International Tribunal for the Former Yugoslavia or that of the International Tribunal for Rwanda,<sup>11</sup> it seemed that the statutes of the international criminal jurisdictions created or to be created dealt or would deal with the crimes and their definitions and the applicable penalties. In that sense, the Code might seem pointless, unless it was regarded as a “beacon” providing guidance for actions by States and international jurisdictions, especially in its first part, which defined the juridical regime governing the crimes, whereas the purpose of part two was to provide legal codification of the “crimes of crimes”, the ones included in the list. In the circumstances he proposed, first, that the Commission should refrain from defining the penalties crime by crime and that the array of penalties should be dealt with in a general provision to be included in part one and, secondly, that it should be stated in substance that the applicable penalties should be established in accordance with the maximum penalties applicable in the State in which the crime had been

committed or on the basis of such maximum penalties. In article 19, paragraph 1, the Commission might also use the language of the Convention on the Prevention and Punishment of the Crime of Genocide and say that States must provide “effective penalties for persons guilty of” crimes against the peace and security of mankind.

22. Turning to the various draft articles, he welcomed the changes proposed by the Special Rapporteur, which generally moved in the direction of greater conciseness. He would himself have favoured a much more radical measure, which would have been to dispense with the definition of the crimes included in the draft Code. As in the case of applicable penalties, the statutes of the existing or future international jurisdictions contained or would contain their own definition of the crimes to be punished. Since it was possible that the Commission might not agree with him on that point, he wished to give his opinion about the new proposals by the Special Rapporteur.

23. With regard to article 15, the comments of Governments on the draft Code gave only a partial idea of the very great reluctance, even resistance, prompted by the very idea that individual perpetrators (or leaders or organizers) of the crime of aggression could be prosecuted. That resistance even raised the question whether aggression should be retained in the list of crimes against the peace and security of mankind, for the criterion of *opinio juris*, which the Special Rapporteur rightly took as the criterion for selection, ought apparently to result in the exclusion of the crime of aggression. But in fact the States opposed to the inclusion of aggression in the list were making an analytical error and were basing their position on a confusion of concepts. They argued that aggression could be committed only by a State, which was in principle true, and that genocide, apartheid or war crimes, still in principle, could also be committed only by States. However, there was no opposition to the possibility of punishing individuals responsible for the latter crimes. Crimes against the peace and security of mankind were such serious crimes that the legal person on whose behalf they were committed, generally a State, became “transparent” and action could be taken against individuals through that person. The responsibility of such individuals could be invoked directly even when the perpetrator, from the legal standpoint, was a State. Not to include aggression among the crimes against the peace and security of mankind would, moreover, constitute a serious regression in international law, if only in relation to article 6, subparagraph (a), of the Charter of the Nürnberg Tribunal.<sup>12</sup> Aggression was therefore in fact the most obvious candidate for classification as a crime against the peace and security of mankind.

24. Some States which were today hostile to the inclusion of aggression in the list in the Code had been wondering in 1991, following the invasion of Kuwait by Iraq, about the possibility of bringing Saddam Hussein and his collaborators, internationally and in person, before an international jurisdiction, a proposition whose

<sup>9</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 26-63.

<sup>10</sup> *Yearbook* . . . 1994, vol. II (Part Two), para. 91.

<sup>11</sup> Security Council resolution 955 (1994) of 8 November 1994, annex.

<sup>12</sup> Charter of the International Military Tribunal annexed to the 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. 279).

implicit, but necessary, precondition was that those States did in fact believe that they were faced with a crime against the peace and security of mankind. The actual, but hidden, cause of all such resistance must therefore be sought elsewhere, for instance, in the lack of a suitable definition of aggression, since that given by the General Assembly<sup>13</sup> could in no way be regarded as suitable. The Special Rapporteur was opposed to the idea of dispensing with a definition and was seeking one which might be acceptable; however, his proposed definition was not satisfactory in all respects, for at least two reasons. First, it spoke of an "act of aggression", a term which did not have a clear legal meaning and was broader than the terms used in other texts which reflected positive law in the most unambiguous manner possible, speaking either of "war of aggression" (Charter of the Nürnberg Tribunal) or of "an armed attack" (Art. 51 of the Charter of the United Nations). Secondly, paragraph 2 of the new text proposed by the Special Rapporteur defined aggression as any use of armed force inconsistent with the Charter of the United Nations, which went beyond the boldest definitions of aggression.

25. The solution seemed therefore to lie elsewhere. For want of a generally accepted definition, an act of aggression could at present be only an act which the Security Council designated as such. Such a definition "by default" was in fact consistent with the fundamental notion of crimes against the peace and security of mankind, in that they were regarded as such by the international community as a whole. The acceptable reflection of the international community was the Security Council, to which the States Members of the United Nations had entrusted primary responsibility for the maintenance of international peace and security (Art. 24 of the Charter) and which could give its determination as to an act or situation of aggression only if no permanent member used its veto and if six other members (including the non-aligned countries if they acted in unison) were not opposed. Fears of possible retroactive determinations were the result of a confusion of ideas. Aggression was undoubtedly a crime and the punishment of the organizers of such a crime remained subject to the judgement of a jurisdiction. The assessment of the political organ, the Security Council, merely interposed itself between the two; there was nothing objectionable in that in view of the peculiar nature of such crimes. Article 15 could therefore state in substance that an individual who committed or ordered the commission of an act of armed aggression, branded as such by the Security Council, was guilty of a crime against the peace and security of mankind.

26. He fully shared the views of the Special Rapporteur on draft article 19.

27. With regard to draft article 21, the amendment of the title proposed and explained by the Special Rapporteur was indeed welcome. However, he wished to point out in passing that the definition contained in article 5 of the statute of the International Tribunal for the Former Yugoslavia, which was based more directly and closely on article 6, subparagraph (c), of the Charter of the Nürnberg Tribunal, was more satisfactory than what was

now proposed and he suggested that the Commission should simply use the same wording. That would answer many of the criticisms made by Governments, for it was understood that the definition of crimes against humanity contained in the Charter of the Nürnberg Tribunal and the statute of the International Tribunal for the Former Yugoslavia applied only in time of war and not in time of peace, as would be the case with the text under consideration, and that, as far as peace time was concerned, genocide supplied a sufficient correction for that apparent defect with regard to crimes which were crimes against the peace and security of mankind and not merely international crimes.

28. Draft article 22 raised a certain number of problems. When it had been adopted on first reading, he had been among those who had wanted the Commission to confine itself to "exceptionally serious" crimes, since, by definition, crimes against the peace and security of mankind were exceptionally serious. He understood the difficulties to which that idea gave rise, however, and which had been brought out in the observations of the Government of Switzerland, in all their varying degrees, very clearly. But he had reservations about some of the drafting innovations introduced by the Special Rapporteur and considered that it would be wise, in that case as well, to follow articles 2 and 3 of the statute of the International Tribunal for the Former Yugoslavia and article 3 of the statute of the International Tribunal for Rwanda very closely. It would also be advisable to deal with the question in two separate articles, namely, with "serious crimes under international humanitarian law", which would be the subject of article 22, and with "violations of the laws and customs of war", which would be the subject of an article 22 *bis*. Personally, he had always objected to the wording of article 2 of the statute of the International Tribunal for the Former Yugoslavia which referred expressly to the Geneva Conventions of 1949, and for two reasons. In the first place, he did not see why, in the case of acts that were international crimes, reference should be made, suddenly, to a particular convention, regardless of whether the State or States concerned had ratified that convention. What made an act criminal was that it involved not the violation of a convention, no matter how severe, but the violation of a general principle of law, namely, the principle of respect for international humanitarian law. Secondly, he did not see why reference was made to the Geneva Conventions of 1949 and not to the Additional Protocols of 1977. Could it be in order to humour some countries which had not ratified Protocol I? At all costs, in his view, it would be far better to replace the words, in paragraph 1, "Grave breaches of the Geneva Conventions of 1949" by the words "Grave breaches of humanitarian international law". The rest would remain unchanged or would, rather, simply repeat the provisions of article 2 of the statute of the International Tribunal for the Former Yugoslavia.

29. With regard to article 24, he welcomed the Special Rapporteur's proposal that the definition should no longer be limited to crimes committed by an agent of the State. Even so, he did not think that the Special Rapporteur altogether met the wider concerns expressed by Governments. He genuinely felt, though at the same time personally regretting it, that the only way to take account

<sup>13</sup> See footnote 3 above.

of those concerns, which were evidence of the marked division on the matter within the international community, would be to refrain from dealing expressly with terrorism in the draft Code.

30. He would, however, draw attention to the inconsistency displayed by Governments, which, on the one hand, endeavoured to prevent—albeit, in general, indirectly—terrorism being included in the list of crimes covered by the Code and, on the other, adopted the very well-known and hotly disputed Security Council resolution 748 (1992) of 31 March 1992. The Council made reference to acts of terrorism—particularly abhorrent ones, since it had dealt with the attacks on the Union de transports aériens flight 772 and Pan Am flight 103<sup>14</sup>—which constituted, three years after their occurrence, a threat to international peace and security. At the same time, he doubted whether it was possible, at present, to characterize terrorism as a crime against the peace and security of mankind and whether it was in any event possible to find a generally acceptable and unifying definition of terrorism, as yet, among the few instruments that existed. He therefore proposed that, for the time being, terrorism should be deleted from the draft Code, which should cover only crimes ready to be characterized as crimes against the peace and security of mankind.

31. He was absolutely opposed to the inclusion in the draft Code of article 25. Drug trafficking was unquestionably a loathsome activity, but almost all of the States that had expressed an opinion were opposed to its characterization as a crime against the peace and security of mankind. That was sufficient reason—and for the very reasons the Special Rapporteur had given in the introduction to his thirteenth report when he had referred to the criteria for the selection of crimes—for not keeping it. Furthermore, he sincerely believed that the reservations expressed by Governments were justified. No matter how contemptible the crime, it was only likely to endanger the peace and security of mankind in the very special cases in which it was “coupled” with other crimes and, in particular, with crimes against humanity. There was no need to make it a self-contained crime against the peace and security of mankind. That certainly did not mean the Special Rapporteur had been wrong to write that some Governments might be justified in wishing drug trafficking to be the subject of international control. That, however, was another problem: it was not necessary for such a crime to be characterized as a crime against the peace and security of mankind in order for it to be controlled at the international level. It was entirely conceivable for an international court, permanent or ad hoc, to have jurisdiction to try such crimes without being obliged on that account to affirm, contrary to all reason, that such a crime endangered the peace and security of mankind. On that point, the Special Rapporteur’s reasoning seemed to be mistaken: basically, he said that, for illicit trafficking in narcotic drugs to be controlled internationally, it must be characterized as a crime against the peace and security of mankind. That was not correct, however, for, any crime could be the subject of international control if States so wished, without any need to include it among the crimes that constituted an immediate danger to the peace and security of mankind.

32. In his view, the Code would have meaning only if it were truly strictly confined to the most serious crimes, namely, to those that posed a serious and immediate threat—as provided in article 1, the spirit of which had been approved by the Commission at its forty-sixth session,<sup>15</sup> and to which the Special Rapporteur made reference in the introduction to his thirteenth report—to the peace and security of mankind, the whole of mankind, and if the international community as a whole recognized that fact. The Commission must act prudently, reasonably and responsibly.

33. Mr. BENNOUNA said that, according to Mr. Pellet, aggression was a matter for the Security Council—the sole voice of the international community which was empowered to state the law in the matter. He therefore wondered what role an international criminal court and the Commission could really play and if that meant that the permanent members of the Security Council would never be found guilty of aggression.

34. Mr. ROSENSTOCK thanked the Special Rapporteur for taking account in his thirteenth report of the views expressed in particular by Governments, for submitting the report promptly so that the members of the Commission had time to study it and for presenting it in a succinct and clear form.

35. The Special Rapporteur had removed the impenetrable political barrier which, in the past, had made it difficult to take the draft Code seriously. In order for any progress to be made, substantial surgery had been necessary. To a large extent, that had been done and the Commission could now look forward to the successful completion of its task.

36. Problems remained, however. One, which it was not for the Commission to determine definitively, was to decide whether the Code was necessary or useful. The draft statute for an international criminal court<sup>16</sup> and the creation of International Tribunals for the Former Yugoslavia and for Rwanda not only established that a court did not imply the existence of a code, but also perhaps raised the question whether the problems involved in the creation of a code did not outweigh the benefits.

37. A second problem—and one that it was also not for the Commission to determine definitively—was whether the Code implied a court and whether it was useful and conducive to peace, security and justice to create a code for application by national jurisdictions.

38. Thirdly, it was impossible to draft a code that would be generally regarded as exhaustive. Much credit was due to the Special Rapporteur for having pruned the list of crimes, in his thirteenth report, down to a list that would, it was to be hoped, be accepted by the international community.

39. A fourth problem concerned the need for and wisdom of attempting to define aggression. Thus far, neither the General Assembly nor any other body had entirely dismissed the conclusions reached by a former Special Rapporteur on the topic, Jean Spiropoulos, who had con-

<sup>14</sup> Security Council resolution 731 (1992) of 21 January 1992.

<sup>15</sup> See footnote 1 above.

<sup>16</sup> See footnote 10 above.

cluded that "the notion of aggression is a notion *per se*, a primary notion, which, by its very essence, is not susceptible of definition".<sup>17</sup> It was in part for that reason that it was recognized that Article 39 of the Charter of the United Nations conferred a special role on the Security Council. Even if Mr. Spiropoulos had been pessimistic, there were overwhelming technical problems. The easy way out would be to equate aggression with any violation of Article 2, paragraph 4, of the Charter. But that seemed simplistic and unwise. There were situations that some would regard as violations of Article 2, paragraph 4, of the Charter and that few members of the Commission would regard as "aggression", much less as an international crime. That was the case, for instance, with the pre-emptive use of force in self-defence, the rescue of hostages, and humanitarian intervention to put an end to genocide. While the definition of aggression laid down by the General Assembly was not very helpful, it did differentiate clearly between aggression and a war of aggression, in that aggression created international responsibility, while only a war of aggression gave rise to personal criminal responsibility. It remained to be seen whether the notion of a war of aggression was a way of enlightening the Commission and of guiding it as to the content of the Code. In some ways, it was anachronistic in its reference back to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact); and it was difficult to know how to use it properly.

40. The fifth question concerned the inclusion of international terrorism in the Code. The global political evolution, which had enabled the adoption of the Declaration on Measures to Eliminate International Terrorism,<sup>18</sup> along with the efforts of the Special Rapporteur, had combined to eliminate impenetrable political obstacles. That did not mean that there were no technical problems or even that it would be possible to go any further. It was necessary, however, to avoid weakening the text. Terrorism was unjustifiable and the question of its inclusion in the Code did not necessarily prevent the Security Council from taking measures in response to a specific situation affecting peace and security throughout the world.

41. Lastly, it was questionable whether illicit trafficking in narcotic drugs could be regarded as a threat to the peace and security of mankind. The advisability of including it in the Code should therefore be examined in more detail when the Commission considered the draft, article by article.

42. He looked forward with interest to that discussion, which would enable the Drafting Committee to get to grips with its task, with the benefit of the views of the Commission as a whole.

43. Mr. PELLET, reverting to what Mr. Bennouna had said, pointed out that applying the law did not consist of endless moralizing directed at States. The fact was that international society was not egalitarian and that the least unsatisfactory way that had been found of maintaining international peace and security had been to set

up the United Nations. That inequality was reflected within the United Nations itself, since there was an imbalance between the General Assembly and the Security Council inasmuch as primary responsibility for the maintenance of international peace and security had been entrusted to the latter; and in the very composition of the Security Council, which included only five permanent members. The fact was regrettable but also indisputable, and it had to be accepted that that was how matters stood. The question—and that was perhaps the idea on which Mr. Bennouna's objection was based—was whether a political organ could decide on a legal question, whether it could intervene in a legal or jurisdictional process. It was clear that it could intervene in a legal process, for the law was not made by and for lawyers, but by politicians, in order to settle problems, which were partly legal, and in the present case it was reflected by legal rules. In a jurisdictional process, that posed a problem and it might be asked whether it was for a political organ to characterize a situation, since that characterization might lead to the conviction of a person. It must be clearly understood that the functions of the Security Council and those of an international criminal court were quite different. The Council would have to give its view on a political situation and the court would have to act accordingly. Admittedly, that had never been done before, but it was perfectly possible.

44. Moreover, to give a more specific answer to the question put by Mr. Bennouna, it was a fact that the members of the Security Council could never be designated aggressors and would thus escape conviction because such was the system established by the Charter adopted in 1945, because no better system existed and because, even if it was detestable, that system at least had the virtue of existing and the Commission was unable to alter it.

45. Mr. VILLAGRÁN KRAMER said that the Commission had not been asked to place itself outside the framework of the Charter. It was clear that its work must be conducted in the framework of existing legal realities. It must not be forgotten, however, that the question of increasing the number of permanent members of the Security Council was on the agenda. If the Charter were amended, it was possible that an agreement or settlement might be reached with regard to the right of veto, for at present it was the veto that constituted the key problem. Nevertheless, the Commission did not have the right to interpret the Charter and could not propose that it should be amended. It must act within the framework of the Charter adopted in 1945. At present, then, it was difficult for it to debate a question that was essentially political. However, he did not rule out the possibility that the establishment of the new international order, which might entail a change in the status of the Security Council, might make it possible to tackle the question, but it would not be for the Commission, but for representatives of Member States in the General Assembly, to do so.

46. Mr. de SARAM said that the questions that had been raised were not purely legal in nature. They touched on sensitive matters pertaining to provisions of the Charter of the United Nations. When dealing with those provisions, one needed to be extremely careful and precise. The questions raised would, of course, be con-

<sup>17</sup> *Yearbook . . . 1951*, vol. II, p. 69, document A/CN.4/44, para. 165.

<sup>18</sup> General Assembly resolution 49/60, annex.



sidered carefully when members addressed the Commission in their principal statements in the debate. He would be doing so. Yet there were certain observations of a general nature which he would like to make at the current stage, in the light of some of the observations already made.

47. First, it should be noted that the Commission had been entrusted with the task of formulating a draft Code of crimes against the peace and security of mankind and not of crimes against the peace and security of mankind recognized as such by one organ or another of the United Nations. Secondly, the question of the relationship between the two functions of the Commission, namely, codification, on the one hand, and progressive development of the law, on the other, had preoccupied its members for a long time, indeed going back almost to the inception of the Commission, and he did not think the codification or progressive development consideration in itself should be a determining factor for the present or any other topic on the Commission's agenda. Thirdly, a question to which Mr. Bennouna had referred also arose with regard to the relationship between the Security Council, the international criminal court, the General Assembly and the Commission. One last important question concerned the relationship between positive law and the jurisdiction entrusted with its application. All those questions were very complex and must be studied in depth and formulated very precisely.

48. Mr. EIRIKSSON said he thought that, despite the realities referred to by Mr. Pellet, a legal purist might reverse the roles he attributed to the international criminal court and the Security Council, respectively, by acknowledging that it was perhaps for the court to characterize a situation and for the Security Council to decide on the measures to be taken in consequence.

49. Mr. ROSENSTOCK said that, as the Commission had accepted the idea that the intervention of an international criminal court was subordinate to a decision by the Security Council and had reaffirmed that idea at its last session when considering the draft statute for an international criminal court, *inter alia*, in article 23, paragraph 2, of the draft statute,<sup>19</sup> on which there had been consensus, he doubted that there was any point in reopening the debate on that question, even though it was clearly important.

50. Mr. BENNOUNA said that he disputed the truth of the assertion that article 23 of the draft statute had commanded consensus. It had been debated at great length and had been rejected by a number of representatives in the General Assembly. It posed an extremely complex problem which was likely to jeopardize the adoption of the draft statute as a whole. That key article had been the subject of passionate debate in the Commission and the question had certainly not been settled. It would inevitably be raised again. It was not in the interests either of the United Nations, or of the Commission, or of any court of justice to mix power politics and law, that is to say the immorality and cynicism of politics and the application of the rules of law by a court. The Security Council was a political organ that decided on political

matters and not on problems of a legal nature, in which justice must play an essential role, especially when the conviction of persons was involved. If one were to restrict oneself to the scenario put forward by Mr. Pellet, under which it was for the Security Council to determine that there had been an act of aggression and thus to point to the possible culprits, with the court confining itself to acting on the basis of that decision, one might wonder what margin for manoeuvre the court would have. It should not be forgotten that the decisions of the Security Council did not prevail over international law or treaties. Only the Charter took precedence over those treaties. The Commission had no competence to reform the Charter. Its role was to concern itself with law, justice and the application of the law by the courts.

51. Mr. MAHIOU said he seemed to recall that several members of the Commission had declared that they did not endorse article 23, paragraph 2, of the draft statute and he felt that it would be difficult to avoid reopening the debate on that specific point, which lay at the heart of an extremely important problem, both legal and political, on which every member of the Commission must have the opportunity to express himself and give his opinion.

52. Mr. EIRIKSSON said he thought that there was no incompatibility between what the Special Rapporteur proposed and what the Commission had decided at its forty-sixth session with respect to the international criminal court. In article 20 of the draft statute, subparagraph (b), on the crime of aggression, did not specify that what was referred to was the crime of aggression recognized as such by the Security Council, but it was clear that article 23, paragraph 2, which made the bringing of a complaint of an act of aggression conditional on the determination of the aggression by the Security Council, was a source of difficulties. He nevertheless thought that solution, which was the one accepted by the Commission, was preferable to an explicit reference to the crime of aggression determined by the Security Council in accordance with General Assembly resolution 3314 (XXIX).

#### **Election of officers (concluded)**

*Mr. Villagrán Kramer was elected Rapporteur by acclamation.*

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

[Agenda item 2]

53. Mr. YANKOV (Chairman of the Drafting Committee) said that, for the topic of the "Draft Code of crimes against the peace and security of mankind", the Drafting Committee would be composed of Mr. Al-Baharna, Mr. Crawford, Mr. Eiriksson, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Szekely, Mr. Vargas Carreño, Mr. Villagrán Kramer and Mr. Yamada.

54. For the topic of "State responsibility", the Drafting Committee would be composed of Mr. Al-Baharna,

<sup>19</sup> See footnote 10 above.

Mr. Barboza, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Lukashuk, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely and Mr. Yamada.

55. For the topic of "International liability for injurious consequences arising out of acts not prohibited by international law", the Drafting Committee would be composed of Mr. Al-Baharna, Mr. Bowett, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Lukashuk, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely and Mr. Villagrán Kramer.

56. For practical reasons and bearing in mind the schedule of work drawn up by the Commission for the period until the conclusion of its current term of office, the Drafting Committee would assign priority to the draft Code of crimes against the peace and security of mankind and to State responsibility, devoting a maximum of 14 meetings to each of those two topics, while not neglecting the topic of international liability for injurious consequences arising out of acts not prohibited by international law, to which it would devote 6 meetings at most. The members of the Commission who were not members of the Drafting Committee would be able to attend the meetings of the latter and would be authorized to take the floor on those occasions, on the understanding that they would speak in moderation.

57. The Drafting Committee would submit to the plenary Commission its report on each of the topics it was considering, if possible, by the first week of July and, at the latest, by the second week of July.

58. Mr. PAMBOU-TCHIVOUNDA (Chairman of the Planning Group) proposed, following the consultations he had held, that the Planning Group should be composed of Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Razafindralambo, Mr. Rosenstock, Mr. Vargas Carreño and, in an *ex officio* capacity, former chairmen of the Commission.

*It was so agreed.*

59. Mr. ROSENSTOCK asked whether an additional meeting could be devoted to general observations on the draft Code before it was considered article by article or by clusters of articles. That method, which had been adopted at the forty-sixth session, had proved extremely valuable. It should also facilitate the work of the Drafting Committee.

60. Mr. YANKOV (Chairman of the Drafting Committee) found the proposal by Mr. Rosenstock very pragmatic, and he invited the other members of the Commission to accept it, for such a way of proceeding should indeed facilitate the smooth running of the Drafting Committee's work.

61. The CHAIRMAN said that it would be best for those members of the Commission wishing to speak on that topic to begin by making general observations on the draft Code. They could then take the floor whenever they so wished in order to make more detailed comments

on particular articles. If he heard no objection, he would take it that the Commission accepted that suggestion.

*It was so agreed.*

*The meeting rose at 1 p.m.*

## 2380th MEETING

*Thursday, 4 May 1995, at 10.10 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present:* Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, 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<sup>1</sup> (*continued*) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)**

[Agenda item 4]

**THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)**

1. The CHAIRMAN invited members to resume consideration of the thirteenth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466). As far as was possible, the Commission should conclude its comments on the articles as a whole before taking up specific articles, which could then be dealt with in turn.

2. Mr. BENNOUNA said that it was high time that the Commission concluded its work on a topic that had occupied it for much of its history. In the present troubled times, some more unified approach to the question than the current unsatisfactory system of ad hoc tribunals was called for. Formulation of a Code, in as succinct a form as possible, would thus give the international community a very important instrument with which to address highly politicized issues.

<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* . . . 1995, vol. II (Part One).



3. The Special Rapporteur had adopted a realistic and pragmatic approach, proposing, on the basis of Governments' positions, a hard core of common denominators likely to command general consensus, and eliminating those crimes that might jeopardize acceptance of the draft Code as a whole. He supported that approach, and also the Special Rapporteur's proposals to abandon, if only provisionally, the threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18), which, it was to be hoped, could be regarded as a thing of the past; and wilful and severe damage to the environment (art. 26), which could perhaps be considered in the context of another agenda item, such as international liability for injurious consequences arising out of acts not prohibited by international law (agenda item 5).

4. He believed, however, it was essential to retain the crime of apartheid, even if it were designated "institutionalized racial discrimination" or "institutionalization of racial discrimination". Unfortunately, apartheid was not a thing of the past, and there were various instances of attempts being made to create "Bantustans" and confine populations to reservations. The crime of apartheid should thus be retained—perhaps with some changes as regards the name—particularly since an existing international convention, the International Convention on the Suppression and Punishment of the Crime of Apartheid, defined apartheid as a crime, a fact that established some certainty on the question at the level of international law.

5. He also agreed with the Special Rapporteur's proposal to eliminate provisionally the crime of recruitment of mercenaries (art. 23), which could perhaps be subsumed under the crime of aggression. On the other hand, the crime of illicit traffic in narcotic drugs (art. 25), on a transboundary or large-scale basis, should be retained. That scourge was so serious as to affect the sovereignty of small States. It might be recalled that in one case a group of drug traffickers had proposed to write off a country's entire foreign debt in exchange for certain privileges. Furthermore, trafficking in narcotic drugs also fed other forms of crime, such as terrorism and subversion. It should thus be kept in the draft Code.

6. The crime of aggression had given rise to lively debate at the previous meeting, probably because it posed the central problem of the separation of the powers and functions of the executive and judicial branches, and of relations between the Security Council and ICJ or any other court. In the observations, reproduced in the thirteenth report, the Governments of Australia, Belarus, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Switzerland had all expressed the view that those powers should be kept separate. He agreed with the Special Rapporteur that General Assembly resolution 3314 (XXIX) could not serve as a point of reference for a judicial body, and that the political and judicial functions must be kept separate. The Commission had taken the line of least resistance in that regard, and must now give the matter more careful consideration.

7. As to the three options referred to by the Special Rapporteur in his report, the middle way favoured in the new text of draft article 15, paragraph 2, had a

disadvantage, one to which Mr. Rosenstock (2379th meeting) had already drawn attention. It was well known that Article 2, paragraph 4, of the Charter of the United Nations covered a wide range of situations not sufficiently serious to constitute acts of aggression as such. Consequently, a simple reference to Article 2, paragraph 4, of the Charter, would not solve the problem of a definition of aggression. In his view, the Commission must merely refer to international law and jurisprudence. The Vienna Convention on the Law of Treaties, for instance, referred to *jus cogens*, yet did not define it—an approach subsequently adopted by jurisprudence. Two possibilities the Drafting Committee might consider would be: either to make a reference to general international law, without further qualification; or else to qualify the reference to "armed force" in the new text proposed for draft article 15, paragraph 2, with wording such as "of a level of seriousness which constitutes an act of aggression under international law". The Security Council should confine itself to a political role, leaving it to the courts to perform their legal role unswayed by political considerations until, at some point in the infinitely remote future, the interests of the two eventually converged.

8. Mr. TOMUSCHAT said that the Special Rapporteur's commendably brief report took due account of the political climate in which the Commission had to work. That did not mean that the Special Rapporteur had bowed to prevailing fashion and ephemeral trends: it was the Commission's task to remain faithful to the fundamental principles of the world order established after 1945 with the birth of the United Nations, whose Charter now constituted a world constitution. However, in its work the Commission still needed the full support of the international community—a community of States themselves represented by their Governments. So far, international law was made only with the approval of States; the Commission could not impose utopian rules on Governments reluctant to accept them.

9. The fact of the matter was that the Commission seemed to be suffering from a loss of contact with political circles. In his 10 years in the Commission, he had spent much time in the drafting of texts, not one of which had yet become an international treaty ready for signature and ratification. That regrettable state of affairs could of course be attributed to a number of causes. What the Commission needed was realism, accompanied by a keen awareness of its responsibility.

10. It was against that background that he commended the Special Rapporteur for having reduced the list of crimes to a hard core. The very extended catalogue of crimes adopted on first reading in 1991 had threatened to doom the whole enterprise to failure. Henceforth, however, Governments could no longer take refuge in the argument that the Commission had shown excessive zeal. A serious debate must now begin. The crimes selected by the Special Rapporteur were those that had many times been characterized as international crimes of the utmost gravity by the spokesmen of States of all regions, ideologies and political tendencies. He endorsed the remarks made by Mr. Pellet (*ibid.*). The Commission was a codifier of the political will of States. It would be futile for it to attempt to force the pace of development of in-

ternational law by pushing too vigorously. Excessive zeal could only lead to yet another draft being consigned to the archives at Headquarters.

11. Consequently, he supported the decision taken by the Special Rapporteur to eliminate from his draft the threat of aggression, intervention, colonial domination and recruitment of mercenaries, as well as apartheid and wilful and severe damage to the environment. Even if one had a hierarchical perception of internationally wrongful acts according to which crimes against the peace and security of mankind were, so to say, the most pernicious and dangerous crimes, it was not absolutely clear, even from the observations of Governments, what conclusions should be drawn. Apartheid had been questionable as a crime for three reasons. First, the matter had related only to South Africa and no consideration had been given to the question whether similar practices were to be found in other States. Secondly, complicity had been used to extend the circle of persons to others far beyond the frontiers of South Africa. Thirdly, even in the case of South Africa itself, the rules had been so imprecise that no white Afrikaner could have escaped the criminal laws. The question now arose whether the establishment of "institutionalization of racial discrimination" as a crime against the peace and security of mankind would command the support of the international community. Actually, States other than South Africa continued to operate systems of institutionalized apartheid under another name. He supported Mr. Bennouna's remarks in that regard that the Commission should devote careful consideration to the matter.

12. Although he agreed that article 26 (Wilful and severe damage to the environment) might have to be more limited in scope than was now the case, there was no question whatsoever that certain kinds of damage to the environment should be characterized as a threat to international peace and security. Deliberate detonation of nuclear explosives or pollution of entire rivers, for example, would certainly qualify as crimes against humanity, and any individual or State that committed such a crime should be subject to appropriate penalties to be applied by the international community.

13. He found it difficult to envisage not making the list of crimes exhaustive, as that would leave the situation far too ambiguous. An act must be defined either as being or as not being a crime against humanity, and it must be made clear that the resulting penalties would be applied by the entire international community.

14. An abstract definition of crimes against the peace and security of mankind, such as the one proposed in draft article 1, should not be part of the Code. Such a definition might be exploited by States to make the Code cover many acts that had been deliberately excluded from it. A better course would be to describe clearly in article 1 the common denominator of the crimes that were to be enumerated later in the Code. Nothing would prevent the international community from subsequently revising or adding to the list of crimes.

15. The provisions on perpetrators of and accomplices in crimes against humanity needed further clarification, as they varied from article to article. In article 15 (Aggression), only a leader or organizer of the act was

punishable; a soldier who was merely following orders could not be found guilty of aggression. Under the new proposed text of article 19 (Genocide), paragraph 3, however, an individual who was guilty of incitement to the crime of genocide was punishable. Finally, the rules on complicity set out in article 3 (Responsibility and punishment) resembled those used in domestic criminal legislation. The most important thing was for the Code to lay down rules whereby perpetrators of crimes against humanity could be severely punished. It was of somewhat lesser importance to envisage punishment for those who abetted such crimes.

16. As a general comment on the language of the draft, he would point out that it was unnecessary to repeat, for each crime, that "on conviction thereof", an individual would be sentenced to punishment. If sentence had been passed, it went without saying that an individual had been found guilty of a crime.

17. No light had yet been shed on the specific penalties to be applied for each crime. In his view, it would prove impossible to establish rigid maximum and minimum sentences, because war crimes and crimes against humanity could take so many and varied forms. One criterion that must be retained, however, was that of imposing exemplary punishments, including life imprisonment, for such serious crimes. A single provision to that effect in the chapter on general principles would suffice; perhaps the Commission could use the statute of the International Tribunal<sup>3</sup> as a model.

18. He welcomed the new version for article 15 and particularly the specific reference to the use of armed force. There were already texts in which certain types of conduct, referred to as "wars of aggression", were characterized as crimes against the peace and security of mankind—General Assembly resolutions 2625 (XXV) and 3314 (XXIX) and the Charter of the Nürnberg Tribunal.<sup>4</sup> Such acts of aggression had to incorporate an element of massive scale, and as they generally involved inter-State conflicts, the Security Council was responsible for dealing with them. The Commission's task, on the other hand, was to establish rules for the individual responsibility of leaders of States—a completely different enterprise.

19. Lastly, he failed to understand the need for the phrase "or in any other manner inconsistent with the Charter of the United Nations" in article 15, paragraph 2. Though it was perfectly defensible in a text governing relations between States, in matters of criminal responsibility the phrase added nothing and simply created ambiguity. He would propose an alternative formulation such as: "For the purposes of the present Code, the massive use of armed force by a State against the sovereignty, territorial integrity or political independence of another State is deemed to constitute a war of aggression." The Commission's objective was not to draft yet another general definition of aggression, but to list specific acts for which individuals bore criminal responsibility.

<sup>3</sup> See 2379th meeting, footnote 5.

<sup>4</sup> *Ibid.*, footnote 12.

20. Mr. HE said he welcomed the fact that the scope of part two had been narrowed to only the most serious crimes. That position conformed to the views on the draft Code expressed by States. The divergences of opinion still remaining on which crimes should be retained in the draft Code could be discussed further during the present session. The task now confronting the Commission was to continue to improve part two, which occupied a key position in the whole draft, so that it met the requirements of precision and rigour of criminal law.

21. The new text proposed for article 15 transplanted Article 2, paragraph 4, of the Charter as a definition of aggression. While the provision on non-use of force embodied in the Charter was a basic principle intended to regulate inter-State relations, it was too broad and vague to serve in the present context as a definition of aggression. Yet the prospects for achieving consensus on any definition of such an important term were meagre. Terrorism, too, was a key term that lacked a universally accepted definition.

22. The new text for article 21 (Systematic or mass violations of human rights) was an improvement, except that it spoke only of the "systematic" commission of specific acts, while the original text had referred to both systematic and "mass" violations of human rights. If the acts enumerated in the article were not committed on a massive scale, they might be said to constitute common crimes, not crimes threatening international peace and security. The wording of the new text should therefore be reconsidered.

23. Mr. MAHIOU said that, in the discussion of article 1 at the forty-sixth session, the Commission had already addressed many of the issues now before it, such as whether a general definition and/or a restrictive list of crimes against humanity should be incorporated in the Code. It would seem that both were needed. Due regard should be paid to making sure that the definition was broad enough not to confine the Code's application to a specific set of circumstances, yet it was also necessary to preserve the tradition in criminal law whereby crimes and their punishments were exhaustively enumerated. He favoured incorporating a general definition in article 1 that would specify the nature of the crimes to be envisaged in the Code.

24. During the first reading of the draft Code, the Commission had used an inductive method of reasoning, seeking to identify crimes against the peace and security of mankind and their individual characteristics. Perhaps now, on second reading, it should turn to the deductive method. Using the list of serious crimes already set out in articles 15 to 26, it might try to develop criteria for distinguishing such crimes from common crimes. Some distinguishing factors included the gravity and scope of the act and whether the act had been designated a crime by the international community.

25. With regard to the second factor, how could one know whether a crime had been designated as such by the international community? The relevant texts often referred to "the international community as a whole", which usually meant consensus had been achieved. Yet there was an element of ambiguity built into the very concept of consensus: it might apply very well in politi-

cal, commercial or economic matters, but not in legal matters and especially not in criminal matters.

26. The gravity could apply to the crime itself or to its consequences or to both at once. Some crimes, aggression and genocide for example, were serious in themselves, regardless of their consequences and should be placed at the top of the list of crimes. In contrast, war crimes, violations of human rights and perhaps some crimes against the environment should be included only if their consequences were serious. The Commission must therefore make a rigorous examination of each crime before deciding to include it.

27. Aggression was clearly the epitome of a crime against the peace and security of mankind. It was equally clear that the Commission should not engage in the futile exercise of trying to define aggression anew but must use the definition adopted by the General Assembly,<sup>5</sup> which represented a minimum of agreement, and see how it could be adapted for the purposes of the draft Code. The Definition of Aggression could meet the Commission's concerns and the general implications of the definition for criminal law, but it had not been produced specifically for the purposes of codification of crimes against the peace and security of mankind. It was primarily a political definition, based largely on interpretation of Chapter VII of the Charter. The penal consequences of the Definition were more difficult to perceive than the political ones. There would be several doubtful areas, including the role of the Security Council, if the text of the Definition was included in the draft article on aggression. It would only confuse things if the Commission went into too much detail about the role of the Security Council and tried to decide, for instance, whether it was representative of the international community as a whole or could be regarded as an international legislator. But there again, the Commission should not call into question the provisions of the Charter, especially the provisions on the role of the Security Council for the purposes of Chapter VII, even though the interpretation of those provisions gave rise to serious difficulties. However, General Assembly resolution 3314 (XXIX) was not the Charter, and the Commission was entitled to discuss the legal, as opposed to the political, aspects of its content and scope.

28. There was no reason to have the Security Council intervene in the functioning of criminal jurisdictions, whether domestic or international. Therefore, if the Commission used the text of the Definition it must first subject it to scrutiny. In any event he could not agree that paragraphs 4 (*h*) and 5 of article 15 should be retained, for that would lead the Commission into a political-legal swamp from which it would be difficult to escape. With regard to the point made by Mr. Pellet (2379th meeting), nowhere did the Charter say that a determination by the Security Council was binding on a domestic or international court. Even if, by means of an audacious interpretation, such a conclusion was reached, there was no reason for such audacity to be formally written into law. The Commission must not provide a kind of impunity for a criminal enjoying the support of a State with the right of veto in the Security Council,

<sup>5</sup> Ibid., footnote 3.

thereby endorsing the unfair structure of international law and relations. In fact, if such inequalities did exist, it did not justify their codification by the Commission.

29. He agreed with the Special Rapporteur's position on the threat of aggression or intervention, for he had stated from the outset his reservations as to the inclusion of such vague acts. It was difficult to agree, on the other hand, that colonial or other forms of foreign domination should not be included in the list. Such domination was not a thing of the past and could resurface at any time. There might be a problem regarding definition or denomination, but foreign domination, colonial or otherwise, could amount to a serious crime. The Commission should therefore give further attention to the matter. The same applied to apartheid, which could still manifest itself, although perhaps under a different name.

30. The treatment of the crime of terrorism depended on whether it was committed by a State or by an individual or group having no connection with a State. State terrorism must certainly be included as a crime against the peace and security of mankind, but the Commission must specify the exact conditions in which an individual act of terrorism, without being linked to a State, could be regarded as such a crime. The solution might be to draft separate paragraphs for the two situations. The same applied to crimes connected with drug trafficking, for including them when they were committed by individuals might have the effect of watering down the concept of crimes against the peace and security of mankind. The Special Rapporteur's proposal to replace the present title of article 21 with "Crimes against humanity" was open to the objection that it could convey the impression some crimes not mentioned in the article were not crimes against humanity, for example, genocide.

31. Mr. LUKASHUK said that he had been following for many years the heroic struggle of the Special Rapporteur to establish peace and legality in international relations. On the whole, the draft Code, although of course not perfect, constituted a good basis for the Commission's work. It might be useful to amend the title of the Code to read "Code of crimes against universal peace and humanity". However, the main problem for the Commission was the harmonization of domestic and international criminal law. In that connection, it might be useful to amend the definition contained in article 1 to read "The crimes defined in this Code in accordance with international law and general principles of law constitute crimes against the peace and security of mankind". Furthermore, the first sentence of article 2 was too strong, and perhaps incorrect, and should be omitted. The correlation between domestic and international law must be made clear and the principle of *nulla poena sine lege* firmly established.

*The meeting rose at 11.35 a.m.*

## 2381st MEETING

*Friday, 5 May 1995, at 10.10 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*later:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, 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<sup>1</sup> (continued)** (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

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

1. Mr. RAZAFINDRALAMBO said that the thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466) was a worthy successor to the previous reports and a model of conciseness and precision.

2. Speaking first of the thoughts prompted by his reading of the report, he joined the Special Rapporteur in deploring the fact that so few Governments had made known their views on the draft Code adopted on first reading. Still more worrying was the fact that no African or Asian country had done so. Those Governments that had remained silent would thus be ill advised to express surprise that, despite their countries' accession to sovereignty, the role historically played by the major countries, particularly of Europe, in originating and developing international law continued to be predominant, as, for example, in the case of the attitude towards the crime of colonial domination or the crime of apartheid. At all events, the Commission must take the fullest account of the developments that had taken place in recent years, namely, of the decisive contribution of the Security Council to the defence of human rights through the establishment of the International Tribunal for the former Yugoslavia<sup>3</sup> and the International Tribunal for Rwanda,<sup>4</sup>

<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 . . . 1995*, vol. II (Part One).

<sup>3</sup> See 2379th meeting, footnote 5.

<sup>4</sup> *Ibid.*, footnote 11.

and also of its own contribution with the adoption at its forty-sixth session of the draft statute for an international criminal court.<sup>5</sup>

3. That remarkable progress in the field of positive law had both facilitated and complicated the task of the Special Rapporteur, who was able to draw heavily on texts he already had before him, but who also had had to ensure that the Code continued to have a genuine *raison d'être* and was truly useful. He thus announced at the outset of his report that he would abandon the draft articles on threat of aggression, intervention, colonial domination and other forms of alien domination and wilful and severe damage to the environment and that he was ready to forgo, not without reluctance, the draft articles on apartheid and on the recruitment, use, financing and training of mercenaries, at least as separate and independent provisions. He said that the other crimes salvaged from the first reading might be retained, subject to some amendments to take account of the observations of certain Governments.

4. In substantially cutting the list adopted on first reading, the Special Rapporteur had based himself on article 20 of the draft statute (Crimes within the jurisdiction of the Court).<sup>6</sup> he had retained the first four most serious crimes listed therein, which were common to both drafts, including genocide and aggression, had abandoned the unduly general wording of the latter and had kept the specific articles relating to international terrorism and illicit traffic in narcotic drugs. He could support the new proposals by the Special Rapporteur, except with regard to the crime of colonial domination and other forms of alien domination and that of wilful and severe damage to the environment. The glaring disparity between the political and economic situation of the States of the North and that of the States of the South forbade any premature optimism as to the final disappearance of all forms of colonial or neo-colonial domination. And in the case of wilful and severe damage to the environment, it was again the developing countries that were likely to suffer the adverse effects of a gap in the punishment of that type of crime. It was enough to recall certain criminal attempts illicitly to dump chemical or radioactive waste that was particularly harmful to their environment in the territory or in the territorial waters of those States.

5. He noted that article 47 of the draft statute (Applicable penalties) contained a special provision on applicable penalties and sanctions and that, for the purposes of the harmonization of the two drafts and with a view to achieving consistency, it would be advisable to reproduce the text of that article in the draft Code, subject to a few minor amendments.

6. He reserved the right to revert to that agenda item to make specific comments on the draft articles submitted.

*Mr. Pambou-Tchivounda took the Chair.*

7. Mr. MIKULKA said that, given the deep divergencies in the views of Governments, he could not but support the proposal of the Special Rapporteur to reduce the

list of crimes adopted on first reading to those whose status as crimes against the peace and security of mankind seemed difficult to contest. The Commission should, however, be under no illusion regarding the fate of the final draft, for, even in that form, it was not certain that States would hasten to adopt the draft Code, especially if it was to take the form of a convention.

8. It followed, as far as the method of work to be adopted was concerned, that the Commission must give priority to the crimes for which prosecution was provided by already well-established rules of international law and, customary rules whose application would not depend on the form of the future instrument and that it should confine itself to crimes of individuals whose characterization as a crime was independent not only of the internal law of States, but also of their ratification of an international convention establishing inter-State cooperation in the field of the prosecution of certain crimes. In other words, the Commission should include in the draft the crimes for which the perpetrators were directly responsible by virtue of already existing general international law and, above all, the crimes of individuals linked to the international crimes of States. In those cases where the criminal liability of the individuals who had taken part in the commission of the international crime of the State was only one of the consequences of that unlawful act of the State itself. Aggression was the best example.

9. Bearing in mind the criteria for inclusion of crimes in the Code that he had just mentioned, however, he thought that crimes such as international terrorism and illicit traffic in narcotic drugs had no place in the draft. He did not dispute the importance of combating those forms of criminal conduct, which had often taken on an international dimension, but, unlike the crimes of aggression, genocide and other crimes against mankind or war crimes which could be prosecuted on the basis of general international law, the criminal prosecution of international terrorism and of illicit traffic in narcotic drugs at the international level presupposed the existence of a convention, except perhaps in cases where those crimes were linked to other crimes punishable under general international law.

10. He endorsed the Special Rapporteur's proposal that the crimes of threat of aggression and intervention should be left aside for the time being because of their vague and imprecise nature, and which could, to a certain extent, be prosecuted as crimes of aggression.

11. He considered the Special Rapporteur's proposal on colonial domination and other forms of alien domination to be acceptable, since colonial domination was virtually extinct and there was no precise definition for alien domination, whereas criminal law required that a crime should be defined.

12. With regard to the crime of apartheid, which was fortunately a thing of the past, the Special Rapporteur's proposal that it should be rephrased as institutionalization of racial discrimination, merited the Commission's attention, but he did not think that purely hypothetical crimes should be included in the Code.

<sup>5</sup> Ibid., footnote 10.

<sup>6</sup> Ibid.

13. As to the recruitment of mercenaries, in so far as it involved the participation of agents of the State, the acts originally dealt with in article 23 (Recruitment, use, financing and training of mercenaries) could be prosecuted as crimes linked to aggression. Otherwise, he had the same objections with regard to that crime as he did to international terrorism and illicit traffic in narcotic drugs.

14. The list of crimes to be included in the Code should therefore consist only of crimes that were already part of positive law (*lex lata*)

15. Given that the Code's scope was limited both by the title of the instrument and the mandate given to the Commission as a result, the draft Code should cover not all crimes under international law committed by individuals, but only those that might threaten the peace and security of mankind or, in other words some "crimes of crimes", although no hierarchy should be established within that category of crimes. He therefore agreed with the Special Rapporteur's proposal that the crime of wilful and severe damage to the environment should be removed from the draft, on the understanding that that did not rule out the possibility of considering it as an international crime without necessarily characterizing it as a crime against the peace and security of mankind.

16. Since relatively few Governments had communicated their comments on the draft Code and the comments received could therefore not reflect the entirety of the views of Governments and, in particular, the main trends on various issues, the Commission must also take account of the views that States had expressed in recent years in the Sixth Committee and the comments they had made on the draft statute for an international criminal court, in which context the question of the list of crimes had also come up. At the same time, the Commission should retain some degree of independence in its thinking, not only because States had radically opposing views on certain issues, but also because they often changed their mind and adopted the opposing view owing to short-term political considerations or the outlooks of individual representatives or experts responsible for speaking for States.

17. Mr. YAMADA commended the Special Rapporteur for adopting a realistic approach and accommodating the observations made by Governments.

18. Commenting generally on the report, he commended the Special Rapporteur's courageous action in having slashed the number of crimes from 12, as contained in the draft adopted on first reading, to only 6, thus increasing the possibility of wider acceptance by Governments. He believed that the Code should deal with only the most serious of serious crimes and those with the gravest consequences. The list of crimes could be shortened still further and he would express his views on that subject when the draft Code was considered article by article.

19. Existing treaties on international crime often lacked the precision and rigour required by criminal law. As those treaties were designed to require Governments to establish national jurisdiction over the crimes defined in the treaties and to conduct trials of such crimes in

their courts, gaps in the definition of what constituted a crime and the specific penalties applicable could be filled by provisions in enabling national legislation. The Commission must, however, consider the possibility that crimes defined in the Code might be tried in an international criminal court. In the deliberations on the draft statute for an international criminal court in the Sixth Committee at the forty-ninth session of the General Assembly (A/CN.4/464/Add.1) and in the Ad Hoc Committee on the establishment of an international criminal court in April 1995,<sup>7</sup> the view had been taken that the principle of legality, as expressed by the maxim *nullum crimen sine lege, nulla poena sine lege*, was the cornerstone of international criminal justice and that a form of international criminal law that was as precise as national criminal law was required. The Code now being formulated must stand on its own and be sufficiently precise to be applied directly by an international court without recourse to any other source of law.

20. In his view, it was not necessary to provide a penalty for each crime. The Commission was dealing with the most serious crimes and, accordingly, the penalties must be severe. It would suffice to incorporate one article setting out the minimum and maximum limits for all the crimes in the Code, with the international criminal court being left to exercise its discretion within those limits.

21. As to the role of the Security Council in relation to the crime of aggression, he recalled that, under Article 39 of the Charter of the United Nations, the Security Council was entrusted with determining the existence of an act of aggression. Such a determination was a prerequisite to any trial for the crime of aggression, but that did not in any way undermine the independence of the judiciary. The principles of the independence of the judiciary and the separation of the judiciary from the executive were intended to protect the human rights of the accused by preventing arbitrary political intervention in the judicial process. On the other hand, the Council and the international judiciary must have the common objective of deterring and punishing such grave crimes as an act of aggression. He could not foresee, within the present framework of international law, how a trial for the crime of aggression could be initiated in the absence of a determination by the Council of the existence of aggression. On the other hand, there might well be a case when the court found the accused not guilty, even though the Council had made a determination of aggression.

22. Mr. VARGAS CARREÑO congratulated the Special Rapporteur on the new version of the draft Code proposed in his thirteenth report, which met two concerns: it took fullest possible account of the wishes of Governments as stated in their comments; and it retained in the Code only the most serious crimes, the "crimes of crimes", against the peace and security of mankind.

23. The purpose of the exercise undertaken by the Commission was to draft a convention which could secure approval by the international community and ratification by a large number of States. That purpose determined some of the criteria to be observed. The first

<sup>7</sup> See document A/AC.244/2.



criterion related to the realistic and non-Utopian nature of the text to be drafted, which must be consistent with existing practice and conventional or customary law. The text must contain many more elements of *lex lata* than of *lex ferenda*. Its wording must be sufficiently clear and precise to prevent conflicting interpretations. And it must not conflict with the aspirations, or disregard the legitimate objections, of States, especially in respect of the gravity of the offences constituting crimes against the peace and security of mankind.

24. Those criteria had induced the Special Rapporteur to delete some of the crimes which had appeared in the previous version. That was on the whole a sensible move and the reasons put forward by the Special Rapporteur to justify it were acceptable: insufficient existing practice or problems now solved, as in the case of colonial domination or apartheid. However, he wished to comment on two of the crimes removed from the list. While there was perhaps no justification for creating a special category for the crime of apartheid, there was no doubt of the continued existence of situations of institutionalized racial discrimination which the draft text should continue to address, for example in article 21 (Systematic or mass violations of human rights). Nor was there any doubt in the case of intervention that the principle of non-intervention remained a fundamental rule of contemporary international law which was asserted in numerous important international instruments and had been reaffirmed by ICJ, particularly in the *Corfu Channel case*<sup>8</sup> and the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,<sup>9</sup> and confirmed by several General Assembly resolutions, including resolution 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty and resolution 2625 (XXV), the annex to which contained the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. However, it must be acknowledged that the principle was of limited scope, owing in particular to the decline in the number of situations, qualifying as internal affairs and to the emergence of situations, affecting human rights in particular, in which the internal jurisdiction exception was unwarranted. It therefore seemed right to delete article 17 (Intervention). But it must be explained that the principle of non-intervention itself remained a fundamental rule of contemporary law and some elements of the deleted text, in particular parts of paragraph 2, must be retained and incorporated, for example, in the articles on aggression and terrorism.

25. With regard to the six articles retained, he approved of the shortening of article 15 (Aggression) to two paragraphs of definition. However, it would be useful to state that a determination of aggression was made in accordance with international law, for that would avoid any debate about the possible function of the Security Council or the international criminal court or about the reference to General Assembly resolution 3314

(XXIX). That would leave very ample latitude. If the Council made a determination of aggression, it was obvious that the effects of such a determination would be binding on all States. The same would be true in the case of a determination of aggression by the international criminal court. He was in favour of retaining the present wording of paragraph 2, which was based on Article 2, paragraph 4, of the Charter.

26. With regard to genocide, he was grateful to the Special Rapporteur for not departing from the text of the Convention on the Prevention and Punishment of the Crime of Genocide.

27. As for article 21, he preferred the title adopted on first reading to the new title proposed by the Special Rapporteur. Some of the acts defined in the draft Code, such as genocide, terrorism or illicit traffic in narcotic drugs, were crimes against humanity. But it was in the protection of human rights that international law had made the greatest progress and the international community had achieved its greatest successes. Nor did he agree with the Special Rapporteur on the inclusion of "individuals" as possible perpetrators of the crimes in question. The international protection of human rights amounted fundamentally to commissioning a specific body to judge acts attributable to agents of the State. If the text spoke of "individuals", it would clearly not be referring to the situations with which the Commission should be concerned. Crimes committed by individuals were unfortunately commonplace occurrences: newspapers in all countries reported daily a large number of crimes, such as murder, torture and other crimes committed by individuals that did not constitute crimes against the peace and security of mankind. The article was concerned with acts, such as terrorism or deportation, for example, committed on behalf of a State. It was also necessary to retain the requirement of the mass and systematic scale of such acts, for an isolated act would not constitute a crime against the peace and security of mankind.

28. The list of crimes must be drafted clearly and precisely. He favoured the deletion of persecution, since it was not a generic act. On the other hand, certain omissions from the list of crimes must be made good. He had in mind primarily enforced disappearances, which constituted one of the most serious crimes of the second half of the twentieth century in some parts of the world. Pursuant to State policy, thousands of persons had disappeared after arrest. The press had published the confession of the current Chilean Commander-in-Chief who had acknowledged ordering the arrest and execution of thousands of people whose bodies had then been dumped at sea. Those were very serious violations of human rights which truly constituted crimes against the peace and security of mankind and should be mentioned in the draft Code. Institutionalized racial discrimination should also be included if the article on apartheid was deleted.

29. With regard to article 22 (Exceptionally serious war crimes), he endorsed the Special Rapporteur's excellent idea of basing the text on the statute of the International Tribunal for the Former Yugoslavia and on the Geneva Conventions of 12 August 1949 and the Protocol

<sup>8</sup> *Merits, Judgment, I.C.J. Reports 1949*, p. 4.

<sup>9</sup> *Ibid.*, 1986, p. 14.

additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

30. On the other hand, he was afraid that the difficulties to which the new version of article 24 (International terrorism) might give rise would prevent the Commission from reaching a consensus. The first cause of probable difficulty lay in the possible inclusion in the definition of terrorism of an act committed by a person "as an individual", as proposed by the Special Rapporteur. Secondly, the definition of terrorism should stand on its own and not be made by reference to subjective motives and to the objective of the terrorist act. Another cause of difficulty lay in the "international" character of terrorism. Referring to the recent attacks in Oklahoma City and Buenos Aires, for example, he wondered whether the fact was decisive that in the former the alleged perpetrators were United States citizens and in the latter they were foreigners. The Commission should discuss that point and endeavour to arrive at a consensus.

31. He agreed that article 25 (Illicit traffic in narcotic drugs) should be included in the draft Code. In his view, the basic element to be taken into account in both the version adopted on first reading and the new one was the scale on which such traffic was carried out.

*Mr. Sreenivasa Rao resumed the Chair.*

32. Mr. KABATSI said that it had all along been the Commission's task to produce not an international criminal code, but a code of the crimes that most outraged the conscience of mankind—the "crimes of crimes". But could it really be said that such "crimes of crimes" were confined to the six that had been included in the new list proposed by the Special Rapporteur? He had rightly started with the principle that it was necessary to defer to the political will of States, but it was important, at the same time, not to form an incomplete picture in that connection by basing it on the will of the few States that had given their comments on the draft Code. The silence of the States that had not made observations could equally be interpreted as an acceptance of the old list. There was nothing to suggest that those States would have agreed to the elimination of, for instance, colonial domination or wilful damage to the environment when whole communities, countries and even regions could suffer irreparable damage that originated in nuclear, chemical or bacteriological plants. With regard to apartheid, States seemed to feel not that that crime had no place in the draft Code, but, rather, that the positive changes in recent years meant that there was no longer any need to worry about a problem that would in any event be covered by article 21. On the other hand, while apartheid had disappeared in South Africa, the phenomenon perhaps existed elsewhere or could resurface in even more acute form. It would therefore be advisable to keep the crime of apartheid in the Code, possibly under the heading "Institutionalization of racial or sectarian discrimination". For the same reasons, the Special Rapporteur had been right to retain article 25.

33. With regard to the applicable penalties, it should suffice to prescribe an upper limit for all the crimes, leaving it to the courts to determine the penalty in each particular case. In that connection, it might be advisable

to follow article 47 of the draft statute for an international criminal court. As to the relationship between the role of the Security Council and the question of aggression, the probability that an act or a situation of aggression was not determined as such by the Council was perhaps unlikely in the immediate future, but it could not be entirely excluded. It was still not too late to warn against the risks of unjustified immunity that would follow if the Council found that, for political reasons, it lacked the capacity to determine that there had been aggression. It was never a good idea to leave the exclusive power to determine whether there had been a criminal act to a political body, even if it was the Security Council of the United Nations.

34. Mr. SZEKELY said that the mutilation done to the draft Code might even result in the Commission submitting to the General Assembly a draft resolution and not a draft Code. He favoured a list that was longer and a Code that was as comprehensive as possible. There was somewhat of a contradiction in the statement that, for an internationally wrongful act to become a crime under the Code, it was not enough for it to be of extreme gravity; it was also necessary for the international community to decide that it was so, and then to allow a small number of States to take that decision. The silence of the large majority of States—quite apart from the fact that it could be interpreted to mean "he who says nothing consents"—should act as an incentive to be imaginative and to find a way of ascertaining the views of a larger number of States. The Commission must certainly take care not to lose sight of political reality, but it would be running the greatest risk of doing so if it failed to do everything to secure the views of the majority of States. For instance, the crime of intervention, which it was hoped, apparently, to exclude from the list, was a contemporary fact of life and peoples suffered from it. And who could guarantee that colonial domination and apartheid were definitely a thing of the past? As for wilful and serious damage to the environment, they were a fact of life, not just now, but for future generations.

35. It would be regrettable if, as a result of the omission or negligence of the majority of States, the Commission had to restrict the scope of the Code unduly and to refrain from strengthening international law and international peace and security by drafting a Code that reflected the views of only some States. The basic mistake perhaps was to believe that it was a question of choosing between what should be included and what should be excluded, whereas it was rather a matter of knowing how to distinguish crimes of extreme gravity from those which were, in addition, a threat to the peace and security of mankind. The question of the characterization of crime (part one of the draft Code) and of the criteria applicable to that characterization must therefore be reviewed. It was by recognizing the highest threshold of the gravity and by defining the public interest it hoped to cater for in the Code that the Commission could more closely reflect the majority wish of the international community as to the crimes to be included in the Code.

*The meeting rose at 11.40 a.m.*



## 2382nd MEETING

Wednesday, 10 May 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, 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<sup>1</sup> (continued) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)**

[Agenda item 4]

**THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. JACOVIDES said that the topic under consideration, and the related questions of an international criminal jurisdiction and the definition of aggression, had a long history in the United Nations dating as far back as 1947. The present phase had commenced following the achievement of a consensus on General Assembly resolution 3314 (XXIX), adopted in 1974, which laid down, in the annex, the Definition of Aggression. Subsequently, in 1981, the General Assembly had given an indication of what it expected of the Commission when it had invited it by resolution 36/106, to examine the draft Code of Offences against the Peace and Security of Mankind with the "required priority", and to take account of the results achieved by the process of the "progressive development" of international law. The draft Code of Crimes against the Peace and Security of Mankind had ultimately been adopted on first reading in 1991. He very much hoped that the final lap had now been reached, at least so far as the Commission was concerned, and that, before its mandate ended in 1996, the Commission would have discharged its duty to the General Assembly by submitting a legal document that was comprehensive but lean and designed to ensure the widest possible acceptability and effectiveness.

2. His only comment with respect to the Special Rapporteur's twelfth report<sup>3</sup> pertained to article 5 (Respon-

sibility of States) which, in his view, should be retained, since he felt strongly that a State should be held internationally liable for damage caused by its agents as a result of a criminal act committed by them.

3. The Special Rapporteur was to be commended on the well-reasoned approach taken in his thirteenth report (A/CN.4/466) and for honouring his promise to limit the list of crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge. He had had difficult choices to make and, on the whole, had made them wisely. As the Special Rapporteur had himself rightly pointed out, had he decided to proceed on the basis of the 12 crimes adopted on first reading, the draft Code might have been reduced to a mere exercise in style. The Commission was not drafting a general international penal code but was concentrating on a list of the most serious international crimes against the peace and security of mankind and one that the international community would be able to approve and ratify. Inevitably, therefore, the choice was considerably restricted.

4. Though it was unfortunate that so few States had responded with their written observations on the draft Code as adopted on first reading, that did not, in his opinion, reflect a lack of interest on the part of the international community. There were many other ways in which States could manifest their will, not least by the positions taken during the consideration of the report of the Commission by their representatives in the General Assembly. There were practical considerations, too, to be borne in mind, particularly in the case of small States with limited resources, and there was the fact that, for the past three years, the focus had been on the draft statute for an international criminal court rather than on the draft Code. Lastly, silence could be construed as consent.

5. At all events, many thought that, notwithstanding the arguments in favour of retaining certain crimes included in the draft Code adopted on first reading, the Code would have to be restricted to the most serious crimes having grave consequences for international peace and security: it was a concession dictated by political reality.

6. It was only partly true to say that the Commission was a codifier, not a legislator. While the Commission must not fall out of step with the political will of States—the legislators—it had responsibility under its statute for the progressive development of international law. That applied in particular, in the light of General Assembly resolution 36/106, to the topic under discussion, though where codification ended and progressive development of international law began was a controversial and subjective matter.

7. In view of those considerations and despite some misgivings, he believed that the Special Rapporteur had been wise to cut back sharply on the number of crimes to be covered by the Code. At the same time, he trusted that no further drastic surgery would be necessary. The draft Code's substance must be preserved so that the final text was a robust and living instrument, with reasonable prospects of being acceptable to the international community as a whole.

<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 . . . 1995*, vol. II (Part One).

<sup>3</sup> *Yearbook . . . 1994*, vol. II (Part One), document A/CN.4/460.

8. The omission of certain crimes from the list in the Code should not imply that the crimes in question were unimportant. True, threat of aggression and intervention, for example, lacked the rigour required by criminal law, but those crimes, and indeed mercenarism, could come under the general rubric of aggression or terrorism. Non-intervention, of course, was a cardinal principle of international law enshrined in treaties, decisions of ICJ such as those in the *Corfu Channel* case<sup>4</sup> and the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,<sup>5</sup> as well as in United Nations resolutions. It was a principle that remained wholly valid. While colonial domination and other forms of alien domination were abhorrent, colonial domination was, he hoped, a thing of the past and therefore had no realistic chance of being accepted if it was included in the Code. There was also no need for a separate section on the environment, since damage to the environment, such as wilful nuclear pollution or the poisoning of vital international water-courses, would, if it affected international peace and security, be punishable as an international crime under other rubrics of the Code such as aggression, war crimes and international terrorism. Again, there was no need to include apartheid in the Code, particularly since apartheid had been superseded by political developments in South Africa. On the other hand, an appropriate form of wording should be incorporated in one or other of the rubrics of the Code to make institutionalized racial or ethnic discrimination, which still persisted in some parts of the world, a criminal act. The aim would be to prevent its continuation, or even emergence, in other contexts.

9. Of the six crimes now proposed by the Special Rapporteur for inclusion in the Code, aggression was unquestionably of crucial importance. The adoption by consensus, after long and painstaking effort, of General Assembly resolution 3314 (XXIX) which laid down the Definition of Aggression in the annex, had removed any pretext for not proceeding with work on the Code. In his thirteenth report, the Special Rapporteur indicated that Switzerland rightly stated in its written observations that the proposed definition of aggression rested mainly—and with perfect justification—on that contained in General Assembly resolution 3314 (XXIX). That definition therefore formed the basis of article 15 (Aggression), adopted on first reading in 1991. On the other hand, the United Kingdom stated that a resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before a judicial body. That view had received wide support from a number of Governments which had, however, also participated in and consented to General Assembly resolution 3314 (XXIX), in the knowledge that the whole exercise had been undertaken in the context of the Code and with a view to supplying the missing link, namely, the Definition of Aggression.

10. In the circumstances, it would be interesting to know whether the Security Council, at any stage in the exercise of its functions under Article 39 of the Charter of the United Nations, had ever relied expressly on that

resolution. In the one situation with which he was most familiar and which had involved the massive use of force, it had not done so. At all events, on the clear understanding that Assembly resolution 3314 (XXIX) would retain its validity, he would be prepared to go along with the Special Rapporteur's proposed new wording, which defined aggression by reference to article 1 of the Definition of Aggression. The latter article was itself based on Article 2, paragraph 4, of the Charter and, according to the prevalent view, provided the clearest instance of *jus cogens* and was therefore difficult to dispute.

11. The closely related matter of the functions of the Security Council under Article 39 of the Charter in determining the existence of an act of aggression and of the international criminal court in deciding the issue of the criminal responsibility of individuals was important in terms of the effectiveness of the Code and of the prospect of its acceptability. In legal terms, the matter was important in that it raised questions as to separation of powers between the political and judicial organs and of the equality of the States represented on the Security Council, and more particularly of its permanent members. Should there be five such members, as at present, or more? In practical terms, it could mean that individuals not only from the permanent members of the Council, with the power of veto, but also from their allies and protégés, would be exempt from criminal responsibility since, as stated in paragraph (8) of the commentary to article 23 of the draft statute for an international criminal court:<sup>6</sup>

Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter of the United Nations to make.

The saving clause in the fourth preambular paragraph of the Definition of Aggression ("... 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") could also serve a useful purpose in that context. The whole point, really, was whether there was a willingness to sacrifice sovereign equality and justice for all as the price for political acceptability.

12. He agreed that the distinction between "acts of aggression" and "wars of aggression" no longer applied, particularly in view of the adoption of the Charter of the United Nations and earlier instruments that outlawed war. Such acts of aggression as invasion or annexation of territory were sufficiently serious to constitute not just wrongful acts but crimes under the Code.

13. Genocide, of the crimes covered by the draft Code, was the one that presented the least difficulty, since there was broad agreement in that respect in the international community as reflected in the Convention on the Prevention and Punishment of the Crime of Genocide. In that connection, the written observation by the Government of the United Kingdom, as contained in the thirteenth report of the Special Rapporteur, on the relationship

<sup>4</sup> See 2381st meeting, footnote 8.

<sup>5</sup> Ibid., footnote 9.

<sup>6</sup> See 2379th meeting, footnote 10.

between the Code and article IX of the Convention was a welcome reminder of the need for the acceptance of compulsory third party settlement in all multilateral law-making conventions. Subject to any necessary drafting changes, therefore, the Special Rapporteur's proposed text was acceptable.

14. Article 21 proposed by the Special Rapporteur for inclusion in the draft Code was entitled "Crimes against humanity". Actually, the reference in the previous title of the article to "mass" violations was meant to indicate the gravity of the offence. The Drafting Committee might therefore wish to reconsider the matter. Personally, he had no strong views and could in fact accept the new title. The definition of torture which appeared between square brackets, was not really necessary and upset the balance of the draft article. On the other hand, the reference to "all other inhumane acts" was in keeping with other similar instruments and should be retained, as should the reference to "deportation or forcible transfer of population". The article could perhaps be expanded to cover institutionalized racial or ethnic discrimination, as a consequence of the omission of apartheid from the Code. Consideration should likewise be given to the inclusion of a reference, as suggested by the Government of Australia, to the practice of systematic disappearance of persons, which was indeed of major humanitarian concern in many parts of the world.

15. Article 22 proposed by the Special Rapporteur entitled "War crimes" reflected the Special Rapporteur's conclusion that the reservations expressed with respect to the new concept of exceptionally serious war crimes, as referred to in the draft adopted on first reading, were valid; hence, it was difficult in practice to establish a precise dividing line between the "grave" breaches defined in the Geneva Conventions of 12 August 1949 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), on the one hand, and the "exceptionally grave breaches" referred to in the draft adopted on first reading, on the other. That conclusion raised some difficult issues for the Commission on which it would be interesting to hear members' views. During the debate on the Commission's report in the Sixth Committee, a strong preference had been voiced for the wording used in draft articles 21 and 22 of the draft Code as adopted on first reading in 1991. In particular, paragraph 2 (b) of article 22 had given rise to no objection. A solid foundation for that provision was also to be found in article 85, paragraph 4, of Protocol I. Consequently, while he appreciated that paragraphs 1 (g) and 2 (d) and 2 (e) of the proposed text went some way to meeting the point, he would strongly urge that the reference to the establishment of settlers in an occupied territory and changes in the demographic composition of an occupied territory, as adopted on first reading, should be retained.

16. On the basis of the observations of States and his own views, the Special Rapporteur had expanded the scope of article 24 (International terrorism) so that the perpetrators included not only agents or representatives of States but also private individuals acting on behalf of groups or associations. Bearing in mind the instances of international and also of national or internal terrorism

(from the New York World Trade Centre bombing to those in Buenos Aires and Oklahoma City), that would seem to be the right approach. Since there was as yet no generally acceptable definition of terrorism, in practical terms the piecemeal approach to identifying specific categories of acts that the entire international community condemned such as aircraft sabotage, aircraft hijacking, attacks against officials and diplomats, hostage taking, theft or unlawful use of nuclear material could lead to some progress in combating terrorism. None the less, in a Code such as the one on which the Commission was engaged, common rules applicable to all forms of terrorism should be included in order to suppress and punish them. The present text might not be perfect, but was aimed in the right direction.

17. Some very valid points were made in the written observations of Governments, notably by Australia and Switzerland concerning article 25 (Illicit traffic in narcotic drugs). Indeed, more detailed work needed to be done on the relationship between that draft article and existing conventions such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, working out methods for mutual assistance between States in the prosecution of offenders and prevention of money laundering, and on the relationship between the jurisdiction of national legal systems and the proposed international jurisdiction under the Code. The fact was that "narco-terrorism" could have a destabilizing effect on some countries, notably those in the Caribbean, which strongly advocated including it in the Code. Drug trafficking, whether by agents of a State, individuals or organizations, could adversely affect international relations. The Special Rapporteur was right to say that many small States were unable to prosecute perpetrators of such traffic when carried out on a large scale in their own territory. He was also right in proposing to add the words "on a large scale . . . or in a transboundary context" to the text.

18. Lastly, on the issue of penalties, the best course seemed to be, considering the gravity of the crimes encompassed by the Code, to stipulate a maximum penalty of life imprisonment, subject to the discretion of the international criminal court to specify such other terms as the particular circumstances of the case might require. In any case, that issue had been dealt with by the Commission in the context of article 47 of the draft statute as recently as 1994.<sup>7</sup> As he had repeatedly said, if it was to be an effective and complete legal instrument, the Code had to include the three elements of crimes, penalties and jurisdiction. So, whether the issue of penalties was dealt with in the context of the Code (list of crimes) or in the context of the international criminal court was not of great practical importance.

19. It was his fervent hope that, as far as the Commission was concerned, it was now about to finalize a major project, providing the international community with an instrument which Governments could in good conscience adopt and apply, thereby taking an important step forward towards international legal order during the United Nations Decade of International Law.<sup>8</sup>

<sup>7</sup> Ibid.

<sup>8</sup> Proclaimed by the General Assembly in its resolution 44/23.

20. Mr. ROSENSTOCK said that, as he recalled events, Mr. Jacovides' remark that General Assembly resolution 3314 (XXIX) on the definition of aggression had been part of an effort in connection with the draft Code was not quite correct. When the exercise of drafting a Code had been abandoned for lack of a definition of aggression, a committee had been established to decide when the matter should be reverted to—a committee whimsically referred to by some as the “propitiousness committee”, because every time it met after a lapse of some years it had been determined that the time was not yet propitious to resume the attempt to draft a definition of aggression in the context of the Code. Then, in the late 1960s, the Soviet Union had made an annual proposal to the General Assembly—often agitation propaganda in some respects—that an attempt should be made to define aggression. That attempt constituted a separate exercise from the one launched in the context of the draft Code. When the exercise had been concluded with the drafting of a text entitled “Definition of Aggression” and without unduly bitter political fallout, no one involved seriously supposed that the text would be of use in criminal law or that it could be related to the draft Code in any immediate sense. Rather it had been thought to constitute some measure of political guidance for the Security Council, without prejudice to the Council's discretion under Article 39 of the Charter of the United Nations. Against that background, it was quite understandable that the definition of aggression produced by the General Assembly was not very helpful.

21. Mr. PAMBOU-TCHIVOUNDA said that the Commission was now in the second week of its consideration of the thirteenth report, a foretaste of which it had received during the presentation of the report by the Special Rapporteur at the 2379th meeting. The presentation had been sober and concise, like the report itself, though it lacked the density of the latter, something which had been commented on by a number of previous speakers. It was a concrete, practical report, and thus one intended to meet the expectations of the Commission itself and of the General Assembly. That important quality had been stressed, and he did not dispute it.

22. What, then, remained to be said with regard to the thirteenth report at the present juncture? It was certainly a prudent and skilful report, which reflected the lofty attachment to the idea that the Special Rapporteur was at the service of the Commission. For example, on the question whether the list of crimes should be expanded or pared down still further, the Special Rapporteur replied in the report that that would be for the Commission to decide. Similarly, with regard to the question whether a scale of penalties should be established, leaving it up to the courts concerned to determine the applicable penalty in each case, his reply was that, given the silence of Governments on the matter, it was now for the Commission to choose which course to follow. In both of those cases, the Commission would perhaps have been grateful to the Special Rapporteur if, without necessarily adopting too bold an approach, he had offered some clarification. However, the Special Rapporteur had instead donned the sumptuous cloak of some Governments' observations, otherwise referring only to a few existing legal instruments, hand-picked to support his cause. That

method deprived the thirteenth report of both vision and breadth.

23. Why did the thirteenth report lack vision? In what respects did draft articles 15 to 25 lack breadth? To begin with, he noted that the report was based on what was intended to be an exclusively realistic approach: the Special Rapporteur confined himself to the existing state of affairs as reflected in the observations of Governments and in the existing legal instruments. The Special Rapporteur's reasoning could be summed up as being that, in order to be included in the Code, crimes against the peace and security of mankind must meet two prerequisites: their status must be the subject of consensus in the international community, and they must be regulated at the international level by means of conventions. It was a way of ensuring that the Code would be subject to the principle of legality, which was stricter in criminal law matters than in any other system. The principle of *nulum crimen sine lege, nulla poena sine lege* would thus be fully met. That reasoning had led to the drawing up of the short catalogue of crimes that embodied the Special Rapporteur's preference for the restrictive approach. He endorsed all the criticisms levelled at that approach by earlier speakers, for it was vitiated in three respects. First, it seemed to have a tactical dimension in its intention, albeit understandably, to finalize the draft Code at any cost, thereby meeting the expectations of the international community. Taken to extremes, however, the approach verged on opportunism, so limited were the sources of the guidelines provided by the international community which the Special Rapporteur had selected, in a process that seemed unjustifiable in view of the many reactions expressed by the delegations of a number of States in the Sixth Committee.

24. Secondly, the approach seemed to echo, or simply replicate, the approach adopted in the draft statute for an international criminal court, which included, as an annex, extracts from international legal instruments which, instead of defining the crimes in question, gave illustrative examples of one or another category of crimes. Even so, such a panorama had the attraction of inviting a synthesis with a view to providing a concrete but general definition of the concept of a crime against the peace and security of mankind. Perhaps, moreover, such a definition did exist, in which case it would have been worth including in the thirteenth report. Yet from indifference the Special Rapporteur had made no response. Furthermore, one could not but regret the fact that, when examining the thirteenth report, the Commission had not considered the idea of setting up a special mechanism responsible for harmonizing the provisions of the draft Code and of the draft statute with a view to achieving a more coherent and integrated structure.

25. Thirdly, the Special Rapporteur's attachment to *lex lata* had led him into a great error, which was manifested in two ways: to begin with, in an unequal treatment of the crimes under consideration, in the light of existing legality. Thus, aggression was singled out for special treatment, whereas apartheid was eliminated, and wilful damage to the environment was shelved indefinitely. That approach allowed substantive problems to remain unresolved—problems that were not necessarily questions of competence. Again, and more important, that

error was manifested in a weakening of the task of codification: *lex lata* generated by conventions had given rise to different systems, systems which, in the terminology used by ICJ, were self-sufficient. The drafting of a Code of Crimes against the Peace and Security of Mankind belonged to quite a different field than that of codification within the meaning of article 15 of the Commission's statute. In the present instance, if one restricted oneself to the definition of the task of codification contained in article 15 of the Commission's statute, one was bound to wonder what had become of the "extensive State practice, precedent and doctrine" allowing for "the more precise formulation and systematization of rules of international law". Indeed, those rules—rules that would set forth the relevant criteria whereby the judge could identify a crime or category of crimes for which they provided—must be defined. There was no conflict or incompatibility between the Code and the systems existing elsewhere. The task of drafting a Code could be accomplished without the Commission being doomed to adopt either excessive or insufficient realism.

26. As to the results achieved by the Special Rapporteur in his thirteenth report, the outcome of his low-profile approach was a list of crimes substantially shorter than that adopted by the Commission on first reading in 1991. Regrettably, it had to be said that that result was very middling—not only because the proposed list lacked the references and general definition one might have expected to find but also because it was deficient in content. It was in those two respects that, in his view, the result lacked breadth.

27. At what level in the structure of the Code should a general definition be situated? He would confess that he did not know. In any case, it was less a question of form than one of substance. A general definition of the category of crimes constituting crimes against the peace and security of mankind was not merely necessary, but indispensable, as a sort of common denominator on the basis of which the Code itself could specify those crimes. Previous speakers had pointed the way forward; and he endorsed the approach advocated by Mr. Mahiou (2380th meeting) in that regard. Furthermore the general definition should be immediately followed by an equally general proposal, setting forth the principle of the applicable penalty. There were two reasons: first, to bring the draft Code and the draft statute into line, since the latter specified a maximum penalty of imprisonment; secondly, because, as the Special Rapporteur pointed out in his report, it would be difficult, in the Code, to stipulate different penalties for offences which were uniformly considered to be extremely serious.

28. The principle of legality made the need for a general definition, together with a definition of each crime, indispensable. The Code would be a mandatory point of reference for the courts responsible for applying it, foremost among them the international criminal court. It was not the role of the judge, in criminal matters, to establish crimes, but rather to apply a penalty to the perpetrators, in a case falling within his jurisdiction. Common sense dictated that the Code must play a leading role in the proceedings of the international criminal court, either under the heading of applicable law and/or competence. Nor should there be any misconception about the ques-

tion of characterization, an exercise that constituted a comparison between a previously defined category and a specific case. In other words, the definition fell within the area delimited by the drafting of the Code, and the characterization played its part when the Code was applied, thus making it the exclusive concern of the judge. It was for the Commission to propose to States a complete body of rules, without the need for recourse to a United Nations body, political or otherwise. To give such a body responsibility for defining a crime or for characterizing a given situation as equivalent to that crime for the purposes of trial proceedings in a judicial body would necessitate a revision of the Charter.

29. He appealed to the Commission to face up to its responsibilities, one of the foremost being the task of re-drafting, in a more expanded form, the list of crimes against the peace and security of mankind now proposed by the Special Rapporteur. The restrictive approach could not be justified. Mankind was an evolving, dynamic concept. So, too, was time: for when it came to celebrating the fiftieth anniversary of the United Nations, it was more than likely some bold delegations would assert that the system was outmoded and that it should be reformed. That remained to be seen, but it was the law's ineluctable task to adapt both to mankind and to time, in other words, to anticipate the terms and limits of their development, thereby contributing to the process of inventing itself and transcending itself.

30. Utopia or reality? The question of the peace and security of mankind showed that Utopianism was now a thing of the past. The world was engaged in ploughing a new furrow, that of a new world order. Could that new world order be anchored in the prerogatives of sovereignty? He doubted it, for, to cite just one example, sovereignty had lost control of the means of mass destruction that posed a major threat to mankind. That new world order would have as its anchor, not sovereignty, but mankind.

31. Mr. THIAM (Special Rapporteur) said he wished to respond to Mr. Pambou-Tchivounda on two matters. On the question of a general definition of crimes against the peace and security of mankind, Mr. Pambou-Tchivounda had participated in the meetings of the Commission and of the Drafting Committee for a number of years and had never once proposed a general definition in either body. Instead of wasting time talking for the sake of talking, he should come up with some specific proposals, which the Commission could then discuss.

32. It had not previously been customary for members of the Commission to engage in personal attacks against one another. He was not an opportunist, nor did he base his reports on tactical considerations. On the contrary, he said what he thought, out of respect for the law. He urged all members to consider his report objectively, without becoming embroiled in pointless considerations.

33. Mr. PAMBOU-TCHIVOUNDA said his comments on the report had certainly not been intended to distress the Special Rapporteur, and if they had done so, he offered his most heartfelt apologies to the Special Rapporteur and to the Commission as a whole.

34. Mr. FOMBA said that the principle of *nullum crimen sine lege, nulla poena sine lege* raised a number of difficulties in terms of the interrelationship between international law and domestic law. The Commission had to decide whether to adopt a flexible or rigid interpretation of that principle.

35. A rigid interpretation of *nullum crimen sine lege, nulla poena sine lege* would have several consequences for the elaboration of the draft Code. The Commission would have to take up a list of offences, scrutinize the relevant legal texts and weed out those that were not as rigorous as domestic law demanded. The result would necessarily be a restrictive approach to drafting the Code. With a flexible interpretation of that principle, it would be acknowledged that the international community was different from national society, that international law differed from national legislation, and that it was not possible to go too far in drawing any analogies between them. Accordingly, the Code would include all crimes on which legal texts, whatever their inadequacies, were extant. The result would be an extensive approach. The Commission's task was to find the happy medium.

36. In applying the *nullum crimen sine lege, nulla poena sine lege* principle to the Code, the Commission should make up a list of all the crimes it proposed to include; send the list to all States; ask them which they considered to be the most serious crimes, both intrinsically and in their sociopolitical dimensions; identify those that were already covered by legal texts; evaluate the relevant legal texts in both their domestic and international ramifications, and especially in terms of the requirements of criminal law; and propose texts where none already existed and submit them to States.

37. As to the concept of crimes against the peace and security of mankind, a number of linguistic and substantive issues still had to be cleared up. For the practical application of the concept, the Commission must pinpoint the most objective and relevant criteria possible for identifying offences that had truly serious implications for the peace and security of mankind. It should then bring all those criteria together and draw up the list of crimes accordingly.

38. The Commission's mandate was viewed from a number of different standpoints in the relevant international instruments, by the Commission itself and by States. Undoubtedly, the Commission's role was to analyse legal texts, evaluate whether they could be accepted by States, identify their failings and propose changes. At some point it would have to determine whether its mandate involved the codification or the progressive development of international law, or both. It could not overstep its bounds, however: States were the ultimate arbiters of its efforts, and it must discern and reflect their intentions. Where a large majority of States desired changes of form or substance in the Commission's drafts, the Commission must be responsive to their wishes. It must not be afraid to innovate if such a course was in the general interest of States.

39. With regard to the draft Code, and specifically article 15, the only existing definition of aggression was found in General Assembly resolution 3314 (XXIX). That text was politically oriented, however, and it was

questionable whether it could fulfil a juridical function. Mr. Mahiou had made a number of interesting remarks in that regard.

40. The Commission had three options on the matter of aggression. It could mention it without defining it—which was surely not the best course of action, as it would force any international court considering a case of aggression to create jurisprudence by specifying the acts that constituted the offence. Alternatively, the Commission could confine itself to a general definition, which would not be as bad a solution. Finally, the definition could be accompanied by a non-exhaustive listing, which would leave the door open for the law to evolve. That, too, would be preferable to having no definition at all.

41. The discussion on whether punishment should be meted out for acts of aggression or for wars of aggression was spurious, and he felt no inclination to enter into it. Wars were made up of acts, after all, and how could one differentiate between isolated and non-isolated acts or quantify the gravity of breaches of the laws of war?

42. On the matter of the role of the Security Council in the maintenance of international peace and security and in the application of penalties, the question was whether a flexible or rigid approach should be taken to the principle of separation of powers between the various institutions of the international community. He was for a rigid approach, because legal considerations should prevail over political ones.

43. He did not agree with Mr. Tomuschat (2380th meeting) that the new paragraphs 3 and 4, proposed for article 19 (Genocide), should be deleted. Incitement to commit genocide and attempts to commit genocide were realities in the world today. One could argue that they were implicitly covered by the phrase "ordered the commission of", in paragraph 1 of the new text proposed by the Special Rapporteur. According to that argument, an order that had been carried out would be equivalent to the commission of an act, while an order not carried out would constitute incitement or attempted genocide.

44. The example of Rwanda, and the situation developing in Burundi, pointed all too clearly to the need to go beyond the Convention on the Prevention and Punishment of the Crime of Genocide by making incitement and attempted genocide punishable offences. In the comments made by Governments mentioned in the thirteenth report, Australia had requested the Commission to re-examine the question of the applicable penalty and had warned that the penalty to be specified in article 19 might be inconsistent with the Convention. That problem had arisen in Rwanda, where the Government had favoured the death penalty in accordance with domestic criminal law, while article 23 of the statute of the International Tribunal for Rwanda<sup>9</sup> had only provided for imprisonment. There was a real danger that individuals who were to be tried by domestic criminal courts—the lesser criminals, in fact—would be subject to the death penalty, while the major culprits would incur only sentences of imprisonment because they were tried by an in-

<sup>9</sup> See 2379th meeting, footnote 11.



ternational tribunal. The same problem had apparently arisen in connection with the former Yugoslavia.

45. The United Kingdom had raised the issue of State responsibility for genocide. In Rwanda, where he had served as Rapporteur for the United Nations commission of inquiry, some officials had accused certain foreign countries of having participated in genocide. He had informed them that the only legal basis for bringing action against such countries was article IX of the Convention. No jurisprudence had yet been developed from that Convention, though a case involving the former Yugoslavia was pending before ICJ.

46. Mr. VILLAGRÁN KRAMER said that, as the United Nations had been established before the Nürnberg Tribunal had handed down sentences for the heinous crimes of the 1940s, the Charter of the United Nations carried no trace of that judgement. In the years since the United Nations had been established, the need for an international criminal court and for a Code of Crimes against the Peace and Security of Mankind had become glaringly apparent. There could be no better way of marking the Organization's fiftieth anniversary year than for the Commission to submit to the General Assembly a finished text of the draft Code.

47. While the Commission was working on that text, States were already making their own laws on the domestic impact of international crimes—an example of "creeping jurisdiction". Some States, including the United States and Canada, had extended their civil, though not criminal, jurisdiction to cases involving torture committed in other countries. A Paraguayan government official had been convicted of torture by a United States court and sentenced to pay compensation to the victims. Similarly, a United States court had convicted a former Minister of Defence of Guatemala of torture and other crimes against humanity and ordered him to pay compensation. Thus, national courts were taking initiatives to fill the gap where there was no international criminal court or penalties for international crimes. Accordingly, the Commission's task of completing the work on the draft Code took on special importance.

48. With regard to article 15, he thought that General Assembly resolution 3314 (XXIX) provided a conceptual framework which any deliberative organ, including the Assembly itself, would use in determining the nature of aggression. The Assembly had adopted the Definition of Aggression in order to provide a framework for the performance of the Security Council's functions. At the time of the adoption of the resolution several members of the Commission had found it unsatisfactory. However, it had been negotiated by the Assembly, with a major contribution from the big Powers, and represented the best achievable balance at that time of ideological confrontation. The consensus had certainly been very fragile, and the resolution had been presented to the General Assembly with a "take it or leave it" attitude. Everyone had noted that it was the small countries which could be prosecuted for aggression, while the big ones were protected by the power of the veto.

49. The Commission might recall that, in 1967, El Salvador had occupied Honduran territory and had been threatened with recourse to the Security Council for

committing an act of aggression, which was indeed a powerful threat. Subsequently, General Assembly resolution 3314 (XXIX) had been incorporated by OAS as positive law in the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty). Within that legal framework the definition had been accepted by a large number of American States. General Assembly resolution 3314 (XXIX) should not, therefore be dismissed as a hopeless solution. In his opinion, the Special Rapporteur had made a big sacrifice by reducing the scope of the concept of aggression and removing threats of aggression from the list of crimes.

50. As to article 17 (Intervention), he took the same pragmatic approach as did the Special Rapporteur. However, the possibility of stipulating punishment for intervention seemed like a horizon which moved further away or came in closer, in step with the Commission's approach to or retreat from the problem. The main question was what recourse should be provided in the event of intervention. In his opinion, intervention should be classified as a wrongful act rather than as a crime against the peace and security of mankind, and it would thus involve only the international responsibility of States. In practice, intervention often involved the use of mercenaries; if the Commission decided to delete intervention from the draft Code it might consider adjusting the balance of its treatment, in article 23 (Recruitment, use, financing and training of mercenaries), of the use of mercenaries. He would not accept the removal of intervention from the list with any enthusiasm, but the trend in the Commission seemed to be headed in that direction.

51. As to article 18 (Colonial domination and other forms of alien domination), the world was certainly changing and the Security Council was tending to use its powers under Chapters VI and VII of the Charter more frequently. It was not clear how the problem of foreign domination would be handled in the twenty-first century, but there would still certainly be peoples that were economically, politically and militarily expansionist. If intervention was not included in the list of crimes, what deterrent would be offered to foreign domination? He would ask the Special Rapporteur to seek an alternative to the deletion of article 18. If foreign domination was not classified as a crime against the peace and security of mankind, it should at least be defined more clearly as a wrongful act.

52. The Special Rapporteur had made a valuable effort with respect to article 19. Mass murder could be regarded as genocide or as systematic or mass violations of human rights. In the case of the destruction of a national, ethnic, racial or religious group the crime was genocide, but in the absence of a national, ethnic, racial or religious element the crime became systematic or mass violations of human rights. The problem of penalties seemed impossible to solve unless the national power of sanction was terminated, leaving only international sanction. As Mr. Fomba had pointed out, persons tried for genocide in a national court could be sentenced to death, while an international court would impose only a prison sentence. The Drafting Committee should make a big effort to solve that problem.

53. With regard to article 20 (Apartheid), he would point out that the International Convention on the Suppression and Punishment of the Crime of Apartheid had a specific territorial scope and that the term "apartheid" did not signify any specific crime in the case of, say, Latin America. What the Commission should be concerned about was economic, political and cultural discrimination and it should try to produce an article characterizing such discrimination as a crime.

54. It was understandable why the Special Rapporteur had proposed changing the title of article 21 to "Crimes against humanity", but the proposal prompted an objection to the form, although not to the substance, of the article. The draft was to be called "Code of Crimes against the Peace and Security of Mankind", a category which contained several elements rather than just one, namely crimes against humanity. The question arose whether the article should cover only one modality of crimes against humanity or whether "systematic or mass violations of human rights", the original title of the article, could provide another modality.

55. The Special Rapporteur had put forward convincing arguments on article 22 (Exceptionally serious war crimes), and was right to try to bring the article into line with the statute of the International Tribunal for the Former Yugoslavia.<sup>10</sup> There was no need for the Commission to engage in any wider exercise; it should concentrate on the elements contained in the present text.

56. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, referred to in the commentary to article 23,<sup>11</sup> had not received very many ratifications. At the time of the adoption of the article, the use of mercenaries, for example in Nicaragua and parts of Africa, had been a topical problem, but interest in the matter had since declined. However, it must be remembered that huge numbers of mercenaries from Europe had volunteered to fight in Africa not just for money but also for ideological reasons, as a means of preserving a model of colonialism. That ideological aspect of mercenarism led him to think that article 23 should be retained.

57. In regard to article 24, he had been struck during the consideration of the subject in the Sixth Committee, at the forty-ninth session of the General Assembly in 1994, by the long list of instruments punishing acts of terrorism at the national level and by the serious approach taken by many delegations to the issue of terrorism, particularly delegations from countries where it was a big problem. No State was free from the risk of the commission of acts of international terrorism in its territory, and it was always difficult to prosecute terrorists. It had been suggested in the past that an international criminal court could provide a solution to the thorny problem of acts of terrorism involving countries experiencing serious tensions in their relations, for example the United States and the United Kingdom in their relations with the Libyan Arab Jamahiriya. An international criminal court might provide a political solution to the

problem of jurisdiction, but what law would it apply if the Commission provided a detailed definition of the crime of terrorism? The Commission should therefore not only work with the format proposed by the Special Rapporteur but also review existing instruments on terrorism and decide whether to name them in the proposed text in order to classify the acts covered by such instruments as serious international crimes.

58. The question of the illicit traffic in narcotic drugs (art. 25) should certainly be included in the draft Code, unlike the question of wilful and severe damage to the environment (art. 26), which should be excluded. It must be remembered that small countries could not bring international drug traffickers to justice; the international cartels could destroy small States and have a disastrous impact on the big States. The Commission's aim, therefore, should not be just to establish an international criminal court to try such criminals but also to strengthen the *opinio juris* that the illicit traffic in narcotic drugs should be classified as an international crime. It should try in fact to "put more muscle" into the content of article 25.

59. Mr. ROSENSTOCK said that, with regard to the definition of aggression contained in the thirteenth report, he was yet to be convinced that the conclusion of a previous Special Rapporteur, Mr. Spiropoulos, was wrong.<sup>12</sup> The present definition presented a number of problems. First, it sought to encompass all violations of Article 2, paragraph 4, of the Charter of the United Nations and thus went well beyond where the international community ought or wanted to go in criminalizing individual conduct. The traditional term used in that context was "war of aggression", which showed that considerably more than a violation of Article 2, paragraph 4, was contemplated. The Commission should take due account of the weight of the concept of a war of aggression, at least in terms of indicating the magnitude of the conduct in question. Perhaps it should look again at Mr. Pellet's suggestion (2379th meeting) that there was a prior role for the Security Council in determining the existence of aggression, with the international criminal court then determining whether a particular individual had committed aggression.

60. Another approach would be to recognize that aggression was the least suitable crime for national courts to handle and should instead be dealt with only by an international court, whose statutes would almost certainly contain a compromise formulation along the lines of article 23 of the draft statute for an international criminal court.<sup>13</sup> That approach might help the Committee with the problem of what acts should be classified as crimes.

61. There would in any event be several drafting problems with the present text of article 15. "Leader or organizer" seemed to point to Adolf Hitler and perhaps no one else! That was wrong because even in a one-man dictatorship a number of people were involved in taking decisions. Furthermore, if the Commission was trying to draft criminal law applicable to individuals, it needed to clarify what "sovereignty" meant in paragraph 2, apart

<sup>10</sup> Ibid., footnote 5.

<sup>11</sup> Initially adopted as article 18. See *Yearbook . . . 1990*, vol. II (Part Two), p. 29.

<sup>12</sup> See 2379th meeting, footnote 17.

<sup>13</sup> Ibid., footnote 10.



from the territorial integrity or political independence of a State. However, the Commission was still far from securing a satisfactory definition in terms of criminal responsibility. It would help things if the Commission could decide whether a prior determination by the Security Council was a necessary precursor to a legal finding of guilt and if it decided that the crime of aggression should be tried only by an international criminal court.

*The meeting rose at 12.55 p.m.*

## 2383rd MEETING

*Thursday, 11 May 1995, at 10.05 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Vilagrán Kramer, Mr. Yamada, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

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

1. Mr. DE SARAM, commenting in general on the draft Code of Crimes against the Peace and Security of Mankind, said that the question of the crimes to be regarded as crimes against the peace and security of mankind had always been enthusiastically debated, whether in the Commission, the Sixth Committee of the General Assembly or other deliberative bodies, and it was always likely to be a matter of some controversy. That was not surprising, since the words “against”, “peace”, “security”, and “mankind”, which appeared in the title of the draft Code, were difficult to define and open to subjective interpretation. The draft Code, unlike the other topics on the Commission’s agenda, touched on some of the

most sensitive aspects of relations between States, some of the most fundamental principles and some of the most important provisions of the Charter of the United Nations. It also contained non-legal or quasi-political components that fell outside the field of competence of the Commission’s members.

2. Yet the time had come for the Commission, which had so far been divided as to a “minimalist” or a “maximalist” approach, to take a firm stand on the scope *ratione materiae* of the draft Code if it wanted to submit the result of its work to the General Assembly within a short time. Obviously, the decisions to be taken by the Commission in that respect should be arrived at by way of a consensus and the Commission’s overall objective should be to agree a consensus text. It was apparently with that in mind that the Special Rapporteur had endeavoured to put forward proposals that could command the support of all members of the Commission, notwithstanding their individual concerns, so that the General Assembly could quickly be provided with a text that it could adopt by a large majority. In his view, those proposals provided an extremely constructive basis for discussion and should enable the Commission’s work on the draft Code to proceed. It was important, however, for the Commission to make it quite clear in its report that its objective had been to agree a text that was the subject of a clear consensus. That search for a consensus showed that the Commission was contributing to the progressive development of the law. Obviously, however, a code that was the result of decisions by consensus could not be regarded as comprehensive and definitive. It should therefore be made clear, perhaps in a preamble to the Code, that the scope of the Code could be enlarged in the future by way of amendments as and when further possibilities for consensus emerged. Accordingly, it would be necessary to record in the Commission’s report ideas and views that had been expressed but not adopted in order not to stand in the way of a consensus.

3. The most difficult question concerned the general nature and purpose of the Code, on which opinions were apparently sharply divided. In the view of some members of the Commission, the purpose of the Code was to declare that some acts were so fundamentally outrageous that they must be characterized as crimes and appear as such in a code of crimes against the peace and security of mankind, the principal purpose of which was to “declare” that they must be the object of worldwide condemnation. Other members considered that the purpose of the Code was to lay down precise rules for application by national or other criminal courts when they had to try particular individuals being prosecuted for crimes. A code that performed both functions, namely, that would at the same time be a general declaration, albeit in the form of a convention, and contain precise provisions for application in criminal proceedings, might be confusing—and that would diminish its effectiveness. Consequently, if the Code was to be a meaningful instrument, its provisions must be applicable in the prosecution of individuals. It was therefore necessary to formulate the provisions very precisely and, in so far as possible, on the basis of existing general international law, that is to say mainly treaty law and such other rules as “were evidence of a general practice accepted as

<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* . . . 1995, vol. II (Part One).

law'', within the meaning of paragraph 1 (b) of Article 38 of the Statute of ICJ. Those requirements would, of course, have implications for the decisions that the Commission would take on the specific elements to be included in, or excluded from, the Code. The proposals which had been made by other speakers in that connection should be considered carefully. Attention had been drawn to certain acts which could in some cases be attributable to individuals and the nature and gravity of which were such that it should be possible to arrive at a consensus on the need to place them within a code of crimes against the peace and security of mankind. Care should, however, be taken not to move away from the strict context of the subjects mentioned during the debate. For instance, in his view, the Commission should not in any way diminish the weight of the rule of international law that condemned the unilateral recourse to force except in self-defence.

4. As to the question of aggression, if the purpose of the Code was taken to be the establishment of precise norms which would ultimately enable individuals to be prosecuted—an approach he favoured—the Definition of Aggression<sup>3</sup> was not appropriate. True, that definition had been the subject of a consensus, but it had been a fragile and carefully balanced consensus, as Mr. Villagrán Kramer had pointed out (2382nd meeting). Three possibilities were open to the Commission: (a) it could redefine aggression, which was virtually impossible; (b) it could make no reference to it in the Code, which would not be very well advised and could undermine the credibility of the Commission; or (c) it could use, but not define, the expression "war of aggression", which appeared in the Charter of the Nürnberg Tribunal<sup>4</sup> and in the principles recognized by the Tribunal.<sup>5</sup> The last of those solutions, though not perfect, seemed to be the most appropriate and a clear explanation of the reasons for such a choice should be given in the report.

5. Lastly, it was essential for Governments to have adequate time and information so that they could be informed of the proposed provisions and their implications, particularly concerning matters relating to national criminal jurisdictions. Without such prior briefing, it would be difficult for a number of countries to participate fully in the General Assembly's deliberations on the draft Code. The more fully Governments participated in the discussions and negotiations on the matter, the more readily they would appreciate the purpose and provisions of the Code and abide by the resulting treaties and conventions.

6. Mr. GÜNEY noted with satisfaction that, in the thirteenth report (A/CN.4/466), the Special Rapporteur had managed to reduce the number of crimes falling within the scope of the provisions of the Code, retaining only those crimes clearly delimited from a legal standpoint and universally regarded as "crimes of crimes", in other

words, acts whose status as a crime against the peace and security of mankind was indisputable. In so doing, he had taken account of political realities and clearly expressed political wills. The thirteenth report had thereby gained in concision and clarity while retaining the qualities of the previous reports and the Special Rapporteur was to be congratulated for accomplishing a valuable and commendable task.

7. Turning to the articles themselves, he noted that the definition of aggression proposed in draft article 15 (Aggression), adopted on first reading, covered all "acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter" (para. 4 (h)) and was based on the Definition of Aggression adopted by the General Assembly. In his view, the Commission would be wise to restrict itself to a general definition together with a non-exhaustive enumeration. Moreover, that was the practice followed in the international conventions that defined international crimes. With regard to genocide, he endorsed the Special Rapporteur's opinion that it was preferable to stay close to the text of the Convention on the Prevention and Punishment of the Crime of Genocide, the only crime on which the international community was in very broad agreement. In draft article 21 (Systematic or mass violations of human rights), as the elements constituting the crimes referred to were not defined, it would be desirable further to specify the scope of the restriction introduced by the expression "in a systematic manner or on a mass scale" and to state clearly that the Code would apply only to acts of exceptional seriousness and of an international scope. In draft article 22 (Exceptionally serious war crimes), attacks against civilian populations should be included among the acts listed.

8. The inclusion of draft article 24 (International terrorism) constituted real progress, for terrorism in all its forms was universally regarded as a criminal act which was also international in scope when it was systematic and prolonged. That text was all the more important, given that no single international definition of terrorism existed. The scope of the article should perhaps be extended to include not only acts of terrorism committed by agents or representatives of a State, but also those committed by individuals acting on behalf of groups or private associations. As the international community had contented itself with drafting conventions on specific acts that were unanimously condemned, it was important to devote an article in the draft Code to that question and it would be necessary to explain clearly in the commentary the reasons for its inclusion. Lastly, the increasingly close linkage between international traffic in narcotic drugs and international terrorism—"narco-terrorism"—fully justified the inclusion in the draft Code of a provision on illicit traffic in narcotic drugs, which, on account of its destabilizing effect on certain countries, was truly a crime against the peace and security of mankind.

9. Mr. YAMADA said that he shared the view of the Special Rapporteur on article 15 that a precise legal definition of the concept of aggression was almost impossible and that he was thus prepared, for practical reasons, to accept the new definition proposed. However, it must not be forgotten that aggression was more than just the use of armed force. It implicitly contained the element of

<sup>3</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>4</sup> See 2379th meeting, footnote 12.

<sup>5</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (hereinafter 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).

an organized attack. He approved of the new wording of article 15, paragraph 1, which took account of the comments of the Government of Paraguay<sup>6</sup> and which should also be used in paragraph 1 of articles 21, 22, 24 and 25. He noted, however, that, in the new paragraph of article 15, the Special Rapporteur had replaced the word “committed” by the words “planned or ordered”, but had not done so in the following articles. In his opinion, paragraph 1 of each of the articles should mention only the principal act of a crime, that is to say “committed”, for any person who planned or ordered the commission of a crime was an accessory before the fact and could be punished by virtue of the provisions of article 3 (Responsibility and punishment) of chapter II (General principles).

10. With regard to draft article 19 (Genocide), he had no comment on paragraph 2, as it reproduced article III of the Convention on the Prevention and Punishment of the Crime of Genocide. However, he wondered how the concept of “direct and public incitement” in paragraph 3 of article 19 was to be construed and sought the views of the Special Rapporteur and of the Commission on that point.

11. He raised that question because Japan had not acceded to the Convention on account of what it saw as a legal obstacle constituted by the provision on incitement to commit genocide contained in article III of the Convention. He pointed out that, although the terms “incitement” and “abetment” were sometimes treated as synonyms, they were entirely different concepts in Japanese criminal law, in which “abetment” was accessory to a principal crime, while “incitement” was an independent crime.

12. Illustrating his point, he explained that a person who was making a public statement in front of a crowd and who accused a foreign minority group residing in Japan of harming the country’s traditional culture and exhorted the crowd to eliminate it would be charged with the crime of “abetment” if the crowd reacted positively by committing hostile acts against the minority group, but not if the crowd did not respond to his exhortations. However, the speaker might be prosecuted for “incitement” even if the crowd did not respond to those exhortations because the crime of “incitement” was an independent crime. In order not to encroach on freedom of expression, “incitement” was rarely cited in Japan, and only in the most serious cases.

13. He was not opposed in principle to using the word “incitement” in article 19, paragraph 3, but would like the denotation of that word to be more clearly defined. Recalling that Mr. Fomba (2382nd meeting) had stressed the seriousness of acts of instigation in Rwanda, he wondered whether Mr. Fomba had had in mind the concept of “abetment”. It was his understanding that the concept of incitement in article 19 referred to an independent crime and applied only to genocide (since it did not recur in any other provision of the draft articles), but he would be grateful for further information and clarifications on the points he had raised.

14. With regard to article 19, paragraph 4, he noted that “attempt” was categorized as a crime. “Attempt” was an effort to commit a crime, amounting to more than mere preparation or planning for it. If the Commission decided that the Code must punish complicity, which included acts of preparation and planning, it must also punish “attempt”. The Commission must also decide whether it was to be punished only in the case of genocide or in the case of other crimes as well. Specifically, was it necessary to include a separate clause on “attempt” in each article or should there be a single clause setting forth the general principle at the start of chapter II?

15. With regard to article 21, noting that the Special Rapporteur gave a detailed explanation of his reasons for omitting the mass element in his new formulation, he said that he personally was not convinced that their systematic nature alone was sufficient to characterize the crimes covered by that article. He reserved the right to comment on other draft articles at a later stage in the debate.

16. Mr. KUSUMA-ATMADJA, congratulating the Special Rapporteur on his report, said that, after the draft articles had been considered on first reading, he had had a difficult choice to make between a maximalist and a restrictive approach. He had wisely chosen the minimalist tendency by reducing the number of crimes in the Code to six. If the definition of a crime against the peace and security of mankind was that the crime must affect mankind as a whole, then the inclusion in the Code of international terrorism and illicit traffic in narcotic drugs raised a problem, all the more so as wilful and severe damage to the environment had been withdrawn from the list of crimes, even though it seemed similar to the two crimes just mentioned. Although international terrorism and illicit traffic in narcotic drugs were serious, it was open to question whether they were crimes against the peace and security of all of mankind. In cumulative terms, perhaps they were, but was that not also true for wilful and severe damage to the environment? To make his point more clearly, he suggested that the Commission should look at the distinction between extremely serious international crimes and crimes against the peace and security of mankind in the context of its work on the draft statute for an international criminal court.

17. At the forty-sixth session, the question of how the Commission should proceed with its work had come up in view of the link between the draft statute for an international criminal court and the draft Code of Crimes against the Peace and Security of Mankind.<sup>7</sup> The Commission had decided to carry out those two activities in parallel, while seeking to ensure the best possible concordance between the two drafts. Two different approaches had been used: a more theoretical one for the draft Code and a pragmatic one for the draft statute, on which rapid results had been required. The two parallel approaches had been followed under the guidance of the Special Rapporteur, who had seen to it that they were pursued with success. The Commission had now completed its work on the draft statute for an international

<sup>6</sup> *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/448 and Add.1.

<sup>7</sup> *Yearbook* . . . 1994, vol. II (Part Two), para. 56.

<sup>8</sup> *Ibid.*, paras. 42-91.

criminal court<sup>8</sup> and was considering the draft Code of Crimes against the Peace and Security of Mankind on second reading.

18. Turning to the list of crimes contained in the thirteenth report, he said that, out of the same concern for harmonization, he was in favour of retaining the first four offences mentioned in the draft articles and taking up the remaining two in the context of the system set up during the work on the draft statute. That should not give rise to too many problems for the crime of illicit traffic in narcotic drugs, but the crime of international terrorism was a more borderline case. It was to be hoped that, over the next five years, the work on the two drafts would have advanced enough so that a more meaningful attempt at harmonization could be made.

19. In conclusion, he said he had every hope that, when the international criminal court had been established, the two systems provided for by the two drafts could be combined to create a permanent international criminal court set up by a treaty or a convention. That dream, which might come true in 50 years, could in any case be the inspiration for the Commission's activities.

20. Mr. JACOVIDES said he owed it to the memory of the late Ambassador Rossides, a former member of the Commission and a strong advocate of the Definition of Aggression,<sup>9</sup> to reply to the comments Mr. Rosenstock had made on the definition of aggression (2382nd meeting). Further research and discussions with other members of the Commission, including Mr. Rosenstock, had confirmed his impression that the Commission's work on the draft Code, begun in 1947, had long been impeded by the lack of a widely accepted definition of aggression. That obstacle had been removed with the adoption by the General Assembly of the definition of aggression, which had been the culmination of seven years of work.

21. By its resolution 2230 (XXII), the General Assembly had established a Special Committee on the Question of Defining Aggression consisting of 35 Member States which had been responsible for considering all aspects of the question—all aspects, not only the political ones—so that an adequate definition of aggression could be prepared. The Special Committee had held seven sessions from 1968 to 1974 and, at its 1974 session, had adopted by consensus a draft definition of aggression which it had recommended to the General Assembly for approval.<sup>10</sup> The General Assembly had adopted that definition, likewise by consensus, in its resolution 3314 (XXIX).

22. While he did not think that that definition of aggression was necessarily perfect, it was still valid in that it provided as good a definition as could be achieved through compromise. He referred in that connection to the pertinent comments made by Mr. Villagrán Kramer (2382nd meeting) on the status of the definition in Latin American regional law.

23. However, with regard to criminal responsibility in the current version of the draft article on aggression, he could go along with the proposal made by the Special Rapporteur.

24. Before concluding, he said he had not heard any comments on the second point he had raised (2382nd meeting), namely, whether the Security Council had ever relied on or been guided by General Assembly resolution 3314 (XXIX), adopted after seven years of work, in determining the existence of an act of aggression as part of its responsibilities under Article 39 of the Charter of the United Nations. He would be grateful for information about the Council's practice in that regard, for it would be indicative of the extent to which the Council took seriously the resolutions that the General Assembly adopted by consensus.

25. Mr. YANKOV expressed his thanks to the Special Rapporteur for having taken account of the comments made by Governments and the members of the Commission. He had done so by avoiding highly controversial issues, not out of fear of polemics, but in an effort to base his proposals on common ground, and by limiting the list of crimes to those that met the requirements of seriousness and "massiveness" that could jeopardize the international legal order.

26. In the past, the idea of a comprehensive conceptual definition comprising the essential objective components of crimes against the peace and security of mankind had been attractive. The turn taken by the discussion, however, had shown that, at the present stage at least, such a definition was impossible and might vitiate the very essence of the Code. Nevertheless, an effort should be made to set out in the body of the Code itself, and not only in the commentary, the inherent characteristics of crimes against the peace and security of mankind, such as seriousness, "massiveness" and effects on the foundations of the international legal order. That would facilitate the task of any court that might some day use the Code, for it would have at its disposal a line of reasoning that was better structured from the legal point of view.

27. Referring to some of the crimes set out in the restricted list and, first, to aggression, he said he agreed that General Assembly resolution 3314 (XXIX), should not be set aside entirely. The Assembly's intention had clearly been not to incorporate in a code of crimes the Definition of Aggression, but rather to provide political guidance to a political decision-making body, not to a judicial organ. As a lawyer, he could not condone the realism, and indeed opportunism, with which some members of the Commission accepted the power structure within the international community or the fact that, of the nearly 200 States making up that community, the five permanent members of the Security Council never committed illegal acts because they had veto power. The democratic principles of law required equality before the law and, although he was not a Utopian, he sincerely hoped a legal order marked by equal application of the law for all, without exception, would soon come into being. That was why he believed, in respect of article 15, that a listing of certain limitations and modalities would be in conformity with the general principle of equality before the law. The Charter gave the Council the power

<sup>9</sup> See footnote 3 above.

<sup>10</sup> *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr.1), pp. 11 et seq.*

to determine the existence of a situation that threatened the peace and security of mankind, that is to say of an act of aggression. But the Council was not justified in going further by setting up courts to which it gave instructions on the penalties to be applied to individuals. Personally, he regretted that the United Nations had so easily accepted the Council's acquisition of such competence, indeed super-competence, in legislative matters. He remained convinced that it should be indicated, if not in the body of the article, at least in the commentary, that a decision by the Council could not have the effect of determining the nature of the penalty to be imposed on an individual who had committed an act of aggression. That, at least, would represent some progress on the road towards equality before the principles of law.

28. He could give his general approval to what the Special Rapporteur said about the crime of genocide in his thirteenth report. He also shared the view of the Government of the United Kingdom about the relationship between the Code and article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which provided for the compulsory jurisdiction of ICJ in the case of disputes between Contracting Parties, and he thought that that rule might also be applied to the punishment of individuals. With regard to the comment of the Government of the United States that the crime of genocide was already defined by the Convention, there were other factors to be taken into consideration, for example, the question of incitement, raised by a previous speaker.

29. Article 21 required more detailed consideration because, once again, the emphasis ought to be placed on at least the three criteria mentioned, namely, seriousness, massive nature, and violation of the international legal order. The definition of such crimes ought to be similar to the one for crimes against humanity, in order to make a clear distinction from violations of human rights under the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, respectively, and from the machinery provided for therein.

30. Article 22 constituted a good basis for the work of the Drafting Committee.

31. With regard to international terrorism (art. 24), the list of acts should be reviewed if the aim was to stick to the concept of "crimes of crimes". There again, the three objective criteria of seriousness, massive nature and violation of the international legal order ought to make choices possible.

32. In the case of article 25 (Illicit traffic in narcotic drugs), whatever the seriousness of the crimes, they did not have a place in the Code, for the existing legal framework offered the necessary means and machinery for their suppression.

33. In contrast, he thought that in shortening the list of crimes the Special Rapporteur had been wrong to delete wilful and severe damage to the environment. With regard to the Special Rapporteur's criteria, it was not unrealistic to envisage that a group of terrorists or an organization possessing the necessary materials, techniques

and knowledge could create a situation equivalent to the Second World War by damaging the environment.

34. The CHAIRMAN, speaking as a member of the Commission, said that the drafting of an international criminal code was the axis on which the whole international criminal justice system was to turn. From the beginning of the Commission's work on the draft Code, it had been apparent that progress would be made only by virtue of the agreements and consensus which could be reached on a few important problems.

35. The definition of aggression had been the first stumbling block in the 1950s. When Mr. Thiam had been appointed Special Rapporteur, at the thirty-fourth session, in 1982, there already existed a definition regarded as an important success of the international community and supposed to offer a sufficient basis for determining an act of aggression.

36. Other elements of the Code had caused difficulties, including its actual purpose. Even today, some members of the Commission had different preferences as to the form which the Code should take: convention, draft declaration or model principles enabling a State to react in the absence of a central machinery, or an international criminal code. The approach finally adopted, that of a code based on national codes and containing precise definitions, rules of evidence and other carefully defined elements to enable criminal actions to be brought, entailed an extremely difficult exercise which, as the example of the draft statute for an international criminal court showed, would take very many years to complete. The statute, very carefully drafted and completed by the Commission at its forty-sixth session, had been submitted to the General Assembly. It was assailed by all sorts of questions and now seemed to be hanging fire.

37. The essential purpose of the Code ought to be to define a set of crimes in general terms in order to provide the various organs of the international community, including States themselves, with guidelines for determining whether certain acts or activities were criminal or unlawful. From that standpoint, the actual definition of the crimes would have less importance and could survive with less precision. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,<sup>11</sup> as well as other declarations adopted by the Sixth Committee, offered a framework for legal deliberation and guidance for the behaviour of States in their bilateral and multilateral relations. A declaration of that kind on a code of crimes might also be very useful and would not be subject to the same rigour as an actual code. In any event, whatever the nature or form of the Code, it would never cover all the crimes which people, individually or collectively, would like to have included in it. In many respects, it was destined to be imperfect. For example, the inclusion of certain crimes in the Code would not necessarily determine the fate of other crimes which had been excluded for various reasons. In that sense, the reduction of the number of crimes contained in the list adopted on first reading from

<sup>11</sup> General Assembly resolution 2625 (XXV), annex.

12 to 6 had no substantial effect on the seriousness or the nature of those crimes in international practice and doctrine. Perhaps the crime of colonial domination no longer had more than a historical importance. It had nevertheless been committed for more than two centuries and its victims had numbered in the millions. That was also true of apartheid, which for a very long time had affected the peace and security of mankind, and of crimes against humanity, which were not new phenomena. While he trusted the view of the Special Rapporteur that a shorter list of crimes would make the Code more easily acceptable for a larger number of States, he would truly back that view only if the Special Rapporteur made it the final conclusion of the second reading. Personally, he would have liked to see at least colonial domination and apartheid included in a Code conceived in fact as a symbolic instrument which could be used by individual States to identify certain acts or activities. If the Code could perform at least that function, the achievement would be a considerable one.

38. The Special Rapporteur had used two criteria to decide whether a given crime should be included in the draft Code: the seriousness of the crime and its acceptance by States for inclusion. The second criterion was debatable, since the Commission's role was precisely to submit its legal assessment of doctrine and State practice for subsequent review by States. It could therefore not prejudice their position and eliminate some crimes on the basis of the limited number of comments which had been submitted to it, especially since those comments were generally not final ones, as shown by the case of the statute for an international criminal court. Accordingly, the comments received from Governments, certainly few in number, were insufficient for establishing any *opinio juris* and could not justify the deletion of some crimes from the list adopted on first reading.

39. Another important subject of debate in the Commission had in fact two aspects. First, should aggression be defined in the Code or should the issue be left as it stood? Secondly, should the Security Council be the only organ competent to determine aggression and its legal consequences? The issue was a very important one which was and would remain interconnected with the question of the right of veto in the Council. Therefore, as the previous speaker had emphasized, the whole international system of criminal justice must meet the criteria of universality, objectivity, impartiality and equality of all before the law.

40. However, a decision by the Commission to leave it to the Security Council to define and determine aggression in a specific case would not bring all the other organs of the international community to a standstill or freeze any legal consequence. The general powers of the Council were not an obstacle to the exercise of their own powers by other organs, subject to certain provisions such as Article 12 of the Charter of the United Nations.

*The meeting rose at 11.50 a.m.*

## 2384th MEETING

*Tuesday, 16 May 1995, at 10.05 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, 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<sup>1</sup> (continued)** (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

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

1. Mr. IDRIS said that the proposals and comments contained in the Special Rapporteur's excellent thirteenth report (A/CN.4/466) provided a reasonable balance for the structure of the draft Code of Crimes against the Peace and Security of Mankind. He appreciated the Special Rapporteur's political wisdom and pragmatism in proposing that the list of crimes should be more restricted. However, there should not be any change in the aim of drafting an instrument of the widest possible acceptability and effectiveness.

2. The Special Rapporteur's intention to limit the list to crimes that were generally agreed to constitute crimes against the peace and security of mankind was a wise one, but it entailed rethinking the question of whether the title of the Code should refer only to those crimes. If the criterion was crimes whose characterization as such was hard to challenge, then it would certainly cover crimes not only against the peace and security of mankind but also crimes that threatened the survival of mankind. Mass killings of groups of people, prevention of births within a group, imposition of living conditions intended to bring about the physical destruction of a group, and the various forms of genocide were some examples of such crimes. Similarly, crimes against humanity such as international terrorism or illicit drug trafficking were not only crimes against the peace and security of man-

<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 . . . 1995*, vol. II (Part One).



kind but crimes which endangered the survival of mankind.

3. The definition of aggression in the draft Code was based on the Definition of Aggression adopted by the General Assembly,<sup>3</sup> which was a political definition. It would not serve any purpose to try to produce a legal definition of aggression, not because, as argued by the previous Special Rapporteur, Mr. Spiropoulos, in 1951,<sup>4</sup> the notion of aggression was a notion *per se* and not susceptible of definition, but because, given modern political realities, concrete cases of aggression were viewed from different perspectives.

4. He preferred the Special Rapporteur's third option: a general definition of aggression accompanied by a non-limitative enumeration. That flexible approach had proved its applicability, notably in the Charter of the Nürnberg Tribunal, in which the list of violations included, but was not limited to, crimes such as murder and ill-treatment.<sup>5</sup> However, he was not in favour of the term "war of aggression". It was controversial and did not cover cases of aggression which had arisen since the Nürnberg Tribunal. The use of the term would constitute a major departure from the main content of the draft articles and reopen an endless debate. Furthermore, the distinction drawn between an act of aggression and a war of aggression on the ground that an act was less serious and did not have the same legal consequences as a war was misleading and unsustainable in practice. It also disregarded the end result of the criminal liability to be established. It was, in fact, important to focus on the wrongful act resulting in the international responsibility of a State and the criminal liability of the main perpetrators acting on behalf of a State. Due attention should also be given to article 15, paragraph 4, which listed specific acts as constituting acts of aggression regardless of a declaration of war.

5. With regard to the articles that the Special Rapporteur recommended should be abandoned for the time being, it should be noted that such a move would not detract from the seriousness of the crimes described in them. He had in mind more particularly article 17 (Intervention), and article 18 (Colonial domination and other forms of alien domination). The view that the articles lacked the precision required by international law missed the point that there had been hardly any other acts in the history of mankind which had caused so much misery to millions of underprivileged people and which were almost universally acknowledged to be crimes.

6. Article 20 (Apartheid) was central to the Code and must be retained. The argument that a separate article was not needed because apartheid was covered by article 21 (Systematic or mass violations of human rights) disregarded the lessons of history, the seriousness of apartheid, and the many decisions of United Nations organs. The issue had consistently received separate attention and must continue to do so. The disappearance of the symptoms of apartheid was no reason for apartheid to be excluded from the Code, which should include acts

because they were criminal in nature and not exclude them because they were no longer likely to occur. One Government had proposed replacing apartheid with "institutionalized racial discrimination". That too missed the point; in any case, racial discrimination was already covered by the International Convention on the Elimination of All Forms of Racial Discrimination.

7. He endorsed the Special Rapporteur's approach in the new version of article 21 and his proposed new title. However, the definition should not be restricted to the narrow criterion of systematic violation of human rights but should include the "mass violations" mentioned originally. Those twin criteria would ensure wider support for the article and its universal applicability.

8. Mr. VARGAS CARREÑO said that, in his previous statement (2381st meeting), he had agreed with the Special Rapporteur that some of the crimes should be deleted from the list but had indicated that article 21 and article 24 (International terrorism) required further work. He was now submitting a new text for article 21 (A/CN.4/L.505) directly to the Commission rather than to the Drafting Committee, for two reasons. First, he hoped to receive comments which would enable him to produce a revised version, and secondly, he might not be able to attend the Drafting Committee when it discussed article 21.

9. The article was a particularly important one and must be compatible with international human rights law. He preferred to retain the original title of "Systematic or mass violations of human rights" because the proposed new title of "Crimes against humanity" was more generic and covered other crimes, such as genocide. However, he could accept the new title if the Special Rapporteur insisted on it.

10. A distinction must be drawn between two types of violation of human rights covered in the article. The first group consisted of murder, enforced disappearance and torture—very serious acts which, when committed by persons enjoying the protection or authorization of a State, warranted classification as crimes against the peace and security of mankind. The question of the person who committed the crime was important. For example, certain murders, no matter how horrible, were no more than common crimes when committed by individuals and were subject only to national jurisdictions or triggered an obligation to extradite. There was no reason for such crimes to be regarded as crimes against the peace and security of mankind. Furthermore, their inclusion in the draft Code might clash with the principles of the international protection of human rights, which had been introduced to find a body which could consider violations of human rights committed by organs and agents of a State. He was not arguing that the crime must necessarily be committed by an agent or representative of a State, but there must be at least some link with a State. The seriousness of a crime which justified inclusion in the Code lay precisely in the fact that it was committed by someone enjoying the protection or the consent of the State to kill, enforce disappearances or torture. His proposal made that point clear.

11. Another characteristic of such crimes was that they must constitute systematic or mass violations of human

<sup>3</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>4</sup> See 2379th meeting, para. 39.

<sup>5</sup> *Ibid.*, footnote 12.

rights. If a policeman tortured an offender to extract a confession he was certainly committing a crime, but not a crime against humanity. In contrast, when a State's head of police set up a centre deliberately to torture political dissidents, as had happened in the not too distant past, he should be regarded as perpetrating such a crime.

12. The crimes of murder and torture included in the first group did not require any explanation, nor should the draft Code contain any definition of them. However, enforced disappearance should be included and defined. Of course, it was difficult to define because it was committed by persons who left no traces of their acts. Enforced disappearances usually ended with the murder of persons who had been arrested or kidnapped without eye witnesses. They usually came to light only years later as a result of the discovery of secret graves or confessions by the perpetrators. He had, nevertheless, tried to give a definition of enforced disappearance based on those given in the Inter-American Convention on Forced Disappearance of Persons and in General Assembly resolution 47/133, containing the Declaration on the Protection of All Persons from Enforced Disappearance. It should be noted that his definition did not apply when the enforced disappearance was perpetrated by common criminals kidnapping a person for ransom. The essential point was that the perpetrators enjoyed impunity because they had the support or acquiescence of government organs and were acting, for all legal purposes, as agents of a State. The other essential point was that, following the kidnapping or arrest, the government authorities refused to provide information on the fate or whereabouts of the victim.

13. The second group of crimes included, *inter alia*, two situations already covered in the thirteenth report. All the crimes in question were institutional violations of human rights committed by persons having the authority to adopt various types of measure which, *de jure* or *de facto*, reduced persons to a status of slavery, servitude, or forced labour, which institutionalized racial discrimination, or which ordered the deportation or forcible transfer of population. Some parts of the world still knew exploitation by individuals which amounted to *de facto* slavery and warranted the attention of the international community. Yet that was not sufficient justification for characterizing such situations as crimes against the peace and security of mankind when there was no institutional support by a State. The Special Rapporteur's deletion of the crime of apartheid from the list had left a gap which must be filled by including institutionalized racial discrimination. That proposal seemed to have the support of several members of the Commission.

14. The deportation or forcible transfer of population on social, political, racial, religious or cultural grounds were certainly violations of most of the provisions of the Universal Declaration of Human Rights<sup>6</sup> and the International Covenant on Civil and Political Rights and had been recognized as crimes against humanity by the Nürnberg Tribunal. More recently, the International Tribunal for the Former Yugoslavia<sup>7</sup> had also acknowl-

edged such acts as crimes. They must therefore be included in the draft Code. However, there had been some transfers of population in the past three or four decades which were debatable and might even be legally acceptable if based, for example, on considerations of health—to control an epidemic—or of a country's economic development, or of protection of the people concerned. All such possibilities were envisaged in article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (the fourth Geneva Convention). Therefore, transfers of population should be regarded as crimes only when motivated by the grounds mentioned in his proposal.

15. Mr. PELLET said that he wished to make three comments and one proposal. His first comment was that, although aggression was a controversial topic, there was a general feeling that it was a crime against the peace and security of mankind. The problem, therefore, was not whether to include it in the list but how to define it. He might have shocked some members of the Commission in his previous statement (2379th meeting) by saying that in the absence of a satisfactory definition of aggression, and General Assembly resolution 3314 (XXIX) was not satisfactory—at best it was a guide for the Security Council—the Commission had to defer to the Council. It had been objected that, while his point might be correct, it should not be stated too openly and that it clashed with the principle of the separation of powers. He considered that as the international community was not a national community, what was good for the State—the separation of powers—was not necessarily good for international governance. All the same, that was a spurious problem. The Commission was drafting the Code to enable courts to try persons accused of particularly serious crimes. Those courts might be international ones but such jurisdictions had and would have to apply rules specified in their statutes, which defined the crimes in question. Therefore, such definitions would mainly be useful for national courts.

16. That purpose of the draft Code had a very specific implication for the crime of aggression. If it was allowed that national courts could try a person for the crime of aggression without a prior filtration process, the Court of Assize of Benghazi, say, could decide that Luxembourg had committed an act of aggression against Mali: an inconceivable and surrealistic situation. National courts could not decide that a State—for it amounted to a State even if, in fact, it was an individual that was being tried—had committed a crime of aggression, because as stated in article 15, paragraph 2, aggression was the use of armed force by a State against another State. A prior determination of aggression by the Security Council was not the ideal solution, but the Commission should resist the temptation of trying to decree a kind of world governance by judges, and above all national judges.

17. His second comment concerned crimes against humanity which related indirectly to several other crimes against the peace and security of mankind, including apartheid, illicit traffic in narcotic drugs and terrorism. While he had much sympathy for those members who argued in favour of including such crimes in the Code, it would, in his view, be both useless and dangerous to do so. Actually, it would be dangerous because it was use-

<sup>6</sup> General Assembly resolution 217 A (III).

<sup>7</sup> See 2379th meeting, footnote 5.



less. As he had already stated, he favoured the Special Rapporteur's proposals in regard to article 21, subject to a closer alignment with article 5 of the statute of the International Tribunal for the Former Yugoslavia. The main element of the definition in article 21, was, of course, the systematic commission of wilful killing, torture, reduction to slavery, persecution, deportation and all other inhumane acts, with the possible addition, as suggested by Mr. Vargas Carreño, of enforced disappearance of persons. It was a very broad definition, particularly because of the reference to persecution, on the one hand, and to all other inhumane acts, on the other. It thus encompassed systematic racial discrimination, particularly if it was combined with the definition of genocide as laid down in article 19 and also terrorism and illicit traffic in narcotic drugs when committed in a systematic manner and on a mass scale. If not committed in that manner, they were just crimes and nothing more, no matter how odious. They would not form part of the "crimes of crimes" that posed a serious and imminent threat to the peace and security of mankind. In other words, either the acts of terrorism and the illicit traffic in narcotic drugs lacked the massive and grave character which meant that they constituted crimes against the peace and security of mankind, or they fell within the definition of crimes against humanity, in which event it was unnecessary to devote special articles to them. He was not suggesting that terrorism and illicit traffic in narcotic drugs were not international crimes—they certainly were and had been defined as such—nor that they could never be crimes against the peace and security of mankind, which they could be. But the previous speakers' comments comfort him in his conviction that when those crimes were committed in a systematic manner and on a mass scale they constituted crimes against humanity within the meaning of article 21 and that it would be neither logical nor useful to devote separate articles to them. It might even open Pandora's Box and lead to a reconsideration of the list the Special Rapporteur had been wise enough to shorten.

18. His third comment was more general. All members, of course, had their own ideas of the crimes that should be covered by the Code, but he would appeal to them not to let themselves be carried away. As had been suggested, a criterion of the highest threshold of gravity could be adopted, but members must not seek to define that threshold in the light of their personal inclination. Rather, the Commission should take account of the views expressed by States. Admittedly, not all States had submitted written observations but the comments that had been received were fairly varied. What was more, a far greater number of States had expressed views in the Sixth Committee of the General Assembly that gave a sufficiently reliable picture of the general feeling in the matter.

19. The widely contrasting views expressed during the very valuable debates on the thirteenth report made it difficult to take a clear decision on what should be referred to the Drafting Committee, yet the Commission must face up to its responsibilities. The Drafting Committee's task was to review the articles referred to it by the Commission along with the Special Rapporteur's proposals made in the light of the general debate, but not to sort out the various provisions. In the light of those

considerations, he wished to make a formal proposal, namely, that the Commission should take a vote—formal or informal—on referral to the Drafting Committee of each of the crimes against the peace and security of mankind proposed by the Special Rapporteur and also on whether they should be retained in the list of crimes to appear in the final draft. The object of the proposal was to preserve the prerogatives of the Commission, which the Drafting Committee must not seek to assume, and to ensure that matters were clear and transparent and to ascertain whether the Commission as a whole wished to refer any particular crime to the Drafting Committee.

20. Mr. FOMBA said that it was difficult not to go round in circles when examining the articles, as they embodied overlapping concepts and lacked clearly defined limits. Of the three key terms in article 21, for instance "violations", "systematic or mass" and "human rights", the term "mass" gave rise to problems of interpretation, while the term "human rights" prompted the question whether its scope was clear and whether it was not a global concept. There was also a question of the link between the crime of "systematic or mass violations of human rights" and other categories of crimes such as genocide, crimes against humanity, war crimes, international terrorism and illicit traffic in narcotic drugs. He wondered whether the generic concept of "systematic or mass violations of human rights" did not cover all those terms and whether there was in fact any basic difference between them.

21. The observations of Governments not only centred on the definition of terms and concepts but were also concerned with the list of crimes. In that connection, he agreed with the Special Rapporteur that it was not possible to provide a complete list of all acts that constituted crimes against the peace and security of mankind.

22. As to specific points, he noted that the title of the new version of article 21 had been changed, as indeed had its scope *ratione personae* and *ratione materiae*. The Special Rapporteur had explained that he preferred the new title—"Crimes against humanity"—as it was an established term in the lexicon of the law. Personally, however, he had some doubts on that score, as the precise meaning of two key words—"crimes" and "humanity"—was not clear. The word "crimes", for instance, could raise problems with regard to the legal definition and classification of acts: what was, or was not, criminal in terms of human conduct? The word "humanity" also raised problems of definition as well as of ideological and cultural perception and of the definition of its scope *ratione personae*. As he saw it, the expressions "Crimes against humanity" and "Systematic or mass violations of human rights"—the title of the earlier version of the article—reflected two generic concepts that could encompass other categories of crimes, such as genocide, and were to some extent interchangeable.

23. The content and legal status of the concept of crimes against humanity as a norm of international law were not so clear as in the case of genocide and violations of the Geneva Conventions and their Additional Protocols. The ambiguity in that concept stemmed from its formulation in the Charter of the Nürnberg Tribunal and the interpretation given to it. It was not immediately

apparent from article 6 (c) of the Charter of the Nürnberg Tribunal whether "crimes against humanity" and "war crimes" overlapped or whether they were separate legal concepts. That provision none the less greatly limited the concept of a crime against humanity, first *ratione personae* inasmuch as the acts must have been committed against civilians and not against soldiers and, secondly, *ratione temporis* inasmuch as the acts must have been committed before or during the war. No explanation of the expression "before the war" was, however, given. There was another instrument, a protocol signed in Berlin on 6 October 1945, which had modified the original version of article 6 (c).<sup>8</sup> In the original version of that subparagraph, a semicolon had been placed after the word "war", which could be interpreted to mean that certain acts could be regarded as crimes against humanity independent of the jurisdiction of the Nürnberg Tribunal. In the version contained in the Protocol, however, the semicolon had been replaced by a comma, which meant that crimes against humanity should be interpreted as entailing responsibility solely for acts connected with war.

24. The United Nations War Crimes Committee on Facts and Evidence in 1946 had sought to clear up any ambiguity by stating that crimes against humanity as referred to in the Four Power Agreement of 8 August 1945,<sup>9</sup> were war crimes within the jurisdiction of the [United Nations War Crimes] Commission. Consequently, "crimes against humanity" had been interpreted by the Nürnberg Tribunal as offences that were connected to the Second World War. Since 1945, however, the normative content of that concept had undergone substantial changes. First, the Nürnberg Tribunal had itself established that "crimes against humanity" covered certain acts perpetrated against civilians, including those with the same nationality as the perpetrator. Further, the origins of "crimes against humanity" as a concept lay in the "principles of humanity" first invoked at the beginning of the nineteenth century by a State to denounce another State's human rights violations of its own citizens. Thus, the concept had been conceived early on to apply to individuals regardless of whether or not the criminal act had been perpetrated during a state of armed conflict and regardless of the nationality of the perpetrator or the victim.

25. Furthermore, the content and legal status of the concept of "crimes against humanity" had been enlarged through the international human rights instruments adopted by the United Nations since 1945. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide affirmed the legal validity of part of the normative content of "crimes against humanity" as defined in article 6 (c) of the Charter of the Nürnberg Tribunal; it went no further, however. There was also the International Convention on the Suppression and Punishment of the Crime of Apartheid, article 1 of which referred to apartheid as a crime against humanity. Furthermore the Commission of Experts established pursuant to Security Council resolution 780

(1992) of 6 October 1992, concerning the Former Yugoslavia, defined a crime against humanity as:

gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim.<sup>10</sup>

The Commission of Experts, established under Security Council resolution 935 (1994) of 1 July 1994, concerning Rwanda, had endorsed that definition and included in it murder, extermination, enslavement, deportation and population transfer, imprisonment, torture, rape, persecutions on political, racial and religious grounds, other inhumane acts and apartheid.

26. As to article 22 (Exceptionally serious war crimes), in its observations, the Swiss Government reproached the Commission for wanting to introduce a third category of "exceptionally serious war crimes", which would encompass especially "grave breaches" in the existing classification under international humanitarian law and questioned the scope *ratione materiae* and the impact on international humanitarian law. Strictly speaking, of course, the concept of "grave breaches" did not apply to internal armed conflicts, which might appear to be a legal aberration in view of the sociological reality of such breaches. In that connection, he noted that paragraph 1 of the new version of the article referred to "grave breaches" of the Geneva Conventions of 1949 but not to Additional Protocols I or II. He would therefore propose either that article 22 should contain an express reference both to the Geneva Conventions and to Additional Protocols I and II, in which case paragraph 1 should be amended to reflect all the relevant provisions of those instruments, or that the necessary clarification should be incorporated in the commentary. Of the two possibilities, he would prefer the first.

27. He fully agreed with the Special Rapporteur that a general definition of terrorism, though perhaps difficult, was not impossible. The definition which was now laid down in the new formulation of article 24 was on the whole a marked improvement on the earlier version, since it included individuals in the category of perpetrators, incorporated new terms such as "act of international terrorism" and "acts of violence", and specified the object of the terrorism. The wording of the article could none the less be improved.

28. The arguments advanced by the Swiss Government in favour of including illicit traffic in narcotic drugs in the Code were sound and commanded his support. Once again, however, the wording of article 25 (Illicit traffic in narcotic drugs) could be improved.

29. The Special Rapporteur had said that it would be difficult to lay down a specific penalty for each crime, and Governments had remained silent on the issue. The solution he favoured was to establish a scale of penalties, and leave it to the courts to decide in each case which penalty to apply. That was also the method followed in the statutes of international criminal courts since 1945. In that regard one might wonder what the legal basis was for the absence of the death penalty from more recent in-

<sup>8</sup> *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946* (Nürnberg, 1947), vol. I, p. 17.

<sup>9</sup> United Nations, *Treaty Series*, vol. 82, p. 279.

<sup>10</sup> Document S/25274, para. 49.

struments. Did that absence denote significant progress in the field of human rights? Again, what fate awaited such instruments as the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty?

30. Mr. AL-KHASAWNEH said that the Commission owed the Special Rapporteur a debt of gratitude for endeavouring to bring the codification exercise on a highly relevant topic begun in 1947 to a successful conclusion. The topic was highly relevant because crimes against the peace and security of mankind continued to be committed on a daily basis and for the most part went unpunished. His own gratitude to the Special Rapporteur was all the more deeply felt in that the topic fell—to use an expression taken from one of the Special Rapporteur's earlier reports—at the meeting place of politics and law, and touched everyone's sensibilities and deeply held convictions. Less diplomatically put, it could be said that the criminalization of the acts and activities described in the Code was seen as a possible curtailment of the freedom of States to act in areas of international relations where they would like to retain that freedom unhindered by considerations of clearly defined legal rules that might give rise to the individual criminal responsibility, not only of their nationals, but sometimes of their State officials.

31. In his thirteenth report the Special Rapporteur had signalled that the time had come to “beat a retreat” on the draft articles that had met with strong opposition from Governments. There was no doubt that the Special Rapporteur's assessment of the prospects of acceptability of the draft by States had been the principal consideration that had led him to make that decision. While sympathetic to that point of view, he found the decision regrettable for two reasons.

32. First, as previously stated, he believed that no firm inferences as to the ultimate acceptability of the draft, in the form of ratifications and accessions, could be drawn from the debates in the Sixth Committee. Nor would he view the replies of Governments—at least in the case under consideration—as constituting a representative statistical sample to warrant such a drastic decision.

33. Secondly, and more importantly, the Commission, as a body of independent jurists, was duty bound—if only as a matter of professional commitment—to pay as much regard to the requirements of elementary justice and logical consistency as it had paid to the political sensibilities of States. As St. Augustine had once remarked, “Without justice, what are kingdoms but great robberies?”. In his view, the same was true of the international political order. Colonial domination and foreign occupation were not a thing of the past. One need only open the newspapers at random to be sure to find two or three cases of the use of force to deny a people the right to self-determination. Similarly, blatant acts of intervention with the express or thinly disguised aim of destabilizing States took place in complete disregard of the massive suffering of the populations of the targeted States. Again, wilful and severe damage to the environment, already identified in article 19 of part one of the draft articles on State responsibility<sup>11</sup> as an act that gave

rise to the consequences associated with crimes, had been dropped from the list in the new draft, disregarding the requirement that there should be some unity of purpose in the work produced by the Commission, which might live to regret that decision.

34. It was generally agreed that what constituted a crime was ultimately a subjective matter, namely, the degree of reprobation elicited in the public conscience as a reaction to a heinous act, which of course was never uniform, even in a homogeneous national society. It was also generally agreed that the law aimed to reduce that subjectivity by linking the infringements to protected interests in preserving life, human dignity and property rights. All of the crimes dropped from the list infringed on those interests, and it should take something more than the unreasoned replies of Governments to convince the Commission to do away so readily with those crimes. That did not, of course, mean the list did not need narrowing, nor did it mean the views of Governments should not be taken into account. It did mean, however, that the decision to drop six of the crimes previously included in the draft was a disproportionate acceptance of the wishes of States in an area where ingenuity and perseverance were both still called for.

35. The Commission spoke of a “maximalist” or a “minimalist” approach, yet the current debate had made it plain that adopting the minimalist approach was no guarantee of acceptance of the draft by States, nor of consensus on its contents. The debate had already produced proposals to reduce the contents of the draft even further—for example, with regard to the crime of aggression, by drawing an artificial distinction between wars of aggression and acts of aggression: artificial, because the concept of war itself had long been treated by international law as a relative concept.

36. Similarly, the proposal that the words “or in any other manner inconsistent with the Charter of the United Nations” should be eliminated from article 15 would reduce the scope of the concept of aggression even further. He could not concur with that proposal, for three reasons. First, the international legal system could not be viewed as a static system. Rather, it was a developing system, aimed at establishing the rule of law at the international level. As Catherine the Great had once put it, “That which stops growing starts to rot”. Establishment of the rule of law at the international level would not be helped if the Commission allowed for a wider margin for the use of force.

37. Secondly, prohibition of the use of force was the general rule, and circumstances when the use of force was permissible were the exception, and should therefore be narrowly construed. To reduce the area where individual criminal responsibility would arise from the use of force did not tally with the need to interpret the exceptions narrowly.

38. Thirdly, aggression, in the topic of State responsibility, had always carried the consequences of crimes, and in addition, still further consequences. That was probably a reflection of the centrality of the State in the system of international law, even though a particular act of aggression might not elicit—subjectively speaking—reprobation stronger than that elicited by, for example,

<sup>11</sup> See 2379th meeting, footnote 8.

an act of genocide. Mr. Mahiou was therefore right to say (2380th meeting) that aggression did not depend on the effects, but was prohibited *per se*.

39. The relationship between the existence of the crime of aggression and a prior determination by the Security Council had been debated for many years, in the context both of the present topic and of the topic of State responsibility. It was plain that predicated individual criminal responsibility on a prior determination by the Council would most probably lead to a situation where no national of the permanent members of the Council would ever be prosecuted for the crime of aggression. The impunity thus created would conflict with elementary considerations of justice. On the other hand, any solution the Commission might adopt should encourage an independent organic determination, and not leave that determination entirely to the unilateral decisions of State courts. On that question, he agreed with Mr. Pellet. One member of the Commission had also proposed that a solution drawing on General Assembly resolution 377 (V) entitled "Uniting for peace" might offer a viable solution. It was an avenue worth exploring.

40. With reference to genocide, he agreed that it was preferable to stay close to the text of the Convention on the Prevention and Punishment of the Crime of Genocide, in view of the broad agreement on the definition it contained. Again, the new, more tightly drafted version of article 21 was an improvement on the previous text. He was also persuaded that a review of precedents would reveal that the determining factor was not the scale of violations but the existence of systematic persecution of a community or a section of a community. He agreed with Mr. Jacovides (2382nd meeting) that forcible transfer of population should be maintained. At the same time, it was worth cautioning that not all cases of forcible population transfer gave rise to individual criminal responsibility. The building of a much-needed dam might require the flooding of large tracts of land, and the population living on them might have to be transferred. Provided certain conditions regarding survival and safety were met, it was doubtful whether any responsibility at all—save that contemplated under the topic of international liability for injurious consequences arising out of acts not prohibited by international law—was attached. Clearly, that situation was very different from the policy of ethnic cleansing. The degree of responsibility should be clearly categorized, perhaps in the commentary.

41. He agreed with the observations of the Swiss Government on article 22 set forth in the thirteenth report. Recognizing the validity of those comments, the Special Rapporteur had sought to improve the drafting of paragraph 2 of the article, through recourse to a non-exhaustive list. On the whole, that was perhaps the best possible solution.

42. On the question of international terrorism, he believed that the two approaches so far adopted by the international community were not mutually exclusive: the approach of identifying certain acts and prosecuting them regardless of motive on the basis of the principle of *aut dedere aut judicare*, and the approach of finding a general definition of terrorism for the purposes of criminal prosecution. Ultimately, the latter course had to be

attempted. The problem was that terrorism had tended to be defined in terms of certain groups regarding which a measure of coercion or violence normally not allowed in ordinary situations was permitted. To that extent the concept of "terrorists" was akin to the concept of "counter-revolutionaries". Yet a crime could not be defined other than by its nature and effects. If it was intended to spread or had the effect of spreading terror, then an act was terrorist, regardless of whether the bomb was carried in a fruit basket or dropped from a military plane. He welcomed the reformulated version of article 24 in that it went a long way towards finding a definition that tallied with logic and consistency. However, pace the comments of the Special Rapporteur, terrorism was sometimes an end in itself: one need only think of the activities of nihilists and anarchists. The Commission should therefore look again at the phrase "in order to compel the aforesaid State".

43. His remarks had perhaps raised more problems than they had suggested answers. However, there was still room to review some of the articles that had been discarded, so as to find a more delicate balance between political realism and legal idealism than was currently to be found in the report.

*The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.*

44. Mr. YAMADA pointed out that the Special Rapporteur had changed the title of article 22 from "Exceptionally serious war crimes" to "War crimes". Yet the opening sentence of the article contained a reference to "an exceptionally serious war crime". Perhaps that was an oversight. Paragraph 1 referred to the Geneva Conventions of 1949, but it should be made plain that Additional Protocol I was included in that reference. As to paragraph 2, it was indeed difficult to draw up an exhaustive list of violations of the laws or customs of war. Nevertheless, he had serious misgivings whether the formulation "but are not limited to:" was consistent with the principle of *nullum crimen sine lege*, for it did not specify any limit. It must be made abundantly clear that those crimes which were not explicitly listed in the paragraph must be as serious as those which were listed therein. He would therefore prefer a different formulation of the leading sentence of paragraph 2, for example along the lines of "Such violations of the laws or customs of war as are:".

45. With reference to article 24, he agreed that perpetrators of international terrorism should not be limited to agents and representatives of States. On the other hand, it was not proper to expand the scope of the article so as to include a lone terrorist who was acting independently and had no affiliation with any terrorist organization or group. The element of an organized crime should be present in that article.

46. With regard to article 25, he still felt that the crime of illicit traffic in narcotic drugs was a borderline case for inclusion in the Code as a crime against the peace and security of mankind. The overwhelming majority of cases of drug trafficking had been effectively prosecuted by national Governments, and excellent international cooperation arrangements existed to suppress such crimes. At the same time, he recognized the difficulties

faced by some countries, particularly in Latin America. In those cases, the crime—sometimes known as “narcoterrorism”—was not simply drug trafficking but was linked with terrorism or the activities of insurgent groups. In view of that consideration, it might be possible to narrow down the concept of the crime to be included in the Code.

47. The Special Rapporteur had been right to abandon draft article 26 (Wilful and severe damage to the environment). Mr. Yankov (2383rd meeting) had pointed out that terrorists might resort to inflicting environmental damage as one of their tactics. He agreed that environmental modification such as was prohibited by the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques was a serious crime against mankind. However, the Commission could address that question either in the article on war crimes or in the article on international terrorism.

48. Mr. RAZAFINDRALAMBO said that the crime of aggression raised two questions, the first concerning its definition, the second regarding the role of the Security Council. On the first question, the observations of Governments merely confirmed that it was difficult to define the concept of aggression from the legal and criminal standpoints. Article 15 as adopted on first reading had been subjected to crossfire from Governments and from many of their representatives in the Sixth Committee. The view had been taken that article 15 was not innovative and merely reproduced the Definition of Aggression contained in the annex to General Assembly resolution 3314 (XXIX), a resolution that was essentially political in character and scope, even if its listing of cases of aggression did contain some more specific and factual elements. Those criticisms were not unwarranted. Indeed, the Commission had decided to adopt the definition only with considerable reluctance, and for lack of a more acceptable alternative. It was thus understandable, given the adverse reactions of certain Governments, that the Special Rapporteur was proposing to abandon the Definition of Aggression except for the first two paragraphs. However, reduced to its most basic expression, that definition did not escape the original reproach of having a political connotation, as was shown by the presence in paragraph 2 of expressions such as “sovereignty”, “political independence” or “any other manner inconsistent with the Charter of the United Nations”. Perhaps the Drafting Committee could find a formulation referring more directly to the victim State, for example, “use of armed force against another State”.

49. The role assigned to the Security Council in article 15 had perhaps been exaggerated. Admittedly, paragraph 4 (h) stated that the Council could qualify as acts of aggression acts other than those listed in the preceding subparagraphs. Moreover, paragraph 5 stipulated that national courts were bound by any determination by the Council as to the existence of an act of aggression. Nevertheless, as the action by the Council did not adversely affect the independence of the judge in his assessment of the acts of aggression itemized in paragraph 4, the Commission seemed to have shown great prudence on the question of interference by the Council in the activities of the courts. Thus, unlike the text of article 15 adopted on first reading, the new text contained no

provision likely to enable the Council to interfere dangerously in the determination or prosecution by the international judge of the crimes specifically characterized as crimes of aggression in paragraph 4.

50. He believed that criticisms on that score were, wittingly or otherwise, levelled at the system advocated in the draft statute for an international criminal court. Under paragraph 2 of article 23 (Action by the Security Council) of the draft statute,<sup>12</sup> relating to the role of the Security Council in the bringing of complaints of aggression, the Council had the power to, as it were, “screen” such complaints, thus enabling it to use the veto to prevent a complaint from being brought. But that provision related only to the modalities for prosecution in the event of an act of aggression. In other words, it set forth the conditions for exercise of the complaint. On the other hand, the Code, like all traditional criminal codes, consisted merely of a catalogue of crimes, described in terms of substance and intent. Accordingly, the Code should not be confused with a code of criminal procedure. The modalities for bringing the complaint were essentially a procedural question: they could if necessary be reconsidered in greater depth later on. Nevertheless, the provisions of article 15 adopted on first reading regarding the role of the Security Council were such as to accentuate the political character of the definition, and of the article as a whole. He thus endorsed the Special Rapporteur’s proposal to drop paragraphs 3, 4 and 5, as well as paragraph 6, which added nothing to the definition. On the other hand, why had paragraph 7, concerning the right to self-determination, been sacrificed? He could find no satisfactory explanation for that decision anywhere in the thirteenth report. Paragraph 7 constituted a valuable saving clause that was worthy of consideration and was of an importance equal to article 18. The two texts represented the two sides of one and the same coin.

51. The definition of genocide in article 19, unlike the definition of aggression, posed no particular problems since it had been taken from a legal text, the Convention on the Prevention and Punishment of the Crime of Genocide. However, one Government had considered that the definition contained in paragraph 2 failed to establish the mental state needed for the imposition of criminal liability. It was the use of the term “intent” that was controversial. The definition of genocide included among the elements constituting the crime the “intent to destroy [...] a national, ethnic, racial or religious group as such”. However, that formulation did not place sufficient emphasis on the fact that the intent in question was not the criminal intent as such, in other words, the deliberate will to commit the crime or the awareness of the criminal nature of the act (*mens rea*). Rather, it stressed the motive of the perpetrator of the crime, namely the destruction of a group of persons on account of their origin. Perhaps the Drafting Committee might review the definition with a view to avoiding any ambiguity, for example, by using a formulation such as “acts committed with the aim of” or “acts manifestly aimed at destroying”.

52. The Special Rapporteur proposed retaining the list of acts of genocide adopted on first reading, while add-

<sup>12</sup> Ibid., footnote 10.

ing acts of direct and public incitement to commit genocide and attempts to commit genocide. In other words, the Special Rapporteur had returned to the definition contained in the Convention. Two questions arose, however. Why should incitement or attempt be specifically designated as crimes in the case of genocide, when those two concepts were already covered by paragraphs 2 and 3 of article 3 (Responsibility and punishment)? On first reading, the Commission had deliberately omitted those two acts, along with complicity, in view of the references to them in article 3. Should the Commission once again base itself on the approach adopted by the drafters of the Convention, as the Security Council had done when drafting the articles of the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda,<sup>13</sup> concerning genocide? It could be argued that the specific reference to those two crimes in the statutes was justified by the fact that those texts contained no general provision on attempts to commit or incitement to commit that crime. Enumerating them as crimes, after the principal crime of genocide, could also be interpreted as reflecting the wish of the Commission to specify in the case of each individual crime whether attempt and incitement were to be criminalized. In order to remove any ambiguity, the Commission must now adopt a clear position. It had two alternatives: either it must pursue the approach adopted in the Convention, and draw up an exhaustive list of the acts considered as genocide, independently of article 3 of the draft Code, or else it must eliminate the crimes of incitement and attempt to commit genocide, leaving it to criminal jurisprudence to apply the appropriate provisions of article 3. In his view, the general provision in article 3 did not exonerate the Commission from making express mention of incitement and attempt as crimes in each article of part two of the Code. That approach had the merit of designating all acts constituting the crime in question, without requiring the court to decide in each case whether or not the concepts set forth in article 3 were applicable.

53. The crime of complicity was mentioned explicitly in article III (e) of the Convention and should be treated no differently from incitement and attempt: a reference to complicity should therefore be incorporated. On the other hand, he saw no need to expand paragraph 2 (e) to cover the transfer of adults as well as children, as suggested by one Government. With the transfer of children, as with attempts to restrict population growth, the purpose was to hinder the propagation of a particular race.

54. The Special Rapporteur had been right to change the title of article 21 to reflect the wording used in the Nürnberg Principles,<sup>14</sup> and in some penal codes. He did not agree, however, that a reference to systematic commission of a crime should be retained while mention of mass violations should be deleted. The two concepts were complementary and the Drafting Committee should try to reformulate article 21 so as to incorporate them. Efforts should also be made to improve the balance of the provisions on torture within the entire draft, perhaps by referring only to cruel, inhuman or degrading treat-

ment or punishment, as in article 7 of the International Covenant on Civil and Political Rights. The proposal made by Mr. Vargas Carreño (2381st meeting) was sound and was worthy of consideration by the Drafting Committee.

55. He could accept the Special Rapporteur's proposal to revert to the classic phrasing, "War crimes", for the title of article 22, and likewise the new structure proposed for the article. The Drafting Committee should none the less consider making paragraph 1 refer to "international humanitarian law", rather than cite the Geneva Conventions of 1949. Again, it would be preferable to speak in paragraph 2 of "serious" violations of the laws or customs of war, a phrase the Commission had already incorporated in the draft statute for an international criminal court. The failure of the new text to mention the establishment of settlers in an occupied territory was a major drawback. Perhaps the Special Rapporteur could explain that omission.

56. As to article 24, he endorsed the Special Rapporteur's opinion that it was necessary to search for the common features of the various forms of terrorism and to derive common rules applicable to their suppression and punishment. Although a variety of treaties now set out penalties for specific terrorist acts, no real progress had been made in eradicating terrorism, and in particular, in doing away with urban terrorism. The reason might be that there was no single text on which international consensus had been reached and punishment of terrorist crimes fell exclusively within national jurisdiction. International prosecution might well be facilitated by designating such crimes as crimes against humanity.

57. As far as article 25 was concerned, the very helplessness of States in the face of illicit drug trafficking mentioned in the report militated in favour of retaining that crime in the draft Code. The new proposal represented an improvement over the earlier version if the Commission agreed to specify the penalty for the crime. Though in general he would prefer penalties to be dealt with in a separate article, the acts mentioned in article 25 formed minimum constituent elements of the larger crime of drug trafficking, like money laundering, for example, and therefore deserved to be treated in the article itself.

58. The CHAIRMAN announced that a former Special Rapporteur of the Commission, Mr. McCaffrey, was present at the meeting, and extended a warm welcome to him on behalf of all members.

59. Mr. AL-BAHARNA said he welcomed the thirteenth report, which raised a number of important issues.

60. In response to the criticisms and reservations of Governments on the draft articles as adopted on first reading, the Special Rapporteur had proposed to reduce the number of crimes from 12 to 6. That reduction seemed far too drastic, however. Even if a vast majority of States desired such a reduction, the choice of crimes for deletion remained a delicate decision, and it was questionable whether such a drastic change should be made on second reading.

<sup>13</sup> Ibid., footnote 11.

<sup>14</sup> See 2383rd meeting, footnote 5.



61. The fact that Governments, in their comments, had declined to specify penalties for each crime demonstrated the need for the Commission to be circumspect in prescribing them. He therefore welcomed the Special Rapporteur's reference, in the report, to the difficulty of the exercise, and the suggestion that a scale of penalties should be established, leaving it up to the courts to determine the applicable penalty in each case. Any provision on penalties should, of course, be made consistent with the corresponding provision in the draft statute for an international criminal court.

62. The new proposed definition of aggression in article 15 was too general. While the earlier version had been criticized by Governments as being too political, the Commission should take a second look at that version and try to find an appropriate wording. Deleting paragraphs 5 to 7, which were political in nature, might help to streamline the legal content. He would also be disinclined to remove paragraph 4 (*h*), although it related to the Security Council, because in matters relating to aggression the Council did have a necessary function that was acknowledged in article 20 of the statute for an international criminal court.

63. Article 19 called for no comment other than the minor point that no specific penalty should be stipulated for the crime of genocide: a general provision in the draft Code on penalties would suffice.

64. He had no objection to the proposal to change the title of article 21 to "Crimes against humanity". If that was done, however, a reference to the "mass" nature of the crimes should be incorporated in the article itself. Otherwise, "wilful killing" and "persecution" as mentioned in the article, in other words, without the "mass" element, could hardly be justified as crimes against humanity. As one Government had pointed out, "persecution" was so vague it could mean anything. He preferred the earlier wording of "persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale". He would also suggest that "wilful killing" should be altered to read "wilful killing on a mass scale". Finally, the words "all other inhumane acts" should be supplemented by the phrase "perpetrated on a mass scale".

65. Article 22 had been sharply criticized by Governments. The Special Rapporteur was consequently proposing a new text consisting of an exhaustive list of war crimes under the Geneva Conventions of 1949 and a non-exhaustive list under the "laws or customs of war". Would it not be possible to adopt a uniform approach, making both lists either exhaustive or non-exhaustive?

66. Article 24 had likewise been the object of Government criticism, centred largely on the question of who could commit the crime, and what its substantive content should be. He was not fully convinced of the desirability of the proposal to extend the scope of the article to "individuals", without some qualification of the individual perpetrators. The general definition of terrorism in paragraph 2 of the proposed text would be acceptable if the word "terror" was replaced by "serious apprehension", a substitution that would neutralize the criticism by one Government that the earlier version defined terrorism in tautological terms.

67. Article 25 was one of the most controversial in the draft Code. Though he saw the merit of arguments both for and against inclusion, he was in favour of retaining the article, subject to deletion of the words "to internal or" from the new paragraph 2. The reference to internal law was such as to make the crime more national than international.

68. Mr. ROSENSTOCK suggested that the Drafting Committee should look into whether a reference to the issue of intent could be incorporated in article 3. Everyone agreed that *mens rea* was an element of a crime; the only divergence of views was on whether it was already implicit in the nature of the acts covered by the draft Code. He agreed that the Commission should not attempt to indicate penalties for each act.

69. Article 19 was broadly acceptable, subject to minor drafting changes and a possible review of the question of attempt in the context of the draft articles as a whole.

70. Again, subject to drafting changes to bring the text into line with the title and to improve its clarity, article 21 was acceptable, as was the new proposal put forward by Mr. Vargas Carreño, whose comments on the requirement of systematic or mass violations accurately reflected the very nature of the draft Code, and whose remarks on deportation were extremely germane. It would indeed be helpful to include the definition of torture, though cross-referencing or a detailed mention in the commentary was also an option. The inclusion of persecution on political, racial or religious grounds would be a step beyond the Charter of the Nürnberg Tribunal, which required that such acts be in execution of or in connection with any crime within the jurisdiction of the Tribunal. The statute of the International Tribunal for the Former Yugoslavia covered such acts only if they were committed in armed conflict. The Drafting Committee should also examine whether the notion of persecution was so vague that the crime should be made subject to penalties only when committed in connection with another crime listed in the Code.

71. The text proposed by the Special Rapporteur for article 22 eliminated some of the problems with the version that had emerged on first reading and had the additional merit of closely following the statute of the International Tribunal for the Former Yugoslavia. The Security Council had recently adopted the statute of the International Tribunal for Rwanda, article 4 of which gave the Tribunal jurisdiction with regard to violations of article 3 common to the Geneva Conventions of 1949 and Additional Protocol II. That was a significant step forward in combating intolerable conduct in any armed conflict, and it would be unfortunate if the draft Code failed to include a similar provision. The Drafting Committee should be asked to consider adding such new provisions as article 22 *bis*.

72. With reference to article 24, he continued to have serious doubts about the wisdom of including provisions on international terrorism. The fact that it would be difficult to reach a sufficiently precise definition of terrorism suggested that the article should in fact be eliminated. However, the text proposed by the Special Rapporteur was an enormous step in the right direction compared with the totally unacceptable version that had been

adopted on first reading. He also recognized the merits of Mr. Pellet's comments on terrorism. Article 25 should be deleted. Its subject did not fit in with the concept of a threat to international peace and security. The existing conventions on narcotic drugs and psychotropic substances focused on suppression of drug trafficking rather than establishing penalties for it at the international level. Increased international cooperation in law enforcement would be a more appropriate approach to the problem than to include the issue in a code of crimes against the peace and security of mankind.

73. Lastly, he endorsed the Special Rapporteur's recommendations on the material that should be deleted from the text adopted on first reading. Reopening those questions would confirm the validity of the concern that the Commission was engaged in a quixotic exercise.

*The meeting rose at 1.05 p.m.*

## 2385th MEETING

*Wednesday, 17 May 1995, at 10.10 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, 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<sup>1</sup> (continued) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)**

[Agenda item 4]

#### **THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. LUKASHUK said that the construction proposed by the Special Rapporteur, although based almost entirely on existing law, had been given a mixed reception both in the Commission and in the Sixth Committee. The envisaged Code of Crimes against the Peace and Se-

curity of Mankind, in addition to the considerable impact which it might have on international law and on State policy, affected the interests and the status of persons occupying high positions of State. There was thus some purpose in shifting the location of the draft Code in the general process of the progressive development of international law.

2. The 50 years of the existence of the United Nations had been a period of restructuring of international law on the basis of the purposes and principles of the Charter of the United Nations. Mankind had finally woken up to the threat to its very survival posed by the lack of a reliable international legal order. If international law was to be able to offer solutions to current problems, it must move on to a new stage in its development and become the law of the international community as a whole. The Commission played an important role in that respect and it was at its initiative that the Vienna Convention on the Law of Treaties had embodied the fundamental idea that peremptory rules were adopted by the international community as a whole, in the sense not of adoption by all States in unanimity, but by a sufficiently representative majority. It was even being suggested, both in the statements of the representatives of some States in the Sixth Committee and in the work done by the Commission on the topic of State responsibility, that a kind of legal status should be conferred on this "international community", which was the victim, for example, when an international crime was committed and which was responsible for deciding what the reaction to such a crime should be. The move towards establishing the international community as a legal entity had implications for the formation of general international law and for the principal institutions responsible for applying such law, primarily the United Nations. But, while changes in the international system were clearly necessary in view of its imperfections, experience taught that it was always dangerous to destroy a system without knowing what could be put in its place.

3. The primacy of the interest of the international community was therefore what differentiated the law of the international community from "usual" international law. Thanks to the Commission's work, international criminal law was today a manifest fact and that was a sign of the maturity of the international community and its legal system. Such law was broken by individuals who were often officials enjoying immunity and it would be unrealistic to expect that leaders would cheerfully give up their privileges. Moreover, it was rarely easy to harmonize national legal systems effectively with international law. It was regrettable in that regard that national courts for most of the time had hardly any involvement in the formulation of international law, whose rules they would, however, be increasingly required to apply. There was thus a need to improve the access of national lawyers to the texts and commentaries produced by the Commission. All such constraints must be taken into consideration in the drafting of the Code and that might now perhaps entail a retreat to a restricted version. As the Special Rapporteur had stressed, the formulation of a whole new area of international law necessarily gave rise to many difficulties. The definition of aggression was a good example of such difficulties, for the existing definition was far from perfect, without there

<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* . . . 1995, vol. II (Part One).



being any reason for thinking that the Commission could quickly draft a better one.

4. Mr. TOMUSCHAT said that he wished to comment on the various crimes included by the Special Rapporteur. In the case of aggression, the Commission's aim was to identify the acts which should be punishable by the international community and not to define the acts which fell under the heading of "aggression" in relations between States. The Commission was therefore perfectly entitled to adopt an independent definition of aggression, applicable to the Code and only the Code. By limiting the definition of aggression for the purposes of the Code to a single "hard core" of particularly heinous and serious acts, the Commission would not be undermining in any way the prohibition of the use of force contained in the Charter of the United Nations, for that was a matter of inter-State relations. The Code would merely say that such acts laid their perpetrators open to criminal prosecution. In any event, in the 50 years since the Judgment of the Nürnberg Tribunal,<sup>3</sup> no one had been prosecuted by the international community for the crime of aggression. With regard to the role of the Security Council, substantive law must be separated from procedural law and the crime as such must not be made dependent on an affirmative vote of the Council. The Council would have its role in procedure and the Commission could base its recommendations on that point on article 23 of the draft statute for an international criminal court,<sup>4</sup> without necessarily adopting the wording of article 23 in every respect. Short of accepting the risks of abuse indicated by other speakers, universal jurisdiction should be excluded for aggression, which was to be tried by an international court.

5. Genocide was in a way the cornerstone of the draft Code. The corresponding provision repeated word for word the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide, which did not prompt any objection, but the Commission lacked a formal evaluation of the practical application of the Convention since its adoption and of the problems which it might have created for the competent jurisdictions. In that area, the drafting work should be guided by such an evaluation, which would probably be enriched by the imminent experience of the International Tribunal for Rwanda.

6. Systematic or mass violations of human rights, rechristened "crimes against humanity", posed thornier problems. Did that category presuppose a link with other crimes in the Code, with war crimes in particular? As the Special Rapporteur had pointed out, that was neither necessary nor desirable. But how were such crimes to be distinguished from crimes under ordinary law? The Special Rapporteur thought that crimes against humanity could be committed by individuals having no official function, but was there not then a risk of bringing within the scope of the Code the activities of all the world's mafias, which were subject to national law? Finally, the use of vague notions such as "persecution" or "all other

inhumane acts" had perhaps been inevitable at the time of the Nürnberg Tribunal, but the Commission's task was precisely to furnish criminal law with the rigour which must characterize it in a State based on the rule of law. As in the case of the link with war crimes, the reference to the Nürnberg Tribunal was not sufficient. The list of crimes should be re-examined with a view to removing some of them and adding others, in particular enforced disappearances.

7. The definition of war crimes was even more complicated. Since the choice made by the Commission at the forty-third session, in 1991, had not been favourably received, the Special Rapporteur wisely proposed abandoning it. The statute of the International Tribunal for Rwanda adopted by the Security Council in 1994<sup>5</sup> nevertheless prompted questions as to whether the scope of the notion of war crimes should be enlarged by the addition of the list contained in article 3 common to the four Geneva Conventions of 1949 and the crimes mentioned in Additional Protocols I and II of 1977. The Commission had no reason to stop short of the threshold crossed by the Security Council, especially since by so doing it might give the impression of questioning the choices made in the statutes of the two existing international tribunals.

8. In principle, international terrorism was a matter of ordinary law and, again in principle, the immunity generally enjoyed by the agents of another State did not cover ordinary-law crimes. It was none the less true that, in that type of case, international legal cooperation rarely produced the expected results, owing to the support enjoyed by the perpetrators of such acts. International terrorism therefore had a place in the draft Code, but minor adjustments must be made to its definition in the light of all the other national and international instruments which had tried to define the specific characteristics of international terrorism. With regard to drug trafficking, the concerns of the States which waged a daily battle against that kind of criminal activity were certainly understandable, but the international community could not take arms against the sea of troubles confronting Member States, which themselves could not shift elsewhere the responsibility for problems which it was their duty to solve. Moreover, how could large-scale trafficking be distinguished from "ordinary" trafficking? If the international community wished to include that crime in the Code, the Commission must comply, but that was a political decision and not a problem of legal logic.

9. The term "crimes against the peace and security of mankind" used in the title of the draft Code suggested an unbreakable link with the prohibition of the use of force contained in Article 2, paragraph 4, of the Charter. Could the term be retained while at the same time including the crime of serious violations of human rights, which in no way implied an armed conflict? The question stood even if the Commission did not have to answer it immediately. Lastly, the rules concerning the capacity of "perpetrator" or "accomplice" required detailed examination. The example of the "perpetrator" of a system of torture who did not personally commit any concrete act of torture was very relevant. The Com-

<sup>3</sup> United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

<sup>4</sup> See 2379th meeting, footnote 10.

<sup>5</sup> *Ibid.*, footnote 11.

mission must therefore always ask itself whether the Code made it possible to punish the main guilty parties—persons occupying the higher levels in the State hierarchy. However, specific rules could not be provided on complicity for each crime, although that would be desirable, if the provisions of article 3 were retained at the same time. A choice must be made between the two approaches, for a combination of them would lead to an unacceptable over-abundance of punishable acts.

10. Mr. VILLAGRÁN KRAMER said that, in the case of aggression, it was useful for the Commission to take account of established international parameters and, in particular, of the prohibition of the threat or use of force as laid down in the Charter of the United Nations, a breach of which obviously gave rise to sanctions. It was the Security Council's prerogative to determine the existence of an act of aggression, in other words, to judge the conduct of a State. The sanctions applicable to a wrongdoing State were set forth in Chapter VII of the Charter; they differed in kind from the criminal sanctions that could be imposed on an individual, but that would none the less depend on the determination made by the Council. The question was therefore whether or not the Council played a role before the trial. If so, an international criminal court could not act without a prior decision by the Council. If not, it was entirely free to act or not to act.

11. In that respect, he saw a certain analogy with the procedure for impeaching an elected official, for instance, a member of a parliament whose immunity had to be lifted by the body of which he was a member before criminal proceedings could be brought against him. The members of the Security Council had reserved the right to characterize the conduct of one of them, or of another State Member of the United Nations. The only difference was that the five permanent members of the Security Council had a right of veto, but it was not impossible that, by amending the Charter, that right could be exercised by a State which was implicated.

12. The Definition of Aggression,<sup>6</sup> no doubt exercised a definite influence. It was that Definition which, in 1975, had persuaded all the member countries of OAS to endorse the inclusion in the Inter-American Treaty of Reciprocal Assistance, of an article listing the constituent elements of aggression.

13. Mr. Vargas Carreño's proposal regarding the enforced disappearance of persons (2384th meeting) was most timely, in his view, and would, he trusted, be taken into account by the Drafting Committee. In order to assist the Drafting Committee in its task, the Commission should also discuss whether extenuating or aggravating circumstances should be the subject of a separate chapter or should appear in each article in the draft.

14. The CHAIRMAN, speaking as a member of the Commission, said that he would comment on the list of crimes which the Special Rapporteur proposed should be dealt with in the draft Code on second reading. He would again express regret that the list of crimes had been reduced from 12 to 6; in that sense, he agreed with another

member of the Commission that conduct should be regarded as a crime because it had been characterized as such and not because it was likely or unlikely that it had in fact taken place. To reduce the list of crimes by eliminating such crimes as colonial domination and other forms of alien domination, apartheid, intervention, and the recruitment, use, financing and training of mercenaries would not only rob the Code of its meaning and disappoint the expectations of members of the international community, but would also call into question its significance, particularly in the light of the statute for an international criminal court, since it was the intention of the Commission that the two instruments should form a comprehensive international criminal justice system. Moreover, the reinstatement in the list of the crimes it was proposed to drop would certainly act as a guarantee that they would not be committed in future.

15. Turning to article 15 (Aggression), he noted that, having regard to the comments of Governments and to the need to adapt the political Definition of Aggression, adopted by the General Assembly, to the Code, which dealt with criminal responsibility, the Special Rapporteur proposed a new version of the definition of aggression in his report. While that definition was useful, it should, in his view, be expanded a little in response to the various views and suggestions already made. For instance, in paragraph 1, the concept of "leader or organizer" as the main focus of criminal liability should be extended to include other decision-makers in the national hierarchy where they were vested with sufficient authority and power to initiate conduct which could be held in law to be a crime of aggression within the meaning of the Code. Paragraph 2 could be retained. Furthermore, paragraph 3 of the version adopted on first reading could be reinstated in the following amended form:

"3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, evidence which is rebuttable in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."

That new paragraph 3 would meet the points raised by the Government of Australia and some members of the Commission, notably those who had argued that an act of aggression or a breach of Article 2, paragraph 4, of the Charter could not be deemed a crime under the Code unless the criterion of the gravity of its consequences was satisfied. There would also be some merit in retaining the illustrative list of conduct which constituted an act of aggression, as set forth in paragraph 4 of the version adopted on first reading, but with subparagraph (h) deleted to make the list more acceptable from the legal standpoint. Paragraph 5 of the definition, which appeared between brackets, and paragraphs 6 and 7 as adopted on first reading could be deleted, as the Special Rapporteur proposed, so as to make article 15 as well more acceptable on second reading, but without detracting from the value of the definition of aggression as a crime under the Code. He agreed with other members of the Commission that no distinction should be made between acts of aggression and wars of aggression in so far as their consequences were of sufficient gravity or magnitude to threaten the peace and security of mankind.

<sup>6</sup> Ibid., footnote 3.

After all, as one member of the Commission had pointed out, any emphasis on wars of aggression would be misplaced, since declarations of war no longer existed in international relations.

16. He would suggest that, before finalizing the wording of article 19 (Genocide), the Commission should examine the points made by some members of the Commission and by the Government of the United States, inasmuch as the text proposed by the Special Rapporteur on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide contained all the basic elements which were the subject of a broad consensus.

17. He welcomed the new title, "Crimes against humanity", proposed for article 21 (Systematic or mass violations of human rights), which reflected the original concept of the Code. But for such crimes to be covered by the Code, they must satisfy the criterion of "systematic or mass violations" of human rights, as was in fact recommended by the Government of the United Kingdom and some members of the Commission. Furthermore, the Commission did not need to, and perhaps could not, define torture, and any attempt to do so could result in an interminable debate. The basic question was at what point a violation of a humanitarian principle or human rights violations, which were essentially matters of domestic concern that fell within the national jurisdiction, became an international problem that came within international jurisdiction. The issue became even more complicated where there was no agreement at the international level or consensus on applicable standards, the appreciation of the factors surrounding the occurrence of such violations and, indeed, credible and impartial means of establishing the facts. Again, as some members had pointed out in reference to other categories of proposed crimes, no matter how abhorrent certain conduct might be, it could not be regarded as a crime under the Code unless it threatened the peace and security of mankind. That criterion, which was logical, appeared to set a limitation or standard.

18. The new wording proposed for article 22 (Exceptionally serious war crimes), for which the Special Rapporteur proposed the title "War crimes", was based on the statute of the International Tribunal for the Former Yugoslavia.<sup>7</sup> In that connection, he could not support Mr. Tomuschat's proposal to expand the article along the lines of the statute of the International Tribunal for Rwanda. As the Security Council had rightly pointed out, the situation in the two countries was different: in the case of the former Yugoslavia, only acts committed at a particular time had been deemed, in law, to fall within the jurisdiction of the Tribunal, whereas, in the case of Rwanda, the Tribunal was meant to fill a gap and any generalization of its statute would therefore be unacceptable. Moreover, given the comments of States and their views on international humanitarian law in general and on the law and customs of war, the article proposed by the Special Rapporteur was unlikely to attract a wide consensus. Without developing the point, he would note that the Commission should examine and analyse in

much greater depth the various concepts involved in the definition of that category of crimes if it was to arrive at a sound formulation that would be widely acceptable in both legal and political terms. The proposal that the concept of "grave breaches" should be included in the article was, however, welcome.

19. He agreed with the Special Rapporteur that article 24 (International terrorism) should be included in the draft Code. He also endorsed his necessary and timely proposal, which would receive wider acceptance, that the article should cover individuals who engaged independently, in acts of terrorism. Furthermore, he shared the view of the Government of the United States of America, that, in a number of international conventions, terrorism was defined by way of enumeration rather than in a generic definition. The Commission must, however, strive to give international terrorism a precise definition that covered all its manifest forms. The word "terror" was preferable to other expressions, since its meaning was generally well understood. The comments made by the Governments of the United Kingdom of Great Britain and Northern Ireland and Switzerland would also be useful in enlarging the concept of terrorism.

20. He could support the inclusion in the draft Code of article 25 (Illicit traffic in narcotic drugs), given the increasingly insidious relationship between terrorism and illicit traffic in narcotic drugs and in view of the comments offered by the Special Rapporteur and the Government of Switzerland. It would, however, be better, in the light of the rather realistic comments of the Government of the United Kingdom, to leave prosecution and punishment to the effective and available national systems in so far as was possible and feasible. But where the crime was a threat to peace and the good order of a State or States and, if it was their wish, it should be possible for it to be tried by an international criminal court as a crime under the Code.

21. In conclusion, he would reiterate that, if the Code was to be universal and widely acceptable, it must encompass the other crimes which had been adopted on first reading and dropped on second reading. Failing that, the Code could not be linked to the draft statute for an international criminal court which the Commission had adopted at its forty-sixth session, whereas the two instruments could together provide a basis for the development of an objective, non-discriminatory and universal international criminal justice system. Secondly, the absence of such crimes from the Code would in no way alter their status as crimes under international law. Thirdly, the draft Code, like the draft statute, would require further intensive review by States with a view to clarifying the elements of the crimes involved, complementing them with rules on procedure and evidence, setting down criteria for the investigation and surrender of suspects, and establishing a proper balance between, on the one hand, the international criminal justice system that was set up and the national criminal justice system and on the other the Charter of the United Nations.

22. Mr. de SARAM said he agreed with Mr. Sreenivasa Rao that international terrorism, which could shake a society to its very foundations, had its place in the draft Code.

<sup>7</sup> Ibid., footnote 5.

**State succession and its impact on the nationality of natural and legal persons (A/CN.4/464/Add.2, sect. F, A/CN.4/467,<sup>8</sup> A/CN.4/L.507, A/CN.4/L.514)**

[Agenda item 7]

**FIRST REPORT OF THE SPECIAL RAPPORTEUR**

23. Mr. MIKULKA (Special Rapporteur) introduced his first report on State succession and its impact on the nationality of natural and legal persons (A/CN.4/467). It dealt with one of the new topics that the Commission had decided to place on its agenda at its forty-fifth session, in 1993.<sup>9</sup> The General Assembly had approved that proposal in its resolutions 48/31 and 49/51. It had also requested, in resolution 49/51, the Secretary-General to invite Governments to submit, by 1 March 1995, relevant material including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

24. Nationality had once again become a question of great interest to the international community following the emergence of new States and, in particular, the dissolution of States in eastern Europe. Problems relating to nationality, and in particular the problem of statelessness, had attracted the attention of a number of international governmental and non-governmental organizations and international bodies, including the High Commissioner on National Minorities of OSCE, the Arbitration Commission of the Conference on Yugoslavia,<sup>10</sup> UNHCR and the Council of Europe. The Commission's decision to include the question of nationality in the context of State succession on its agenda thus seemed fully justified by the practical needs of the international community.

25. The first report consisted of an introduction and seven chapters. With regard to the historical review of the work of the Commission, he noted that that topic currently under consideration stood at the intersection of two other topics that the Commission had already considered, namely, nationality, including statelessness, and succession of States and Governments. The results of the Commission's previous work on those two topics were the Convention on the Reduction of Statelessness, adopted in 1961, on the basis of the draft convention prepared by the Commission (the Convention had entered into force in 1975), the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. He wished to pay tribute to his predecessors, the special rapporteurs for the two topics under consideration, for their contribution to that work: Mr. Manley O. Hudson, Special Rapporteur for the topic of nationality, including statelessness; Mr. Roberto Córdova, who had replaced him; Mr. Manfred Lachs, Special Rapporteur for the topic of succession of States and Governments; Sir Humphrey Waldock, Special Rapporteur for succession in respect of treaties; Sir

Francis Vallat, who had replaced him; and Mr. Mohamed Bedjaoui, Special Rapporteur for succession in respect of matters other than treaties.

26. With regard to the delimitation of the topic, he pointed out that the problems the Commission must study were part of the branch of international law dealing with nationality rather than State succession. By their nature, they were very similar to those which the Commission had already considered under the topic of nationality, including statelessness. However, they differed from it in two respects: on the one hand, the Commission's vision was broader than before (it covered all of the issues resulting from changes of nationality and was not limited to the topic of statelessness), and, on the other hand, the scope of consideration was limited to changes of nationality resulting from State succession and thus having the nature of collective naturalizations.

27. In contrast to international treaties or debts, which comprised an international legal relation, which was subject to transfer, the relation of the State to the individual, which was covered by the concept of nationality, excluded a priori any notion of "substitution" or "devolution". Nationality was always inherent and was not a "successional matter", as, for example, were State treaties, property, debts, and so on.

28. The topic under consideration, which stood, as had been said, at the point where the law of nationality and the law of State succession intersected, also related to the problem of diplomatic intercourse and immunities, included in the list of topics selected for codification at the first session in 1949<sup>11</sup> which had never been considered. The problem of the continuity of nationality, which arose in the context of collective naturalizations resulting from territorial changes, was part of diplomatic intercourse and immunities. It was for the Commission to decide whether and to what extent that issue should be considered in the context of the current topic.

29. With regard to the working method, the Commission should adopt a flexible approach in dealing with the topic, using both the method of codification and that of progressive development of international law.

30. As to the form which the outcome of the work on the topic might take, he drew the Commission's attention to the fact that, at its forty-fifth session, when it had included the topic of "State succession and its impact on the nationality of natural and legal persons" in its agenda, it had indicated in its report that the outcome of the work could for instance be a study or a draft declaration to be adopted by the General Assembly and had decided that the final form of the work would be determined at a later stage.<sup>12</sup> The General Assembly, in resolution 49/51 endorsed the Commission's decision to undertake work on the new topics, on the understanding that the final form to be given to the work on those topics would be decided after a preliminary study had been presented to the General Assembly.

<sup>8</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>9</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 97, document A/48/10, para. 440.

<sup>10</sup> See the "Declaration on Yugoslavia" (A/C.1/46/11, annex).

<sup>11</sup> *Yearbook* . . . 1949, Part Two, p. 279, para. 16.

<sup>12</sup> *Yearbook* . . . 1993, vol. II (Part Two), p. 97, document A/48/10, para. 339.

31. With regard to the terminology used, he considered that, in order to ensure uniformity, the Commission should continue to use the definitions it had formulated previously in the context of the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, particularly with regard to the basic concepts, defined in article 2 of both Conventions, and especially with respect to the definition of the expression "succession of States". As the Commission had explained in its commentary to those provisions, that expression was used as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event.<sup>13</sup> At that time, the Commission had considered that expression preferable to other expressions such as "replacement in the sovereignty in respect of territory". It had stated that the word "responsibility" should be read in conjunction with the words "for the international relations of territory" and was not intended to convey any notion of "State responsibility", a topic currently under study by the Commission. The meanings attributed to the terms "predecessor State", "successor State" and "date of the succession of States" were merely consequential upon the meaning given to the expression "succession of States".<sup>14</sup>

32. Introducing chapter I of the report, entitled "Current relevance of the topic", he said that he had decided to include that chapter in the report in the light of certain comments that had been made when the Commission had decided to include the topic in its agenda, some members of the Commission having taken the view that the topic was an academic one and devoid of practical scope. He had thus deemed it useful to mention in the report some of the international bodies that had concerned themselves with the problem of nationality in relation to recent territorial changes, in order to stress the importance of the problem under consideration from the point of view of the practical needs of the international community. Chapter I also contained several references to international symposia and meetings that had been attended by legal experts from different countries and that had dealt with issues relating to nationality. In his view, the records of those meetings might be of benefit to the Commission in its work on the topic.

33. Chapter II of the report dealt with the concept and function of nationality. On that question, a clear distinction must be made between the nationality of individuals and that of legal persons. On the nationality of individuals, the various components of the concept of nationality had been identified by ICJ in the *Nottebohm* case. According to the definition given by the Court, nationality was

a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the

juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.<sup>15</sup>

34. The notion or the concept of nationality could be defined in widely different ways depending on whether the problem was approached from the perspective of internal or international law. For the function of nationality was, in each case, different. Seen from the perspective of international law, to the extent that individuals were not direct subjects of international law, nationality was the medium through which they could normally enjoy benefits from international law; whereas, in internal law, the function of nationality was different and there could be various categories of "nationals". The existence of different categories of nationality within a State had been a phenomenon specific to the federal States of Eastern Europe: the Soviet Union, Yugoslavia and Czechoslovakia.

35. By way of analogy with the position of individuals, legal persons (corporations) had a nationality as well. As in the case of an individual, the existence of the bond of nationality was necessary for the purposes of the application of international law in relation to a legal person and, most often, for the purposes of diplomatic protection. There was, however, a limit to the analogy that could be drawn between the nationality of individuals and the nationality of legal persons.

36. It could be said that there was no rigid notion of nationality with respect to legal persons. For that reason, it was a usual practice of States to provide expressly, in a treaty or in their internal laws, which legal persons could be regarded as "nationals" for the purposes of the application of the treaty or of national laws. Owing to the fact that legal persons might have links with several States, the establishment of the "national" status of a legal person involved a balancing of various factors.

37. The preceding comments raised a question that the Commission must answer, namely, whether it was truly useful to undertake the study of the impact of State succession on the nationality of legal persons in parallel with the study concerning the nationality of natural persons. Did the study of problems of nationality of legal persons have the same degree of urgency as the study of problems concerning the nationality of individuals? In his view, the Commission might separate the two issues and study first the most urgent one—that of the nationality of natural persons.

38. Turning to chapter III, which dealt with the roles of internal law and international law, he noted that it was generally accepted that it was not for international law but for the internal law of each State to determine who was, and who was not, to be considered its national. That conclusion remained valid in cases of State succession. It was for the internal law of the predecessor State to determine who had lost the nationality of that State following the change; it was for the internal law of the successor State to determine who had acquired it. That principle had been confirmed by article 1 of the Convention on

<sup>13</sup> *Official Documents of the United Nations Conference on the Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III (A/CONF.80/16/Add.2), p. 6, commentary to article 2, para. (3).

<sup>14</sup> *Ibid.*, para. (4).

<sup>15</sup> *Nottebohm, Second phase, Judgment, I.C.J. Reports, 1955*, pp. 4 *et seq.*, at p. 23.

Certain Questions relating to the Conflict of Nationality Laws, by PCIJ in its advisory opinion with regard to the *Nationality Decrees issued in Tunis and Morocco*<sup>16</sup> and in its advisory opinion on the question concerning the *Acquisition of Polish Nationality*,<sup>17</sup> and had been reiterated by ICJ in the *Nottebohm* case.<sup>18</sup> At the same time, however, according to the opinion of some writers, there could be exceptional cases where individuals might possess a nationality for international purposes in the absence of any applicable nationality law. That begged the question whether the existence of two distinct concepts of nationality—one under internal law and another under international law—was accepted. That issue had a special importance in the context of State succession. The Commission must ask itself the following questions: if the concept of nationality for international purposes was to be considered as generally accepted, what were its elements and what exactly was its function?

39. With regard to the function of international law, while it could be said that the legislative competence of the State with respect to nationality was not absolute, it must also be accepted that the role of international law with respect to nationality was very limited. In principle, States were subject to two types of limitations in the areas of nationality, the first type relating to the delimitation of competence between States and the second, to the obligations associated with the protection of human rights. In any event, international law could not substitute for internal legislation indicating who were and who were not nationals of the State.

40. International law intervened through both customary and conventional rules. The Convention on Certain Questions relating to the Conflict of Nationality Laws referred to international conventions, international custom, and the principles of law generally recognized with regard to nationality. While the rules of customary law were still rudimentary, conventions and treaties aimed at the harmonization of national legislations with a view to eliminating the unfortunate consequences which resulted from the use by States of differing processes of acquisition or loss of nationality. Some of those consequences—such as statelessness—were considered more serious than others—such as double nationality. Among the conventions, one could cite the above-mentioned Convention, the Protocol relating to a Certain Case of Statelessness, its Special Protocol concerning Statelessness and its Protocol relating to Military Obligations in Certain Cases of Dual Nationality, as well as the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness. Among the regional instruments, mention could be made of the Convention on Nationality of the Arab League of 1954 and the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded between the States members of the Council of Europe.

41. As to whether those instruments were relevant in the context of State succession, he noted that, first of all, they provided useful guidance to the States concerned by

offering solutions which could *mutatis mutandis* be used by national legislators in search of solutions to problems arising from territorial change. Secondly, such conventions, when the parties thereto included the predecessor State, could be formally binding upon successor States in accordance with the relevant rules of international law governing State succession in respect of treaties. Those instruments could thus add to the general limitations imposed by customary rules of international law on the discretion of the successor State in the field of nationality. Other international treaties directly concerned with problems of nationality in cases of State succession had played an important role, in particular after the First World War. The Convention on Certain Questions relating to the Conflict of Nationality Laws included the principles of law generally recognized with regard to nationality among the limitations to which the freedom of States was subjected in the area of nationality. But the Convention remained silent with respect to the precise content of that concept, which the Commission might therefore attempt to spell out in its study of the subject.

42. With regard to limitations on the freedom of States in the area of nationality, the first limitation arose from the principle of effective nationality based on the concept of a genuine link, a principle often cited in connection with the decision of ICJ in the *Nottebohm* case. That judgment had elicited some criticism, although the principle of effective nationality as such had not been challenged. Another category of limitations, whose importance had increased considerably after the Second World War, arose from some obligations of States in the area of human rights which imposed limits on the exercise of their discretion when it came to granting or withdrawing nationality. That held true for naturalizations in general, as well as in the particular context of State succession. Article 15 of the Universal Declaration of Human Rights<sup>19</sup> provided that everyone had the right to a nationality and that no one was to be arbitrarily deprived of his nationality nor denied the right to change his nationality. Similarly, article 8 of the Convention on the Reduction of Statelessness provided that a contracting State could not deprive a person of its nationality if such deprivation would render him stateless. According to article 9 of the same Convention, the contracting State could not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds. The Commission could study the precise limits of the discretionary competence of the predecessor State to deprive of its nationality the inhabitants of the territory it had lost, as well as the question whether an obligation of the successor State to grant its nationality to the inhabitants concerned could be deduced from the principles previously mentioned.

43. Concerning categories of succession, he held the view that the Commission must address separately the problems of nationality arising in the context of different types of territorial changes. That would reveal whether it was appropriate to maintain, as some writers did, that most of the principles referred to in connection with universal succession apply, *mutatis mutandis*, to the effects of partial succession on nationality. In the context of its

<sup>16</sup> P.C.I.J. 1923, Series B, No. 4, p. 24.

<sup>17</sup> Ibid., No. 7, p. 16.

<sup>18</sup> *Nottebohm* (see footnote 15 above), p. 4.

<sup>19</sup> General Assembly resolution 217 A (III).



work on succession of States in respect of treaties, the Commission had specified three broad categories: succession in respect of part of territory; newly independent States; and uniting and separation of States.<sup>20</sup> Those categories had been maintained by the diplomatic conference and had been incorporated in the Vienna Convention on Succession of States in respect of Treaties. For the purposes of the draft on succession of States in respect of matters other than treaties, the Commission had deemed that some further precision in the choice of categories was necessary. Consequently, with regard to succession in respect of part of territory, the Commission had decided that it was appropriate to distinguish and deal separately with three cases: the case where part of the territory of a State was transferred by that State to another State; the case where a dependent territory achieved its decolonization by integration with a State other than the colonial State; and the case where a part of the territory of a State separated from that State and united with another State.<sup>21</sup> Regarding the uniting and separation of States, the Commission had found it appropriate to distinguish between the "separation of part or parts of the territory of a State" and the "dissolution of a State".<sup>22</sup> Those categories had been approved by the diplomatic conference and were at the basis of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. In the judgement of the Special Rapporteur, for the purposes of the study of State succession and its impact on nationality, it would be appropriate to keep the categories adopted for the codification of the law of succession of States in respect of matters other than treaties. The continuity or discontinuity of the international personality of the predecessor State in cases of cessation or dissolution of States had direct implications in the area of nationality. The issues which arose in the first case were by nature substantially different from those which arose in the second case. Moreover, for cases of uniting of States, a distinction was required between the situation in which a State united freely with another State, consequently disappearing as a subject of international law—the "absorption" hypothesis—and the situation in which the two predecessor States united to form a new subject of international law and therefore both disappeared as sovereign States. The nationality issues that had arisen during the decolonization process should be studied only in so far as such study shed light on nationality issues common to all types of territorial changes. He also believed that, like the Commission's previous work, the study should be limited "only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".<sup>23</sup> Accordingly, the study should not deal with questions of nationality which might arise, for example, in cases of annexation by force of the territory of a State.

<sup>20</sup> *Yearbook* . . . 1974, vol. II (Part One), p. 172, document A/9610/Rev.1, para. 71.

<sup>21</sup> *Ibid.*, pp. 208-211, article 14 of the draft articles on succession of States in respect of treaties and commentary thereto.

<sup>22</sup> *Yearbook* . . . 1981, vol. II (Part Two), para. 75.

<sup>23</sup> Article 6 of the Vienna Convention on Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

44. The Commission must delimit the scope of the problem *ratione personae*, *ratione materiae* and *ratione temporis*. For the scope of the problem *ratione personae*, there was some uncertainty regarding the categories of persons who were susceptible of having their nationality affected by change of sovereignty. That applied to all individuals who could potentially lose the nationality of the predecessor State, as well as all individuals susceptible of being granted the nationality of the successor State. It was obvious that the two categories of persons would not necessarily be identical. *Ratione materiae*, the preliminary study should deal with questions of loss of the nationality of the predecessor State and with questions of conflict of nationalities susceptible of resulting from State succession, namely, statelessness and double or multiple nationality. With regard to loss of nationality, the study should aim at clarifying the extent to which the loss of the nationality of the predecessor State occurred automatically, as a logical consequence of the succession of States, and the extent to which international law obliged the predecessor State to withdraw its nationality from the inhabitants of the territory concerned or, on the contrary, limited the discretionary power of that State to withdraw its nationality from certain categories of individuals susceptible of changing nationality. In terms of acquisition of nationality, the delimitation of categories of persons susceptible of acquiring the nationality of the successor State was not easy. In the event of total State succession, such as the absorption of one State by another State or the unification of States, when the predecessor State or States, respectively, ceased to exist, all nationals of the predecessor State or States were candidates for the acquisition of the nationality of the successor State. But in the case of dissolution of a State, which also then ceased to exist, the situation became more complicated owing to the fact that two or more successor States appeared and the range of individuals susceptible of acquiring the nationality of each particular successor State had to be defined separately. Similar difficulties would arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of succession or transfer of a part or parts of a territory. In respect of conflict of nationalities, the Commission could investigate whether the States concerned, namely, the predecessor State and the successor State or States, were required to negotiate and settle nationality questions by mutual agreement with a view to warding off conflicts of nationalities, especially statelessness. Finally, the Commission should study the right of option, which was provided for in a substantial number of international treaties and had quite recently been envisaged by the Arbitration Commission of the Conference on Yugoslavia.<sup>24</sup>

45. With regard to the scope of the problem *ratione temporis*, since the topic was the question of nationality solely in relation to the phenomenon of State succession, the scope of the study excluded questions relating to changes of nationality which occurred prior to or following the date of the succession of States. It should not be forgotten, however, that, in the majority of cases, successor States took time to adopt their laws on nationality

<sup>24</sup> See footnote 10 above.

and that, in the interim period, human life continued. There could therefore be problems concerning nationality which, although not resulting directly from the change of sovereignty as such, nevertheless deserved the Commission's attention.

46. Turning to continuity of nationality, he said he wished to make three points. First, the rule of the continuity of nationality was a part of the regime of diplomatic protection. Secondly, neither the practice nor the doctrine gave a clear answer to the question of the relevance of that rule in the event of involuntary changes in nationality brought about by State succession. There were good reasons to believe that, in the case of State succession, that rule could be modified. Lastly, since the problem of continuity of nationality was closely associated with the regime of diplomatic protection, the question arose whether it should be brought within the scope of the current study.

47. Mr. IDRIS expressed his congratulations to the Special Rapporteur on his extremely detailed and thought-provoking first report, as well as on his excellent introduction. Before the Commission entered into the debate, he would like two things to be clarified in connection with General Assembly resolution 49/51. First, the resolution included the words "on the understanding that the final form to be given to the results of the work will be decided after a preliminary study is presented to the General Assembly". It was therefore clear that the Commission's work would involve a preliminary study. The Special Rapporteur, however, had referred to a report as opposed to a study. He would like to know how the Special Rapporteur envisaged such a report.

48. Secondly, in its resolution 49/51, the General Assembly requested the Secretary-General to invite Governments to submit materials including national legislation and decisions of national tribunals. Since a preliminary study, and not a preliminary report, was involved, it would be useful to know how much material had been compiled.

49. Mr. MIKULKA (Special Rapporteur) said he had deliberately said very little about the final form to be given to the results of the Commission's work. He had a number of ideas on that subject, of course, but, before outlining them, he wished to give members of the Commission an opportunity to discuss the topic itself. He saw no contradiction between the preparation of a preliminary study and the drafting of a report. Any preliminary study carried out by the Commission could in any case be transmitted to the General Assembly only as part of its report. The Commission could apply the solution used for the draft statute for an international criminal court: the report of the Working Group on a draft statute for an international criminal court had been submitted to the Commission and then annexed to the Commission's report to the General Assembly.<sup>25</sup> In order to comply with the wishes of the General Assembly, the Commission could transmit a summary outlining possible approaches and various positions and options in order to

enable the Sixth Committee to advise the Commission about the preferences of States.

50. The final form to be given to the results of the work could not be decided on before the preliminary study was submitted to the General Assembly, even though the Commission could express its preferences in that regard.

51. Turning to the second point made, he noted that relatively few States had submitted documentation on their national legislation, but that those States included several that had recently undergone territorial transformation: in other words, successor States. The secretariat had also made a number of documents available to him. But a great many cases of State succession were covered neither by recent documents nor by older ones and nothing could be done but to await the replies of Governments. If the Commission decided to set up a small working group on the topic, however, its members would have access, with the secretariat's assistance, to all the documents that had been available to him.

52. Mr. LUKASHUK said that, after having carefully studied the first report of the Special Rapporteur, he found that it clearly outlined all aspects of the topic. The Special Rapporteur faced a particularly arduous task, since he had to establish a link between two important yet distinct problems: State succession and nationality not governed by international law. In that connection, he wished to make two comments.

53. In the first place, nationality was the legal link between an individual and a State, but that did not really make matters very clear. Moreover, the link had undergone significant changes in connection with the protection of human rights. At present, nationality might be regarded as the attribute of a member of the organization of a State.

54. Secondly, the right of the individual to nationality was recognized at both the international and the national levels: hence, arbitrary treatment or absolute sovereignty of the State was excluded. In that connection as well, State succession must be analysed with due regard for the relationship between nationality and human rights.

*The meeting rose at 12.55 p.m.*

## 2386th MEETING

*Thursday, 18 May 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Ro-

<sup>25</sup> *Yearbook* . . . 1993, vol. II (Part Two), document A/48/10, annex.



senstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)**

[Agenda item 4]

**THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)**

1. Mr. THIAM (Special Rapporteur), summing up the discussion of his thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466), expressed his thanks to the members of the Commission for the many cogent arguments they had advanced. His task in summing up would be a difficult one, for he would have to reconcile differing opinions expressed on certain issues and respond to certain criticisms levelled at his report.

2. The thirteenth report had been faulted for not taking into account the views of those Governments—mainly of developing countries—that had chosen not to react to the draft articles adopted on first reading and submitted for their comments. He himself had expressed regret at the lack of response from those Governments, but given that lack of response, what should he have done? He could hardly have reflected non-existent comments in his report.

3. It had been said that the report had too radically reduced the number of crimes that were to figure in the Code and that it relied too heavily on the contents of existing treaties and conventions. Yet from the very start of the drafting exercise, members of the Commission had exhorted him to use such instruments as the basis for his work. He had questioned the validity of that approach, in the belief that progressive development of the law meant going beyond existing legal instruments—looking into General Assembly and Security Council resolutions, for example. In fact, he was deeply convinced that most of the crimes in the draft Code constituted violations of *jus cogens*. It was therefore incorrect to assert that he had relied unduly on existing treaties.

4. Again, his approach had been faulted for being excessively prudent. Members of the Commission apparently wanted him to push forward vigorously in the development of international law, even where there was no consensus within the Commission itself. Yet that was not the role of a Special Rapporteur. His job was not to force certain solutions on the Commission, but faithfully to reflect the pros and cons of a particular hypothesis so

that, by thinking things through together, the members could reach agreement.

5. As to the draft articles themselves, a consensus had clearly developed in favour of including at least four of the crimes—aggression, genocide, war crimes and crimes against humanity.

6. The definition of aggression needed to be further refined, but the role of the Security Council had been over-emphasized in that connection. The Council had no authority over individuals; it could only determine whether an act of aggression had been committed. The demarcation line between the Council's competence and that of any court that applied the Code would emerge gradually, as specific cases were considered, but there was no way the Council could take over the functions of a court. That was why he had proposed a very general definition of aggression, one that deliberately made no mention of the Security Council or of General Assembly resolution 3314 (XXIX). If the Commission wished to go beyond that general definition, it should by all means do so.

7. None of the members of the Commission had opposed the inclusion of the crime of genocide in the draft Code. Furthermore, war crimes had been sufficiently dealt with in conventions or internal laws, so that there was no debate as to the wisdom of incorporating an article on them.

8. For crimes against humanity, he had originally proposed replacing that expression by "systematic or mass violations of human rights". It had been argued, however, and his own further research into the literature had shown, that a violation of human rights need not be "massive" in order to be a crime against humanity. A single atrocity committed against a sole individual could be so shocking as to constitute an offence against mankind as a whole. The need for a crime to be "massive", therefore, was questionable, and that was why he had reverted to the original wording for the title. It was ultimately for the Commission to decide which title should be kept.

9. There were a number of crimes whose inclusion in the draft Code had not generated widespread enthusiasm. Although many Latin American writers thought that intervention must be characterized as a crime against the peace and security of mankind, that view was not widely shared. Intervention was not pernicious in all instances. It could be benign—even salutary. For example, when a country attempted, by judicious means, to dissuade another from a politically or militarily dangerous venture, that was intervention—but it was not criminal. Armed intervention, of course, must not go unpunished, but it could be qualified as aggression, which was already covered in the draft Code. None of the Drafting Committee's efforts to produce a suitable definition of the threat of aggression had ever met with the approval of Governments, and he felt it was time to abandon the notion. Recruitment of mercenaries had been a burning issue some years back, but with the perspective afforded by the passage of time it could be seen that all the elements of the crime could be placed under the crime of aggression. As no strong arguments had been advanced in their favour, there would seem to be ample grounds for deleting from

<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 . . . 1995*, vol. II (Part One).

the draft Code the articles on intervention, threat of aggression and recruitment of mercenaries.

10. A number of crimes remained controversial, and they were the ones the Commission should focus on at the present stage. Apartheid had been a source of outrage in the past, especially on the African continent, but the very term, synonymous with the practice of a particular African country, had now been consigned to the annals of history. If the phenomenon should ever re-emerge, a new term would have to be devised. One Government had suggested "institutionalization of racial discrimination". The Commission should give serious consideration to that phrase, and an article defining it, in the draft Code.

11. Colonial domination could also be said to be a thing of the past. The recent Iraqi invasion of Kuwait notwithstanding, in today's world it was highly unlikely that one country would dare to use its superior force to take over another. As the crime dated back principally to the sixteenth and seventeenth centuries, its perpetrators could never be brought to justice now. Colonial domination was defined in article 19 of part one of the draft on State responsibility as an international crime.<sup>3</sup> Was that not enough? If not, the Commission should set about drafting a better definition of the crime than he had been able to achieve.

12. He had proposed a general definition of international terrorism that had been criticized by a number of Governments on the grounds that the crime should not be subject to prosecution in general terms, but rather in specific cases and on the basis of conventions covering specific manifestations of terrorism. If the crime was to be kept in the draft Code, therefore, a more acceptable definition would have to be drafted. It appeared that there was very little support for including illicit traffic in narcotic drugs. Many writers viewed it as an international crime, but not as a crime against the peace and security of mankind. The Commission might therefore wish to exclude it.

13. Accordingly, on those four crimes—racial discrimination, colonial domination, international terrorism and illicit traffic in narcotic drugs—a further round of consultations should be instituted, with a view to determining which of them should be kept in the draft Code.

14. The CHAIRMAN thanked the Special Rapporteur for his summing up and suggested that, in order to facilitate the consultations and ensure a truly frank exchange of views, the Commission should hold an informal meeting.

*The meeting rose at 10.50 a.m.*

<sup>3</sup> See 2384th meeting, footnote 10.

## 2387th MEETING

*Friday, 19 May 1995, at 10.30 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (*continued*) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

#### THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRMAN noted that the articles covered in the Special Rapporteur's thirteenth report (A/CN.4/466), namely, articles 15 to 25, were not currently before the Drafting Committee and that the Commission had to take a formal decision on them. Taking into consideration the consultations he had held, he suggested that the Commission should adopt the following decision:

"The Commission refers to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration as a matter of priority on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in plenary, on the understanding that, in formulating those articles, the Drafting Committee will bear in mind and at its discretion deal with all or part of the elements of the draft articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism)."

2. As to any other articles, it was his intention, subject to the Commission's agreement, to conduct informal consultations to determine the best way to deal with them.

<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 . . . 1995*, vol. II (Part One).

3. If he heard no objection, he would take it that the Commission decided to adopt that suggestion.

*It was so decided.*

**State succession and its impact on the nationality of natural and legal persons (continued)\***  
(A/CN.4/464/Add.2, sect. F, A/CN.4/467,<sup>3</sup> A/CN.4/L.507, A/CN.4/L.514)

[Agenda item 7]

**FIRST REPORT OF THE SPECIAL RAPPORTEUR**  
(continued)\*

4. Mr. BOWETT expressed his thanks to the Special Rapporteur for having drafted a first report (A/CN.4/467) that was both clear and comprehensive. He agreed with most of what was said in it and wished only to make a few comments.

5. He agreed with the Special Rapporteur that the Commission should focus on situations where there was a change of sovereignty over territory. He also agreed that the Commission should concentrate, at least initially, on natural persons, if only because it was much easier for legal persons to incorporate themselves in a foreign country than for an individual to acquire a new nationality.

6. The selection of categories of succession was a delicate task; the Special Rapporteur had already expressed certain preferences in his first report. He, however, was not convinced that the selection of categories was crucial at the present stage. Everything would depend on the course the Commission chose to follow. In most cases, there were two States, the predecessor State and the successor State, and that was the basis from which the Commission could establish an obligation for those two States to negotiate an agreement under which the individuals concerned could acquire a nationality. If there was such a thing as a human right to a nationality, there must be a concomitant obligation on States and it was in the application of that obligation that the Commission could be of service to States. The Commission could not only stress the obligation to negotiate so that the individuals concerned could acquire a nationality, but it could also list the principles that ought to be embodied in the agreements concluded among States.

7. If there was a right of nationality as a human right, there was still a need for a genuine link to be established between the person and the State of his nationality before that right could be recognized. In that connection, he shared the view of the Special Rapporteur that the Commission could usefully give more definition to the concept of a genuine link than ICJ had done in the *Nottebohm* case.<sup>4</sup>

8. However, he had definite reservations about unrestricted free choice of nationality or right of option. The Special Rapporteur referred to the position of the Arbi-

tration Commission of the Conference on Yugoslavia, which he found to be extremely dubious and according to which every individual could choose to belong to whatever ethnic, religious or language community he or she wished. In his view, the Commission should itemize those factors which would indicate that a choice was *bona fide* and must therefore be respected and given effect by the State through the granting of nationality.

9. If agreements on the granting of nationality were to be negotiated, that could take time and the negotiations could well continue even after the formal transfer of sovereignty over the territory had taken place. It was therefore necessary to provide for a transitional status to be applied while an agreement was being negotiated, while legislation was being prepared in the State concerned or while the individual was exercising his right of option—that is to say during what the Special Rapporteur had referred to as ‘interim arrangements’.

10. The Special Rapporteur had also referred to the effect of change of nationality on the right of diplomatic protection. Although that problem was incidental, it was of some importance. The normal rule required that, in order to enjoy the protection of a State, a person must have held the nationality of that State continuously from the time of injury to the time of the claim. However, that continuity could be broken and the right of protection lost when a change of nationality occurred through a transfer of territory. It would therefore be appropriate to make the rule apply only to situations where a change of nationality came about through the free choice of an individual and not as a result of a transfer of territory.

11. Mr. TOMUSCHAT, congratulating the Special Rapporteur on an excellent report, said he too believed that it was unnecessary to think in terms of drafting an international treaty. In the first place the Commission had in the past already produced declarations and works of codification which did not rank as international treaties and that was therefore in line with good practice. More particularly, however, it was now that some States had need of rapid legal assistance from the international community to help them decide by which criteria they should be guided. The drafting of a treaty could take about 10 years, at the end of which time, however, the topic might have lost all interest.

12. Also the study should, in his view, focus on natural persons, with a separate study being justified in the case of legal persons, since they did not necessarily have the same nationality in all their legal relations.

13. He endorsed the Special Rapporteur's idea of a study of the limits imposed by international law on internal law, whose sphere of activity must not be extended in the absence of a genuine link with the State concerned. With regard to the Special Rapporteur's statement that internal law and international law were independent of each other, he wondered whether, in cases of extreme gravity, it should not be possible to claim that acts carried out at the national level were null and void. He had in mind the case where the decision to divest certain natural persons of their nationality was an element in the persecution of an ethnic minority. In Germany, for instance, the Act by which the Third Reich had deprived the Jews of their nationality had subsequently been

\* Resumed from the 2385th meeting.

<sup>3</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>4</sup> See 2385th meeting, footnote 15.

declared unconstitutional by the Constitutional Court. Furthermore, in a lengthy article, Mr. F. A. Mann defended the proposition that consideration should be given, in the context of responsibility, to making the consequences of the commission of an internationally wrongful act null and void.<sup>5</sup>

14. The centre of the Commission's discussions would be the right to nationality, the principle of which had been stressed by the Special Rapporteur. In that connection, article 24 of the International Covenant on Civil and Political Rights carefully said very little about recognizing a right to nationality. Paragraph 3 did, however, stipulate that "Every child has the right to acquire a nationality". Perhaps, therefore, a distinction should be drawn between adults and children so that children would have to be born with a nationality and could not be stateless from birth. Moreover, State succession could not leave millions of people without a nationality and it was therefore up to the international community to introduce rules whereby any person involved in a State succession would be recognized as having a nationality. In that connection, he agreed that an obligation should be imposed on States to negotiate a solution that would avoid such a deplorable situation.

15. Another instrument, the International Convention on the Elimination of All Forms of Racial Discrimination, was also very careful in that, in the case of prohibited grounds of discrimination, it expressly excluded from the Convention questions of nationality. Consequently, it was not absolutely prohibited to take account of certain links of origin, history and civilization with a view to recognizing the nationality of persons.

16. He wished to underline the need to move ahead with the study and, in particular, to propose a certain number of choices to the General Assembly and the members of the Commission, for the General Assembly had not requested an academic study on the state of the law of nationality. In that connection, it would be extremely useful to have information on the practice followed by the Baltic States and especially the Russian Federation on the objections and criticisms expressed with regard to such practice—such as the Russian criticisms of the practice of the Baltic States—and on the reaction to those criticisms. The Commission could then endeavour to arrive at the right balance.

17. Mr. de SARAM said he agreed that the main focus should be on the nationality of natural persons, who were more likely to suffer from the merger or division of States or from the attachment of one part of the territory of a State to another. The right of a State to determine the conditions governing the acquisition or loss of nationality was not unlimited because there were treaties which were applicable. It was important for the States concerned to enter into negotiations, but the individuals concerned also had rights, which, as pointed out by Mr. Bowett, did not any longer allow complete freedom of choice. The Commission would therefore be greatly assisted in its discussions if it had before it documentation that would enable all of its members to gain an accurate

idea of the relevant provisions of the law of treaties and of their practical application.

18. Mr. BENNOUNA said that the academic side of the question of nationality was well known. Consequently, it was a knowledge of practice that was lacking. Only on the basis of practice could the Commission propose solutions or, at least, guidelines.

19. Mr. MIKULKA (Special Rapporteur) said the fact that he referred in his report to the right of option, as envisaged by the Arbitration Commission of the Conference on Yugoslavia, in no way meant that he endorsed that approach: he had even had occasion to criticize it in another forum. As to the available documentation, referred to in his report, it consisted, on the one hand, of earlier material published by the Codification Division of the United Nations Office of Legal Affairs in 1959 and 1978<sup>6</sup> and of more recent documents on national legislation which had been provided by Governments in response to the request of the General Assembly and by other sources.

20. Ms. DAUCHY (Secretary to the Commission) said that the secretariat had a complete list of the documents transmitted to the Special Rapporteur. It could also have reproduced, either for general distribution or at least for members of the Commission who so requested, a document of about 100 pages which contained replies from the Governments of Austria, Cyprus, the Czech Republic, Singapore, Slovakia, Tunisia and the United Kingdom of Great Britain and Northern Ireland.

21. Mr. ROSENSTOCK reminded members that it had been suggested that a working group should be appointed—a solution that would assist the Commission in its task having regard to its programme of work.

22. Mr. PAMBOU-TCHIVOUNDA (First Vice-Chairman) said it was apparent from consultations he had held that there was general agreement on the need to set up a working group; opinions differed on the right time to do so, however.

23. Following a discussion in which Mr. BENNOUNA, Mr. EIRIKSSON, Mr. YANKOV, Mr. GÜNEY, Mr. AL-BAHARNA, Mr. IDRIS and Mr. MIKULKA took part, the CHAIRMAN said that there was a consensus on the need to appoint a working group, which would start work at the end of the general debate on the topic. He would therefore ask the First Vice-Chairman to pursue his consultations with a view to establishing a list of those who wished to be members of the group, in consultation with the Special Rapporteur, so that the Commission could take a decision as soon as possible on the working group's terms of reference and composition. Since consideration of the topic was still at the preliminary stage, he would personally favour an open-ended working group so as to have the benefit of the contribution of all members.

*The meeting rose at 11.35 a.m.*

<sup>5</sup> "The consequences of an international wrong in international and municipal law", *The British Year Book of International Law* 1976-1977 (Oxford, Clarendon Press, 1978), pp. 5 *et seq.*

<sup>6</sup> United Nations, Legislative Series, *Laws concerning Nationality* (ST/LEG/SER.B/4) (Sales No.54.V.1) and Supplement to *Laws concerning Nationality* (ST/LEG/SER.B/9) (Sales No.59.V.3) and *Materials on Succession of States in respect of Matters other than Treaties* (ST/LEG/SER.B/17) (Sales No.77.V.9).

## 2388th MEETING

*Tuesday, 23 May 1995, at 10.05 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State succession and its impact on the nationality of natural and legal persons (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/467,<sup>1</sup> A/CN.4/L.507, A/CN.4/L.514)**

[Agenda item 7]

**FIRST REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)**

1. Mr. PAMBOU-TCHIVOUNDA said that the didactic approach adopted by the Special Rapporteur in his first report (A/CN.4/467), with respect both to the form and to the substance, was probably warranted by the novelty of the subject-matter. The report reflected the mood of the times—a mood in which the principle of sovereignty that had governed international law since the nineteenth century was heading, at the dawn of the twenty-first century, towards a watershed where sovereignty and solidarity in the service of humankind converged. New times, and a new topic, called for an urgent treatment: that message was to be found in every section of the report. Yet one might ask whether that message needed a report of so many pages, and whether the situations calling for urgency cited by the Special Rapporteur—namely, those relating to the recent changes in eastern Europe—were not already a thing of the past. Admittedly, the past was useful, but the Commission's task was to work for the future. Russia and Chechnya; Morocco and Western Sahara; China and Hong Kong; Rwanda; Burundi; Canada and Quebec; Senegal, faced with a wave of Casamance irredentism; the European countries currently engaged in building a European Union; Ethiopia, now shorn of Eritrea, yet which in April 1995 had acquired a new federal constitution favouring ethnic particularism: those were some of the questions that should be given urgent treatment in the context of the present topic. Could the approach adopted to the problems posed by the former Soviet Union, the former Yugoslavia, or the former Czechoslovakia be transposed to the future,

and to the situations just mentioned? It was a moot point, but it was not a theoretical question. On the contrary, it was central to the topic under consideration.

2. As to the Special Rapporteur's approach and the structure of the report, after the historical review of the work of the Commission on drafting a regime of State succession, one might have expected to find an indication of what the Special Rapporteur understood to be the content of the topic assigned to him. Did its title refer to State succession in matters of nationality, and thus mean that, as in the case of the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, the Commission was called on to draw up a specific regime as a positive response to the problems posed by nationality in a situation of State succession? Or, did it refer to the impact of any type of State succession on nationality, and thus raise the question, in the light of those same conventions, of what rules and principles were applicable to nationality, and of the extent to which they were applicable? Those two questions should have been considered in detail in a section of the report preceding chapter I entitled "Current relevance of the topic". Yet not until much further on in, at the end of chapter V, did one read that the Special Rapporteur had opted for "the current study of State succession and its impact on the nationality of natural and legal persons". Both the Commission and the General Assembly, to which its preliminary study would be submitted, would benefit from an elucidation of the content of the topic.

3. The preliminary study should avoid two pitfalls. First, the Commission must avoid the temptation to exaggerate the role of international law in the field of the topic under consideration. Secondly, it should also take cognizance of the fact that the question to be regulated concerned, first and foremost, not inanimate objects, but human beings. His comments would relate to those two contentions, which encapsulated the highly political scope of the topic.

4. On the first point of contention, which was not necessarily a reproach, namely, that the Special Rapporteur idealized the role played by international law, especially with regard to its impact on natural persons, three comments could be made. To begin with, due primacy must be restored to internal law, for there was an inherent link between the State—regardless of the circumstances and context of its emergence—and the nationality of the population claiming to be its nationals. As acknowledged in the report, both the literature and the practice of the courts agreed on the exclusive character of the competence of the State in determining nationality. In other words, the State defined the conditions for granting nationality. But it was also the State that defined the conditions for loss of nationality, and the State that could confer on individuals the freedom to choose from among more than one nationality. Admittedly, in a celebrated opinion delivered in 1984, the Inter-American Court of Human Rights had ruled that that principle was limited by the requirements imposed by international law;<sup>2</sup> but

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (Advisory Opinion OC-4/84, *International Law Reports* (Cambridge), vol. 79 (1989), p. 283).

the scope of that opinion, which was in any case only an opinion, should be viewed relatively. In the case of international recognition, for example, it was well known that the act whereby a State recognized another State in the context of State succession was almost never accompanied by a requirement that the legislation enacted by the new State regarding nationality should be in conformity with international law. It was an internal administrative matter, a matter for the Government, and one with which international law did not concern itself.

5. Secondly, even if international law were to deal with that question, it would still be necessary to determine the substance—namely, the rules and sources of that international law. The Special Rapporteur referred to the Draft Convention on Nationality of 1929,<sup>3</sup> but that Convention had remained at the drafting stage, and was not positive law. The report also contained a reference to article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws. There again, the Convention had not entered into force and, in his view, therefore, it was not law.

6. The practice of the courts and customary rules were two ways of generating international law which served as the background to the principle of effective nationality referred to at length in the report. That principle, however, was highly controversial. The *Mavrommatis Palestine Concessions*<sup>4</sup> and *Nottebohm*<sup>5</sup> cases had conferred a practical function on the principle of effective nationality, providing rules on the basis of which to decide between the rival claims of two States in the exercise of diplomatic protection, nationality being one condition for their implementation. That rule did indeed apply to cases of conflict of nationality, provided they remained within the framework of diplomatic protection. Outside that framework, the principle of effective nationality lost its pertinence and scope. That assertion was borne out by the arbitral award in the *Flegenheimer* case,<sup>6</sup> and by the judgment of the Court of Justice of the European Communities in case No. C-369/90<sup>7</sup> which had virtually ridiculed the principle of effectiveness, as the product of a romantic epoch in the history of international relations.

7. Thirdly, when the Special Rapporteur found it undesirable that, as a result of change of sovereignty, persons should be rendered stateless against their will, he was invoking international human rights law, which, as he pointed out in his report, imposed additional limits on States in the exercise of their discretion when it came to granting or withdrawing their nationality. However, international human rights law was riddled with fundamental contradictions. One could conceive that determination of the nationality of individuals in a context of

State succession should require consultation with the population, in the light of the principle of the right of peoples to self-determination, which was surely a people's collective right. In its advisory opinion on the question of *Western Sahara*,<sup>8</sup> ICJ had reaffirmed the obligation of a State to consult with the population. The implementation of that obligation devolved on States. In 1987, the Human Rights Committee had clearly recognized that an individual could not claim to be the victim of a violation of the right of peoples to self-determination as set forth in article 1 of the International Covenant on Civil and Political Rights. In Czechoslovak constitutional law—the most recent example referred to by the Special Rapporteur—a law on referendums had been enacted in 1991, but had not been implemented, because of the need to address the political crisis of 1992. That law had been allowed to lapse, yet no one had regarded that state of affairs as a violation of international law. And when the Czech Republic and Slovakia had each adopted legislation on nationality, that legislation had been unequal, with regard to the conditions each imposed for the acquisition of nationality, and also with regard to the settlement of questions of dual nationality.<sup>9</sup> Thus, article 15 of the Universal Declaration of Human Rights<sup>10</sup> must be seen as declaratory law, rather than as binding law. That article, like the relevant provisions of the Covenant, left States free to take account of their own interests and fears, and of other political rather than purely legal considerations, in questions regarding the determination of nationality.

8. As to his second contention, the Special Rapporteur recommended that the Commission should not undertake the study of the impact of State succession on the nationality of legal persons in parallel with the study concerning the nationality of natural persons. The Commission was invited to separate the two issues and to study first the most urgent one—that of the nationality of natural persons. He endorsed that approach, which would also help to highlight the specific features of a subject which needed to be placed in an appropriate legal framework. As he had said at the outset, the subject-matter of the topic was not inanimate objects such as treaties, debts, archives, or property—issues that had already been addressed by the Commission, and on which the very existence of the State did not fundamentally depend. On the contrary, it concerned the essential bases of the State perceived, not from an abstract or descriptive standpoint, but as implied by territorial and demographic variables, and the legal structure appropriate to organize a framework to deal with the interaction of those variables. That structure concerned both the predecessor State and the successor State, for the primary goal of the law of State succession was to ensure the social and political stability of each of the entities involved.

9. Still with reference to his second contention, he noted that the Special Rapporteur invited the Commission to devote its first efforts to the search for a link. The two categories of succession envisaged by the Commis-

<sup>3</sup> "Nationality, responsibility of States, territorial waters", *American Journal of International Law* (Washington, D.C.), vol. 23, Special Number (April 1929), p.13.

<sup>4</sup> *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 6.

<sup>5</sup> See 2385th meeting, footnote 15.

<sup>6</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIV (Sales No. 65.V.4), pp. 327 et seq.

<sup>7</sup> Court of Justice of the European Communities, *Recueil de la jurisprudence de la Cour et du Tribunal de première instance*, 1992-7, judgment of 7 July 1992, *Mario Vicente Micheletti e.a. v. Delegación del Gobierno en Cantabria*.

<sup>8</sup> *Advisory Opinion, I.C.J. Reports, 1975*, p. 12.

<sup>9</sup> The Czech law and the Slovak law on nationality were amended by Laws Nos. 92/1990 and 88/1990 of the Czech National Council and the Slovak National Council, respectively.

<sup>10</sup> General Assembly resolution 217 A (III).

sion, for succession of States in respect of treaties and in respect of State property, archives and debts, were clearly described by the Special Rapporteur in his report, but from a purely formal standpoint. The report failed to create a tie-in with the material or substantive principles of the two systems, such as the principles of continuity *ipso jure*, of *tabula rasa*, of equitable sharing, or of non-transmissibility. All those principles, individually or as a whole, reflected a concern to ensure fairness; one might go so far as to say that the international law of the succession of States was a reaction, in the form of positive provisions, to a situation of intolerable unfairness. A reminder of those principles would thus not have gone amiss.

10. He failed to understand why the Special Rapporteur stated that for the purposes of the current study, it would be appropriate to keep the categories which the Commission had adopted for the codification of the law of succession of States in respect of matters other than treaties, in other words, the regime in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. One very soon realized, however, that the Special Rapporteur himself was not convinced of the soundness of that approach, for he returned to the regime in the Vienna Convention on Succession of States in respect of Treaties, referring to transfer of territory, uniting of States, and dissolution (in other words, separation) of a State—all major categories in that Convention. Was the Commission to opt for one regime and reject the other, or to draw on elements from both? He himself would have opted for the latter approach. At all events, he considered that if the Commission was to give priority to the nationality of natural persons, it must base itself primarily on the regime in the Vienna Convention on Succession of States in respect of Treaties, while exploiting the overlaps between the two, having regard to the material principles to which he had referred.

11. The territorial location of populations was a further essential indicator to be used in the definition of the scope of the problem *ratione loci*, in addition to those used by the Special Rapporteur in chapter VI of his report. That criterion could help to pinpoint extreme cases not referred to in the report, thereby broadening the range of cases proposed for consideration.

12. Mr. BENNOUNA said the first report on State succession and its impact on the nationality of natural and legal persons was obviously intended to clear the way for more in-depth discussion. Recent events in eastern Europe had revealed that State succession was indeed a topical issue, though he himself would have preferred the Commission to add a different subject to its agenda, one that deeply affected all countries of the world, especially the developing countries: investment rights. The final form for the Commission's work on State succession had not yet been established, though he agreed with the Special Rapporteur's statement that, as a first step, it should be a study for submission to the General Assembly.

13. The Special Rapporteur was correct in pointing out that, while internal and international law overlapped in respect of State succession and nationality, the topic had

traditionally been held to fall within the province of internal law. Since State sovereignty was involved, the Commission would be well advised to follow the Special Rapporteur's suggestion that it confine its work to the elaboration of general criteria for use by States. States would then be free to adapt the criteria to specific cases and to take into account particular regional or national features.

14. As Mr. Bowett (2387th meeting) had pointed out, the concept of an obligation to negotiate had now been accepted and incorporated in legal practice. It might be useful to adopt it as one of the general criteria for State succession, so as to avert any harmful effects on individuals of changes in the configurations or borders of States or in the balance of power among them.

15. The reference to the various categories of "nationals" in internal law raised a delicate, indeed explosive, issue. Some States openly discriminated against certain groups of citizens by establishing separate categories, which amounted to denying them their full civil and political rights. The case of Palestine, for example, could usefully be studied in the context of State succession and nationality. There were currently 800,000 Arab Israelis relegated to the status of second-class citizens. The Commission should look into whether that was compatible with international law and what the implications were for the succession of States under the agreement signed on 13 September 1993.<sup>11</sup>

16. The Special Rapporteur suggested that priority should be given to the impact of State succession on the nationality of natural, as opposed to legal, persons, since that was the more urgent issue. Urgent it was, yet the nationality of legal persons was also an important matter and should not be left entirely unattended. Recent events had brought the issue to the fore, particularly in the context of investment rights. In that regard, he drew attention to the judgment of ICJ in the case concerning *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*.<sup>12</sup> The question of ownership or control of a legal person was now taken into account in most investment agreements. Perhaps a reference to such issues should be included in the Commission's work on the topic, even if a thorough consideration of the nationality of legal persons was to be deferred until a later date.

17. Another highly sensitive, indeed politicized, issue was the extent to which a State had the ability to grant or withdraw the nationality of an individual. The problem arose frequently in connection with family reunification and immigration. In some cases, children acquired nationalities that were different from those of their parents and, as a result, were physically separated from them. Such issues should be brought up in the course of the work on State succession.

18. The Special Rapporteur indicated that the Commission's study should cover only "normal" situations of State succession, not those involving force or annexation. He was not sure there was a clear-cut distinction to

<sup>11</sup> Declaration of Principles on Interim Self-Government Arrangements, including its Annexes, and its Agreed Minutes (A/48/486-S/26560, annex).

<sup>12</sup> *Judgment, I.C.J. Reports 1989, p. 15.*



be drawn in such matters, but even if there was, it was precisely in "abnormal" situations of State succession that human rights were most likely to be violated. All the more reason, therefore, for the Commission to seek to establish criteria for State conduct. As to the right of option, he agreed with Mr. Bowett that it came into play only in very limited and exceptional circumstances.

19. Finally, he endorsed the Special Rapporteur's apt comments on continuity of nationality, namely, that in the context of State succession, continuity of nationality could not operate as in the regime of diplomatic protection.

20. On the whole, he would have preferred a less theoretical, more experience-oriented approach than the one used in the report. Far too few examples had been cited of State practice, particularly in eastern Europe and in the territories of the former Soviet Union. The Commission did not wish to provide abstract guidelines or any general theory. In his next report, the Special Rapporteur should fill in the gaps, looking particularly closely at the advantages and drawbacks of the actual solutions found in recent cases of State succession. He did agree with the Special Rapporteur, however, that the best service the Commission could render the General Assembly and States was to provide a series of factors and general criteria that could be used for negotiation in cases of State succession. Naturally, such criteria must be aligned with the peremptory norms of international law and with humanitarian law.

21. One element of the nationality question that had not been touched on, and which he believed fundamental, was an individual's emotional attachment to his or her roots. No regulations or rules could prevent a person from identifying with the place where he or she was born and raised, and that was something that had to be taken into account in the Commission's future work on State succession.

22. Mr. IDRIS said that any analogy with State succession to treaties, property or debts should be closely tied in with the question of nationality. Nationality was, after all, a prerequisite for the exercise of civil and political rights. The basic principle to be established was that succession of States did not give legal title to the individual in regard to succession to nationality. That was a manifestation of the State's sovereignty and territoriality.

23. There was broad consensus in the literature and the practice of the courts in favour of acknowledging that nationality was essentially governed by internal law. That was also true in cases where the acquisition of nationality was covered by treaty, or when internal law required that nationality be acquired under a convention. A good example of such a provision was article 3 of Slovenia's law on citizenship. The principle that it was for each State to determine, in its own law, who were its nationals, had been adopted in the Convention on Certain Questions relating to the Conflict of Nationality Laws.

24. Nevertheless, having agreed that nationality was not a "successional matter", he said that he experienced some difficulty with the Special Rapporteur's suggestion of using the definitions the Commission had already formulated for the Vienna Convention on Succession of

States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. The term "succession of States" would thus refer to the replacement of one State by another in the responsibility for the international relations of a territory. Yet he wondered whether the notion of responsibility for international relations was really relevant in the context of nationality. Since nationality was a matter that fell essentially within the sovereignty of a State, it would be more appropriate to use a concept already considered by the Commission—sovereignty in respect of territory. The definition of State succession in respect of nationality would then be the replacement of one State by another in sovereignty in respect of territory.

25. He said that he was uncomfortable with the definition of nationality given by the Special Rapporteur in his report, namely that "Nationality", in the sense of citizenship of a certain State, must not be confused with "nationality" as meaning membership of a certain nation in the sense of race.<sup>13</sup> The distinction drawn in that definition was both controversial and confusing, and the reference to race was undesirable. Although nationality was basically an institution of internal law, as ICJ had recognized in the *Barcelona Traction* case,<sup>14</sup> and because the international application of that notion must be based on the nationality law of a given State, a decision by a State to grant its own nationality did not necessarily have to be accepted internationally without question. In the *Nottebohm* case, ICJ had decided that

a State cannot claim that the rules it had thus laid down are entitled to recognition by another State unless it has acted in conformity with the general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection against other States.<sup>15</sup>

The Court's adoption of the principle of a genuine link had sparked considerable discussion, and much criticism. The critics had argued that the "link theory" had not been advanced by the parties to the dispute, and that the Court had transferred the requirement of an "effective connection" from the domain of dual nationality to the domain of only one nationality. Thus, the "genuine link" requirement in limiting the successor State in its discretion to extend its nationality had yet to be clarified.

26. Regarding the scope of the topic, the General Assembly had endorsed the Commission's recommendation that it should include both natural and legal persons. It was too late now to restrict the study to natural persons alone as such a course would fall short of the expectations of Governments.

27. He supported the idea of establishing a working group as a good way of moving forward on the controversial issue of nationality. The group should identify the fundamental aspects of the topic and elicit further comments by Governments. Such comments were indispensable, particularly with a view to obtaining a clear picture of State practice. The working group should not,

<sup>13</sup> R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. 1, parts 2-4 (London, Longman, 1992), p. 857.

<sup>14</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 3.

<sup>15</sup> See 2385th meeting, footnote 15.



however, propose any solutions at the present stage. It was more important to identify problems and investigate State practice.

28. Mr. MIKULKA (Special Rapporteur) said that it might be useful for him to respond to some of the points already raised. First, with regard to categories of succession, Mr. Pambou-Tchivounda had stated a preference for a mixture of those contained in the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. Such a mixture would be difficult because, although some of the matters dealt with in the former had received similar treatment in the latter, others had been handled in a radically different way. He had therefore concluded that the latter Convention provided a better basis for the Commission's consideration of the matter.

29. For example, the Vienna Convention on Succession of States in respect of Treaties covered three entirely different situations in one category: the unification of States; the dissolution of States; and the separation of part of a State to form an independent State. Such a simplification had of course been possible for the purposes of a convention on the succession of States in respect of treaties, for those who had drafted that Convention had concluded that in all three situations only one rule should apply: the rule of continuity of treaties *ipso facto*. In the case of problems of nationality, however, clear distinctions must be made between the three situations because they gave rise to entirely different problems. It was impossible to disregard the differences between cases when the predecessor State continued to exist (separation), when the predecessor State disappeared completely (dissolution), and when the international personality of one of the predecessor States disappeared (unification).

30. He had also tried in his report to enrich the categories by introducing a distinction based on the German precedent. German unification had not taken place on the basis envisaged in the Vienna Convention on Succession of States in respect of Treaties, namely, that two predecessor States disappeared and a new State was born, but rather on the basis of the "absorption" of the German Democratic Republic by the Federal Republic of Germany. In other words, the international personality of the Federal Republic was never contested, whereas the German Democratic Republic disappeared as an independent State. That meant, for the purposes of nationality, that the problem lay with the nationality of citizens of the former German Democratic Republic. Of course, the German situation had another special feature: whether to recognize the effects of the Second World War on nationality, but there was no need for the Commission to go into that question.

31. He understood Mr. Bennouna's doubts about the proposal in the report that the Commission should leave aside the problem of situations not in conformity with international law. Doubts had always arisen when the Commission had debated that topic in the past, and the proposal was intended merely to facilitate the present work in the initial stages. The topic was so difficult that complicating factors must be set aside for the moment, and the Commission must try to clarify matters relating

to normal situations, but without stating explicitly that the rules which it drafted did not apply to abnormal situations. Naturally, the Commission's exclusion of such situations certainly could not be used to justify wrongful acts. Similarly, some of the rules applicable to normal situations might well apply to abnormal ones as well. No doubt an annexing State would be breaking a fundamental rule of international law and committing violations of the human rights of the population of the annexed territory. Furthermore, the fact that international law prohibited annexation by force did not mean that international law was not interested in the consequences of such a wrongful act.

32. On the question of the existing practice of States, he had explained in his introduction that he had not yet had time to examine all the information submitted by States. Furthermore, it was not usual to conduct a detailed examination of State practice in the preliminary stages of a study. At a later stage he would, of course, give close attention to national legislation. It would be a sensitive undertaking because States were jealous of their internal competence with respect to questions of nationality, and the Commission must not give the impression that it was trying to decide whether a State's practice conflicted with international law. Some States had expressed concern on that point in the Sixth Committee. Clearly, without setting itself up as a court, the Commission might eventually conclude that the practice of some States was not in conformity with the general trend of international law.

33. Mr. Idris had commented on the definitions set out in section E of the introduction to the report. For the moment they were the definitions already adopted by the Commission and they had no implications for the substance of the topic. He wanted the Commission to speak a common language because the notion of succession had been used in the literature with entirely different definitions. The Commission and the two diplomatic conferences had opted for a given terminology which the Commission should continue to use in order not to confuse the issues further.

34. Mr. Idris would prefer to replace "responsibility" in the definition of succession of States by a reference to sovereignty. The Commission had debated that point 20 years before and had decided not to use the notion of sovereignty simply to avoid the impression that sovereignty as such could devolve from one State to another. If "responsibility" were replaced by "sovereignty" in the definition, the succession of States would mean the replacement of one State by another in territorial sovereignty. That would mean that sovereignty itself was a matter of succession and did not have an "original" character and that all the limitations on sovereignty accepted by the predecessor State devolved on the successor State. The Commission would then have to hold as lengthy a debate on the point as had taken place during the drafting of the two above-mentioned Conventions and it would never get to the basic issues of nationality.

35. One point not yet raised by any member had been put as a question in chapter III of the report: if the concept of nationality for international purposes is to be considered as generally accepted, what are its elements

and what exactly is its function? In that regard, he would certainly welcome clarification from members.

36. Mr. CRAWFORD said that the Special Rapporteur's statement in his report that nationality was not a "successional matter" was true in one sense, but there remained the compelling situation of individual human rights as embodied in a variety of treaties and the more general position of individuals. State succession had traditionally been viewed from the perspective of States, but, as the Special Rapporteur had made clear, that was no longer sufficient. He was in general agreement with the Special Rapporteur's conclusions, but none the less wished to comment on some points.

37. First, he agreed that the question of continuity of nationality should be included in what was a general study. In fact, there were two problems of continuity: continuity in respect of acts occurring prior to the date of the succession; and continuity as between the date of succession and the date when issues of nationality were settled. It must be made clear that any subsequent clarification of the position should be deemed to operate retrospectively at least to the date of the succession. That was an area where the concept of a "successional matter" should not be applied too rigidly. There were some areas of the law of State succession in which the succession occurred *ipso jure* on the date of succession, although some consequences had to be dealt with subsequently. There were many other areas which were not of that kind: matters of State debt, for example, where problems had to be sorted out afterwards, although the succession did not necessarily bring about an innovation.

38. More generally, the Commission should view with favour the use of a series of presumptions. It was possible that international law had not yet developed far enough to determine which persons acquired which nationality, but it could certainly establish presumptions that would be regarded as applicable to, and would help to regulate, a particular situation, though that situation would of course be regulated primarily by the legislation of the successor State or States and by agreement between them.

39. He agreed with the flexible approach the Special Rapporteur proposed to adopt with respect to the outcome of the work and, in particular, with his view that the Commission should in the first instance submit a report to the General Assembly describing the nature of the problem and the way in which it should be tackled. On the other hand, he did not agree with Mr. Idris that the Commission should confine itself to identifying the problems rather than indicating the solutions. Although the Commission should not be categorical in proposing solutions, it would be useful if, in the context of the consideration of the matter in the Sixth Committee, it could indicate any possible solutions in a given area.

40. He strongly agreed on the desirability of using the existing definitions, particularly those laid down in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts as well as the existing categories of succession set forth in that Convention, with the refinement proposed by the Special Rapporteur to cover the case of Germany. The Convention was clearly the right instrument to follow because, in principle,

the problems of succession to treaties occurred within the international domain, whereas the problems of succession with respect to matters other than treaties occurred in both the internal and the international domain and thus gave rise to many more difficulties.

41. While it was entirely defensible for the Commission to deal first with the nationality of natural persons—since that was the area in which human rights issues and in which tragedies occurred—the Commission's report to the General Assembly should not omit consideration of the question of legal persons altogether. The distinctions the Special Rapporteur had drawn between natural and legal persons were helpful. Indeed, there were some legal systems that did not have their own internal conception of the nationality of corporations. International law attributed a nationality to those corporations for its own purposes. The position with regard to individuals was quite different: all States had a concept of the nationality of individuals, and so there was an important distinction between them, which might have corollaries in the framework of succession. None the less, it must be the case that, where a corporation was established under the law of a State or territory affected by a succession and the corporation continued to exist, the nationality attributed to it by international law must have changed—a fact that should attract comment.

42. The Special Rapporteur had given a very interesting account of the concept of nationality for international purposes. Within the framework of the strictly dualistic account of nationality that was characteristic of the older sources—but was to be found even in as non-dualistic a source as the work of O'Connell<sup>16</sup>—the idea of nationality for international purposes presented something of a conundrum. Nationality was a creation of national law but international law could not be excluded even though it might not perform the primary role. Consequently, provided that some flexibility was maintained, it seemed to him that it was useful to talk about the idea of nationality for international purposes—about a kind of imputed nationality, as it were, which might have consequences particularly in the framework of a set of presumptions.

43. In general, he preferred the idea of presumptions to the idea of factors to which Mr. Bennouna had referred. If it could be established on the basis of practice and presumptions what the outcome ought to be, that would be useful in guiding States and in examining any anomalous situations. For example, there should be a presumption that a nationality acquired by a person consequential to a succession of States was effective from the date of that succession. There should also be a rather strong presumption that no person should become stateless as a result of a succession of States, though exactly how that was to be achieved was another matter. He looked forward to an analysis of modern State practice in that regard in the Special Rapporteur's subsequent reports.

44. It followed that he strongly agreed with the Special Rapporteur's statement in the report rejecting the categorical dualist view of O'Connell that international law

<sup>16</sup> D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. 1 (Cambridge, England, Cambridge University Press, 1967), p. 498.

did not at the present stage of development impose any duty on the successor State to grant nationality. It seemed to him that, in certain cases, international law did or should impose such a duty. It would be monstrous if, for example, a national of the former German Democratic Republic had become stateless as a result of the integration of that Republic into the Federal Republic of Germany. If there was no argument about that, then international law should reflect the position, at least at the level of a presumption and quite possibly at the level of an obligation.

45. Guidance could certainly be obtained from the various provisions on statelessness even though such provisions might not apply textually to cases of total succession. They certainly might apply textually to cases of partial succession. It would be interesting to know whether they were taken into account in the context of the German case with respect to the continuing obligation of the Federal Republic of Germany concerning issues of statelessness.

46. He fully concurred with the Special Rapporteur, and for the reasons he gave, that cases of unlawful succession should be excluded from the report. It would, however, be useful to make the point that such exclusion did not necessarily mean that particular solutions would be inapplicable. It was simply that cases of aggression and the like gave rise to special situations which it was obviously inappropriate to deal with within the framework of particular studies. That conclusion had already been reached by the Commission and it did not seem helpful to reopen the matter.

47. He also agreed with the Special Rapporteur about the role of the right of option in the resolution of problems. The presumption that persons did not have more than one nationality was much less strong than the presumption against statelessness. Indeed, it might be that, notwithstanding recent developments that had tended to eliminate dual nationality, there was no such presumption at all. A State which was entitled to extend its nationality to an individual did not become disentitled to do so merely because another State might have the same entitlement. On the other hand, the right of option was certainly a way of regulating conflicts of nationality and it should definitely be included within the framework of the general study. It would not, on the other hand, be useful to discuss the problem of different categories of nationals under national law, which was rather a problem of discrimination in the context of the law of the States which maintained such a distinction. The Commission's concern should be with the general conception of nationality, but it might be worth pointing out in the report that all States were subject to obligations of non-discrimination and that those obligations extended to the conduct they adopted under laws relating to nationality.

48. He was very much in favour of the consideration of the topic by the Commission and of the Special Rapporteur's treatment of it thus far.

49. Mr. GÜNEY said that it would seem advisable at the present stage to limit the topic to the nationality of natural persons, as recommended by the Special Rapporteur, leaving aside the nationality of legal persons for the time being, and to study in further detail existing interna-

tional norms regarding change of nationality and dual nationality. He took that view, first, because the nationality of legal persons did not have the same effect in all legal relations and, secondly, because there must be no discrimination when it came to change of nationality and dual nationality. With the free movement of persons for migration and other reasons, it was becoming increasingly necessary to envisage dual nationality, to bring internal law in the matter up to date, and to ensure that individuals were not deprived of their nationality. In that connection, Mr. Tomuschat's question (2387th meeting) whether an act divesting an individual of his nationality could be declared null and void merited close consideration. First, however, as rightly pointed out by Mr. Benouna, it was essential to have recourse to the obligation to negotiate—an obligation that had been recognized in a number of judgments of ICJ and in particular in its judgment in the *North Sea Continental Shelf* case.<sup>17</sup>

50. The question of nationality was closely linked to that of State succession. In that connection, it should not be forgotten that the codification and progressive development of the law on State succession, as laid down in the above-mentioned Conventions, had not met with much success in contemporary State practice; those two conventions had not, in fact, yet entered into force. They governed fundamental aspects of State succession, unification and dissolution, however, and the experience gained therefore dictated the need for the utmost prudence before one embarked on the preparation of new instruments, whatever their nature. State practice, and in particular the practice of the eastern European countries within the framework of internal law, would have a decisive role to play in pointing the way towards the establishment of principles and rules with a view to providing States with the relevant guidelines.

51. He agreed that a working group should be appointed to consider the topic further and to expedite the work on it. An open-ended working group would provide an excellent forum for doing so.

52. Mr. FOMBA said that among the substantive questions the proposed working group should seek to determine were the specific effects of State succession on the nationality of natural and legal persons, and the position of international law with regard to the problems involved. For instance, did positive law provide any enlightenment in that connection? If so, what did that law consist of, and if not, what legal principles could usefully be adopted in terms of the rights and obligations of States, and in what kind of instrument should they be incorporated?

53. He agreed entirely with Mr. Tomuschat (*ibid.*) about the form to be taken by the results of the work on the topic. In that connection, he would note in passing that Eritrea was the only African State mentioned as having responded to the invitation to submit relevant materials. He had, in fact, just received the text of its Proclamation 21/1992 of 6 April 1992, but had not had time to examine it.

<sup>17</sup> *I.C.J. Reports* 1969, p. 3

54. Like a number of other speakers, he considered that the Commission should deal first with the nationality of natural persons. The Special Rapporteur asked, in his report, whether it was conceivable that an international authority, or at least the rules that were binding on States, could play a role in the allocation of individuals among different States. His own reaction to that question was that it would already be an achievement if just a few principles could be laid down. It would be even better, however, if an authority along the lines of UNHCR could be envisaged.

55. The Special Rapporteur stressed that it was difficult to specify exactly the legal limitations on the freedom of States, also indicating that the record of international law in that regard was, on the whole, somewhat thin. Actually, it did set out the golden rule, the key to all the problems likely to arise, namely the principle of effective nationality. Accordingly, that principle should be laid down formally, its content specified and its use made systematic; it should also be accompanied by effective international monitoring machinery. To that end, it was important to draw on the recent practice of eastern European countries. As to the limitations imposed by international humanitarian law on the freedom of States was concerned, he believed that the few existing treaty provisions did recognize a human right to nationality and also a right of option.

56. With regard to categories of succession, the Special Rapporteur considered that the problem of nationality arising in the context of different types of territorial changes should be dealt with separately. It would be an acceptable approach provided a common denominator could be found in all cases. If not, each case would have to be decided individually, although the form that the Commission's work on the topic took would also influence the matter. As far as newly independent States were concerned, the French-speaking States of Black Africa had a wealth of legal literature and members might wish to consult the *Encyclopédie juridique de l'Afrique*,<sup>18</sup> which provided a synthesis of African practice.

57. The Special Rapporteur further stated that, as the decolonization process had now been completed, the Commission could limit its study to issues of nationality that had arisen during that process only in so far as it was necessary to shed light on nationality issues common to all types of territorial changes. Even if the era of decolonization had gone forever—a question hotly debated during the discussion on the draft Code of Crimes Against the Peace and Security of Mankind—and notwithstanding the terms of article 19 of part one of the draft articles on State responsibility<sup>19</sup> and the view expressed in the report concerning the annexation by force of the territory of a State, he saw no good reason not to study practice in that area.

58. In the matter of the scope of the problem, and specifically the obligation to negotiate and to reach agree-

ment, he agreed with Mr. Bowett (*ibid.*), particularly about the need to introduce transitional arrangements for the period between the date of the succession of States and the date on which the law on nationality was enacted.

59. The question of the right of option must not be reduced to a mere academic discussion of the relationship between the attribution of the sovereignty of the State and the will of individuals. Rather, it was a question of recognizing and preserving the right of option while providing sufficient guarantees with regard to the principle of effective nationality.

60. The Special Rapporteur averred that neither practice nor doctrine gave a clear answer to the question whether the rule of continuity of nationality applied in the event of involuntary changes brought about by State succession. Further research into that point was perhaps required, especially in the light of recent practice in eastern Europe. In that connection, he shared the view of one writer, according to whom, in the event of State succession, the legal position with regard to nationality, from the standpoint of diplomatic protection, should be evaluated in a far more flexible way.<sup>20</sup> The most practical solution possible must therefore be found. Above all it must be designed to achieve effective protection of the interests of the individual as also of the State. In that regard, it was difficult to see how an involuntary change of nationality could have the effect of suspending proceedings or denying justice in a claim for diplomatic protection. But perhaps he was being a little naive. He was not opposed to the idea of dealing with the matter in the context of a preliminary study, provided the study took the form of, for instance, an annex to any declaration or general principles ultimately adopted on the topic as a whole.

*The meeting rose at 1.05 p.m.*

<sup>20</sup> United Nations, *Reports of International Arbitral Awards*, vol. V (Sales No. 1952.V.3), pp. 488 *et seq.*

## 2389th MEETING

*Wednesday, 24 May 1995, at 10.10 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.*

<sup>18</sup> S. Melone, "La nationalité des personnes physiques", *Encyclopédie juridique de l'Afrique*, vol. 6, *Droit des personnes et de la famille* (Abidjan, Dakar, Lomé, Les Nouvelles Éditions Africaines, 1982), pp. 83 *et seq.*

<sup>19</sup> See 2379th meeting, footnote 8.

**State succession and its impact on the nationality of natural and legal persons (continued)**  
(A/CN.4/464/Add.2, sect. F, A/CN.4/467,<sup>1</sup> A/CN.4/L.507, A/CN.4/L.514)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. VILLAGRÁN KRAMER expressed his congratulations to the Special Rapporteur on his clear and stimulating first report (A/CN.4/467), with its wealth of ideas. Quite apart from the information provided, he had appreciated the Special Rapporteur's personal touch, which had revealed the human tragedies that resulted from problems of State succession. There had been many such problems after the First World War, and they had re-emerged after the disintegration of the Soviet Union.

2. As a general comment, he considered that, while it was essential to use the existing texts as a basis with regard to State succession, it was also necessary to take account of the new trends that were emerging with respect to matters of nationality. He would try to approach the questions that arose from the standpoint of international law rather than from that of internal law.

3. Noting that the Special Rapporteur dealt first with the nationality of natural persons and only later with the nationality of legal persons, he acknowledged that it was important to give priority to the human factor and to place the rights of natural persons in the context of human rights. He also noted that, when raising the problem of nationality in the context of State succession, the Special Rapporteur seemed to want to rely, not on the frame of reference of the Vienna Convention on Succession of States in respect of Treaties, but rather on that of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. He endorsed that approach, for the former was only a normative framework, whereas the latter took account of a *de facto* and *de jure* situation, such as that which arose in the legal vacuum during transitional periods between the moment of a State's succession, separation or accession to independence and the moment at which a new law on nationality took effect.

4. Furthermore, with regard to changes of nationality that might result from State succession, the Special Rapporteur raised the fundamental question whether, following a change of sovereignty, persons could find themselves deprived of nationality and, in the event that they were obliged to have a nationality, what the links attaching them to a country must be. In that regard, he thought that it would be a good idea for the Commission to base itself on the approach of private international law, using the concept of "rules of attachment" or "criteria of attachment". Some criteria of attachment, such as, for example, *jus soli* and *jus sanguinis*, were well known in the case of nationality of origin. In matters of naturalization, however, there were other criteria of attachment, such as habitual residence.

5. The Commission must decide whether the question of nationality was to be approached from the standpoint of existing internal law or, on the contrary, from that of international law, with a view to elaborating a system that might be accepted at the regional or international levels. In his view, that was the fundamental issue. On the eve of the twenty-first century, the criteria that had been the basis of the 1930 Hague Conference for the Codification of International Law were not enough. Much water had flowed under the bridge since then and there had been too many human tragedies to justify continuing to approach the problem of nationality solely from the standpoint of internal law.

6. In its advisory opinion in the case concerning *Nationality Decrees Issued in Tunis and Morocco*,<sup>2</sup> cited by the Special Rapporteur in his first report, PCIJ had affirmed the principle that it was for each State to determine who were its nationals. But at the same time it had noted that the legislative competence of the State with respect to nationality was not absolute, for it must in fact be exercised within the limits imposed by general international law and international conventions. The Court had thus thrown some light on the role that international law could play in matters of nationality.

7. Between that opinion and the judgment of ICJ in the *Nottebohm* case,<sup>3</sup> relatively little time had elapsed, but the approach to the question of nationality had evolved, with the Court noting in its judgment that, for nationality to be recognized at the international level, the laws of the State which conferred it must be in accordance with the principles of international law. It could thus clearly be seen from that case how international law imposed limits on the competence of States.

8. For several decades now, international law had been strongly influenced by the principles relating to the protection of human rights. In matters of nationality, too, the body of human rights conventions tended to influence the custom and practice of States. The Special Rapporteur had referred to the Universal Declaration of Human Rights,<sup>4</sup> article 15 of which provided that everyone had the right to a nationality. He suggested that the Special Rapporteur should also study the effects and consequences of the provisions of the International Covenant on Civil and Political Rights concerning nationality. Article 12, paragraph 2, of the Covenant stipulated that everyone was free to leave any country, including his own; and paragraph 4 provided that no one was to be arbitrarily deprived of the right to enter his own country. That presupposed that there existed between a person and his own country a relationship resulting from a *de facto* and *de jure* situation, the criteria for which it would be necessary to determine and whereby a person identified himself with a country or with its population. Article 24, paragraph 3, stipulated that every child had the right to acquire a nationality. From a legal standpoint, that right, which was accorded to children, must also be applicable to adults, given that there could be no discrimination between the situation of persons on the grounds of their status as children or as adults. The

<sup>2</sup> See 2385th meeting, footnote 16.

<sup>3</sup> *Ibid.*, footnote 15.

<sup>4</sup> General Assembly resolution 217 A (III).

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

Commission could not but interpret *lato sensu* the principles concerning the right to nationality set forth in the human rights instruments, as, moreover, the European Court of Human Rights had done.

9. Turning to another aspect of the question, he wondered whether, in order to pinpoint the problem of nationality more precisely, it would not be better to study separately nationality of origin, individual and collective naturalization, situations of dual nationality and transitional situations.

10. With regard to nationality of origin, the Commission could not base its analysis on the *Nottebohm* case, in which ICJ had dealt only with naturalization, making no reference to nationality of origin. Yet nationality of origin played a major role in succession of States and the importance of *jus soli* and *jus sanguinis* as criteria of attachment must not be underestimated. Even today, there was a tendency for international law to recognize *jus sanguinis* as a criterion of attachment extending beyond one generation and some European countries reacquired many nationals through the operation of that principle. For instance, children or grandchildren of Germans or Italians who had emigrated to Latin America or elsewhere returned to the country of origin of their father or grandfather whose nationality they had retained.

11. In situations of dual nationality, the *Nottebohm* case was of limited interest, as ICJ had referred to that question only accessorially in its search for effective nationality. In that connection, he noted that a distinction must be drawn between effective nationality and affective nationality, linked to love of one's country. The latter must also be taken into account: everyone was familiar with cases of persons who had enlisted under a foreign flag to defend a country and who had gained access to the nationality of that country as a result.

12. At all events, naturalization and dual nationality had one thing in common: in both cases, the link must be not only *de facto*, but also *de jure*, for, as the Court had clearly indicated, a *de facto* situation must be matched by a corresponding *de jure* situation. Consequently, the criteria for determination of nationality must include not only elements such as the habitual place of residence of the person, but also the existence of close links with a given country.

13. With regard to collective naturalizations, he thought that the Commission might usefully turn to the Code of Private International Law (Bustamante Code), contained in the Convention on Private International Law which was widely applied in relations between about 15 countries of Latin America and which established, for cases of loss of nationality and acquisition of nationality, rules governing conflicts that were applicable to collective naturalizations performed by a legal act of a State or on the basis of an agreement. But the question arose of how it was possible to resolve by legal means the situation in which persons to whom a nationality was collectively granted or removed found themselves. It was undeniable that collective naturalization by decree resolved a general problem, but it left many others unresolved and it disregarded the right of option which every person had under the laws. Nevertheless, the fact that the mechanism existed was in itself a virtue

and it should be studied in greater depth in order to determine its scope and limitations, on the basis of the elements provided by international law. To the criteria for naturalization mentioned by the Special Rapporteur should be added *jus sanguinis* and *jus soli*.

14. He found interesting the part of the report devoted to the "genuine link" theory with regard to the principle of effective nationality. In that connection, he referred to the problem of the situation of persons who, in exercise of the right of option, had already chosen a nationality and who, following a succession of States, had to change their nationality again.

15. In conclusion, he wished to raise what seemed to him a fundamental question: what was the Commission's objective concerning the topic? It would of course attempt to prepare a study, but, in order to do so, it must first ask itself whether it was going to work on the basis of the existing situation or of the desirable situation. As the existing rules did not cover all cases that arose in matters of nationality, the Commission would no doubt have to break new ground. It might adopt a mixed approach, analogous in principle to the one it had applied to the topic of State responsibility, basing itself partly on *lex lata* and partly on *lex ferenda*. It might attempt to elaborate a sort of "Restatement of the Law", following the practice adopted in the United States of America, and, without proposing the text of a draft convention, might state what the law was and what it should be.

16. Mr. PELLET noted that the Special Rapporteur had presented the facts of the topic clearly and skilfully, but without adopting any cut and dried positions, which limited the grounds for possible disagreement. He regarded that approach as both modest and ambitious. It was modest in four respects. First, the Special Rapporteur proposed to be guided by practice, which seemed both a wise and an indispensable approach. Secondly, he considered it important not to alarm successor States, which were currently particularly sensitive on that issue; nor should the Commission set itself up as a tribunal to judge the practices of those States in matters of nationality. That being so, the Special Rapporteur rightly stressed that the problems with which he was dealing had close links with the protection of human rights. Consequently, while it was undeniable that, in principle, the regulation of nationality was essentially a matter for the national jurisdiction of States, that jurisdiction could not be exercised in a manner that violated the rights and dignity of the peoples concerned. Thirdly, the Special Rapporteur did not intend to call into question the fundamental principles of positive law, in particular the law of State succession. That approach was entirely commendable, but he was concerned at the tenor of some statements made in the debate. One member of the Commission, for instance, had proposed taking advantage of the current exercise to review the very definition of succession of States by ceasing to consider it as the replacement of one State by another in the responsibility for the international relations of territory, according to the formulation embodied in the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, and instead considering it as the replacement of one State by another in sovereignty



in respect of territory. Like the Special Rapporteur, he was opposed to that suggestion, for at least two fundamental reasons. First, one of the motives that had led the Commission, following lengthy and difficult discussions, to retain the first definition, was the fact that State succession was a general institution of the law of nations that was applied to greatly differing situations, one of which, decolonization, had until only recently been of fundamental importance. Yet, just as the definition contained in the above-mentioned Conventions was appropriate to that situation, the new definition proposed would be entirely inappropriate in that regard, for it was highly disputable that a colonial State exercised “sovereignty” over the territory it administered.

17. Incidentally, with regard to colonization and decolonization, he wished to comment on the critical reactions provoked by the Special Rapporteur’s proposal that, now that decolonization had been achieved, the emphasis should be placed on the other forms of State succession. Admittedly, the rules adopted in matters of nationality in the context of decolonization might be of interest to the Commission, at least for purposes of comparison, but the topic did not really lend itself to polemics on the question of colonialism and neocolonialism: disturbing as the latter phenomenon was, it had only a very remote bearing on the topic under consideration.

18. The second reason why he sincerely believed the Commission should stick to the previous definition of State succession was that it had proved its worth and was now in common use in inter-State practice. It had been applied by the International Conference on the Former Yugoslavia, in the case concerning *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*,<sup>5</sup> and in the opinions of the Arbitration Commission of the Conference on the Former Yugoslavia.<sup>6</sup> He was particularly opposed to the view expressed by some members of the Commission that the two above-mentioned Conventions in which that definition was set out were, to exaggerate a little, nothing more than scraps of paper. While specific aspects of those Conventions, particularly the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, were open to criticism, on the whole they did not deserve the abuse being heaped upon them. In the first place, the Vienna Convention on Succession of States in respect of Treaties was apparently about to enter into force very soon. Secondly, and primarily, the fundamental principles underlying the Conventions were, as the Arbitration Commission of the Conference on the Former Yugoslavia had pointed out, those that governed the law of State succession as a whole. A case in point was the principle that problems arising in the event of State succession must be solved through an agreement with a view to achieving an equitable result—a principle that could certainly be applied to nationality, in which case equity would mean, at the very least, that a large population group would not remain bereft of nationality.

19. The Special Rapporteur found that the two Conventions offered the additional advantage of specifying categories of State succession and he actually preferred

the more detailed categories in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, which placed more emphasis than the Vienna Convention on Succession of States in respect of Treaties did on the concept of dissolution of a State, which was so important for the topic under consideration and so relevant to contemporary events. He had been surprised to hear Mr. Bowett state (2387th meeting) that, in all cases of State succession, there was a predecessor State and a successor State. There was always, of course, a “before” and an “after”, but, in the event of dissolution or absorption following State succession, one or several successor States existed (one in the event of absorption, several in the case of dissolution), but there was no longer a predecessor State when problems arose. Therein lay one of the difficulties of the topic.

20. A fourth “modest” element in the approach taken by the Special Rapporteur was his attitude to the problem of legal persons, which he proposed to leave aside, not definitely, but only for the time being, stating in his first report that it was not an urgent matter and that the problem presented itself on very different terms than did that of the nationality of individuals. That was one of the few points on which he disagreed with the Special Rapporteur, for he endorsed neither his diagnosis of the problem nor the therapy he proposed.

21. Concerning the diagnosis, he believed that the problem was both urgent and important: if his information was correct, it was being discussed by the group on succession of States within the International Conference on the Former Yugoslavia. The very complexity of the subject, which derived from the difficult problem of foreign branches and subsidiaries—something not mentioned in the report—was one more reason why the Commission should take up the study of the topic as soon as possible. Moreover, the problem did not differ so greatly from those raised by the nationality of natural persons and the report was perhaps a bit biased, since the Special Rapporteur cited only the opinions of English experts in public law. The private-law doctrine derived from Roman law was perhaps a bit less categorical on that point. The view stated in the report that different tests of nationality are used for different purposes did not seem conclusive. In each of the cases discussed, nationality existed as a legal concept, and the problem was to determine the nature of nationality after State succession.

22. With regard to the therapy, he knew that it was not possible to do everything at once, but he suggested that the Special Rapporteur should revise the position adopted in his report and take up as soon as possible the impact of State succession on the nationality of legal persons or, at the very least, make a more detailed and broader analysis of whether there were common principles applicable to the nationality of legal persons and natural persons.

23. As a final comment on his disagreements with the Special Rapporteur, he referred to the interpretation of Opinion No. 2 of the Arbitration Commission of the Conference on the Former Yugoslavia<sup>7</sup>—also known as the “Badinter Commission”, from the name of its chair-

<sup>5</sup> *Order of 1 November 1989, I.C.J. Reports 1989*, p. 126.

<sup>6</sup> *International Legal Materials*, vol. XXXI, No. 6 (November 1992), p. 1494.

<sup>7</sup> *Ibid.*, p. 1497.

man, cited in the report. The Special Rapporteur indicated that the Arbitration Commission recalled that, by virtue of the right to self-determination, every individual might choose to belong to whatever ethnic, religious or language community he or she wished. In actual fact, the Arbitration Commission had said that individuals must be granted the right to make that choice—and that was something rather different.

24. The Special Rapporteur also stated that in the view of the Arbitration Commission of the Conference on the Former Yugoslavia one possible consequence of this principle might be for the members of the Serbian population in Bosnia and Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entailed with respect to the States concerned. It was true that the Arbitration Commission had thereby proclaimed the right of each human being to recognition of his or her objective affinity with the ethnic, religious or language community of his or her choice. That, however, was completely different from the link of nationality as it was used in international law, meaning a “global” link that bound someone to a given State. In that opinion, the Arbitration Commission had simply been referring to the right of individuals belonging to a minority to be treated as such within the territory of a State. It was inappropriate to make light of that solution. The principle cited by the Arbitration Commission, which it had related to the right of peoples to self-determination and minority rights, was a wise one and one which could appease passions and reconcile the contradictory interests and rights of States, groups and individuals. It did not mean giving individuals a right of option on nationality in the sense used in the first report or in international law.

25. The Special Rapporteur’s approach was not only modest, it was also ambitious, and for that he should be commended.

26. He had, for example, been right to try to catalogue all the theories on State succession while avoiding general principles that would certainly be inappropriate in some cases. Nevertheless, Mr. Crawford’s idea (2388th meeting) of starting from “presumptions” that would operate like general principles, in order subsequently to see which nuances or derogations should be added, seemed acceptable. The presumptions were not only that each individual had the right to a nationality, but also that each human being actually had a nationality and also that the nationality of a person was that of the “strongest” attachment.

27. The Special Rapporteur was likewise ambitious in having placed the issue at the crossroads of at least three significant branches of international law: nationality law, the law of State succession and international human rights law. It did appear, however, that excessive importance had been given to nationality law and it must not be allowed to take over the entire subject. The Commission must not become involved in a kind of “illicit” codification of nationality law as a whole. That was why the presentation of certain problems relating to diplomatic protection seemed confusing. State succession did have an impact on the continuity of nationality, which in

itself gave rise to a problem in connection with diplomatic protection, which in turn seemed closely related to the law of international responsibility. But by focusing too heavily on that issue, the Commission would be in danger of codifying large swathes of international law on the basis of one specific topic that was fairly easy to accommodate. From that point of view, the last paragraph of the report was quite ambiguous; if the Commission managed to confine itself to the problem of the continuity of nationality for the purposes of diplomatic protection in the context of State succession, the inclusion of that problem in the study would be useful and reasonable, but if the Commission embarked on an analysis of the law of diplomatic protection as a whole, that would be entirely unreasonable.

28. In conclusion, he was not sure how to interpret the idea of a “preliminary study” requested by the General Assembly in its resolution 49/51. Both that resolution and the discussion preceding its adoption seemed to reveal the General Assembly’s message as being that the outline drafted by Mr. Mikulka in 1993,<sup>8</sup> which was necessarily brief, had not been sufficiently clear for it and that it wished to have a more in-depth study. The first report embodied such a preliminary study remarkably well and, subject to the positions which the Commission would take on it and which would be reflected in its report to the General Assembly, the first report should constitute the preliminary study to be transmitted to the General Assembly in accordance with its request. If the Special Rapporteur felt the need for more “operational” support from a working group, there was no reason not to grant his wish, if the Commission’s schedule of work so permitted. But the purpose should be simply to help the Special Rapporteur formulate even more specific guidelines. The Commission could and should endorse the general guidelines proposed by the Special Rapporteur, with the reservations and nuances brought out during the discussion, incorporate them in its own report on the work of the session and transmit them to the General Assembly in the form of a preliminary study.

29. Mr. AL-BAHARNA said that he found the report to be impressive, thorough and stimulating, although rather orthodox and traditional in its approach and interpretations, perhaps because it seemed weighted in favour of classical rules on the subject. For his part, he would have preferred a humanitarian approach because of the need to prevent innocent people from becoming the hapless victims of changes of sovereignty.

30. His first comment was that the topic before the Commission was far from being an easy one, as no less an authority than D. P. O’Connell had indicated.<sup>9</sup> The difficulty derived from the fact that nation-States had always jealously guarded their sovereignty over nationality. As nationality was essentially an institution of the internal laws of States, its international application in any particular case must be based on the nationality law of the State in question. It was for that very reason that, as

<sup>8</sup> “Outlines prepared by members of the Commission on selected topics of international law”, *Yearbook... 1993*, vol. II (Part One), document A/CN.4/454.

<sup>9</sup> D. P. O’Connell, *The Law of State Succession* (Cambridge, England, Cambridge University Press, 1956).



pointed out by the Special Rapporteur in his report, the Commission had not been anxious to deal with the problem of nationality in relation to that of State succession. A former Special Rapporteur on the subject, Mr. Bedjaoui, had gone so far as to say that “in all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality”.<sup>10</sup>

31. His second comment pertained to the function of international law in the relationship between State succession and nationality. Given the essential character of nationality, international law probably had only a limited role to play, but that role could not be denied. The role of international law properly involved preventing the successor State from enacting legislation that was unfair to or inequitable for individuals affected by a change in sovereignty. By the same token, international law could not acquiesce in the granting of nationality to a person who did not genuinely belong to the successor State. That function of international law, which the Special Rapporteur had aptly described in his report and which was corroborated by the judgment of ICJ in the *Nottebohm* case,<sup>11</sup> meant that there were limits on State action in respect of both the withdrawal and the granting of nationality. The Commission’s task must accordingly be to define the limits of such State action under international law.

32. His third comment related to the human rights implications of the subject. Article 15 of the Universal Declaration on Human Rights<sup>12</sup> stated that “Everyone has the right to a nationality” and that “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”. There seemed to be some controversy as to the real purport and effect of those provisions, but it was indisputable that article 15 had far-reaching consequences for the traditional rules in respect of the obligations of the successor State for the acquisition and termination of nationality. The Special Rapporteur had rightly stated that the development, after the Second World War, of international norms for the protection of human rights gave the rules of international law a greater say in the area of nationality. Accordingly, the negative effects of internal law on nationality that could lead to statelessness or discrimination of any kind should be questionable under contemporary international law. The classical position expounded by Mr. O’Connell that international law imposed no duty on the successor State to grant nationality and the statement by Mr. Crawford (ibid.) that, apart from treaty, a new State was not obliged to extend its nationality to all persons resident on its territory were both free from contention. The effect of article 15 of the Universal Declaration on Human Rights was, on the one hand, to restrict statelessness and, on the other, to give individuals the right to change their nationality as they wished. Those restrictions would be binding on all States, including the successor State. The human rights issue involved was the heart of the topic under consideration and it was the lack of such an angle that gave the impression that the report was tilted in fa-

vour of classical norms and principles. The Commission should seek to restore the balance and the Special Rapporteur should explore fully the effects and impact of article 15 on the classical rules of nationality as they related to State succession if the Commission’s deliberations were to contribute to the development of rules of international law on the topic.

33. Fourthly, there was the dichotomy between customary international law, which offered only a few guidelines to States for the formulation of their legislation on nationality, and conventional international law, which was more developed. Although that dichotomy was convenient, it did not seem to help much to identify the norms that governed nationality in cases of State succession. An approach that helped to derive the applicable norms from the entire corpus of international law—doctrine, State practice and jurisprudence—would have been greatly preferable. The Commission could not formulate universally applicable principles unless it looked at all the solutions adopted following changes in sovereignty in Asia, Africa and the Caribbean in the post-colonial era and, more recently, in eastern Europe.

34. Fifthly, regarding the framework suggested for the preliminary study, the proposal by the Special Rapporteur that the scope of the problem should be delimited *ratione personae*, *ratione materiae* and *ratione temporis* seemed too doctrinaire. The Special Rapporteur himself pointed out, in his report, that the delimitation of the scope *ratione temporis* would for the most part remain theoretical because of the time it took States to adopt their laws on nationality. It would therefore be preferable to delimit the scope in terms of the practical problems encountered: acquisition of nationality, relevance of birth, residence and domicile, the element of a genuine link, loss of nationality, conflict of nationality, right of option and continuity of nationality. As to whether the study should deal with the regime of diplomatic protection on the grounds of its close association with the problem of continuity of nationality, he believed that an affirmative response would extend the topic beyond the mandate given to the Commission by the General Assembly. Lastly, he endorsed the Special Rapporteur’s proposal that the Commission’s work on the topic should have the character of a study which would be submitted to the General Assembly in the form of a report and in which priority would be given to the most urgent problems of the nationality of natural persons.

*The meeting rose at 11.30 a.m.*

## 2390th MEETING

*Friday, 26 May 1995, at 10.05 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney,

<sup>10</sup> *Yearbook* ... 1968, vol. II, p. 114, document A/CN.4/204, para. 133.

<sup>11</sup> See 2385th meeting, footnote 15.

<sup>12</sup> See footnote 4 above.

Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State succession and its impact on the nationality of natural and legal persons (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/467,<sup>1</sup> A/CN.4/L.507, A/CN.4/L.514)**

[Agenda item 7]

**FIRST REPORT OF THE SPECIAL RAPPORTEUR**  
(*continued*)

1. Mr. KABATSI said that when, on a succession of States, one State assumed the international responsibilities of another over a particular territory, the nationals involved were quite frequently affected in a variety of ways, which were more often than not negative. It was the negative consequences of succession that must be addressed first, and the problems and causes must be carefully, and if possible exhaustively, identified so as to find solutions. As an initial step, an in-depth study of the topic was required and should concentrate primarily on the negative impact on natural persons, legal persons being dealt with later on perhaps.

2. Of the many negative consequences that could ensue from a change in sovereignty over territory, three of them called for special mention. In the first place, an individual or a group of individuals could—for a variety of reasons, including race or even tribe, religion, political ideology or system, or lack of a genuine link or emotional attachment to the new State—end up with the nationality of a State to which they might not wish to belong. Secondly, such an individual or individuals might fail to acquire the nationality of the State to which he or they would have liked to belong; and, thirdly—the worst situation of all—an individual or a group of individuals might end up stateless. The study must attempt to find a solution to those three situations in particular.

3. In his first report (A/CN.4/467), the Special Rapporteur had quoted the statement contained in the first report of a previous Special Rapporteur, Mr. Bedjaoui,<sup>2</sup> that, in all cases of succession, “there is in theory no succession or continuity in respect of nationality”. Although that was in principle correct, the point might require careful study with a view to providing for continuity of nationality, if only on a temporary basis, to avoid unnecessary hardship for the individual or individuals concerned.

4. The Special Rapporteur also stated, referring to internal law in the literature, that it is not for international law, but for the internal law of each State to determine who is, and who is not, to be considered its national. In-

ternal law was, of course, the main source for the attribution of nationality, but it should also be borne in mind that, in the small world of today and with all the obligations incumbent on States under international law, the power of States to legislate in matters of nationality should not be unlimited. Denial of nationality in deserving cases had had disastrous consequences not only for the people and regions concerned but for the international community as a whole. The Palestinian situation was a case in point, for it had caused untold human suffering and had used the energies and vast resources of the international community. There was the case of Rwanda too. With the attainment of independence, the new regime had decided that one section of the population was not to enjoy nationality status. Those who had chosen not to go into exile had then been subjected to the persecution that had culminated in recent years in grotesque acts of genocide. In addition to the human tragedy endured by the persons involved, the other States in the region and the international community as a whole had also suffered.

5. The Commission owed it to the world to prepare a study that would reinforce international law in such a way as to minimize the chances of a recurrence of such tragedies elsewhere. To that extent, he agreed with Mr. Al-Baharna (2389th meeting) that it was regrettable that the report tended to emphasize the classical approach to the treatment of the subject at the expense of human rights considerations. As was apparent from the report, however, the Special Rapporteur had not neglected the role that international law and human rights could play in limiting the discretionary power of the State. In particular, the Special Rapporteur had clearly demonstrated that the obligations of States with respect to human rights protection called into question techniques such as that of statelessness and any other kind of discrimination.

6. Accordingly, the study should target the question of the human being and his rights, since that was an area of international law that could be developed for the benefit of mankind as a whole. There were a significant number of multilateral treaties, particularly human rights treaties, which pointed the way towards further progressive development of the law on the topic under consideration. They too could help to bring about an improvement with regard to the negative impact of State succession on nationality.

7. Mr. MAHIOU said that, when the Commission had first decided to take up the topic, he had not been entirely certain about the task that lay ahead; now, having read the Special Rapporteur's first report, he remained somewhat sceptical. Matters were still at the preliminary stage, however, and the purpose of the debate was to consider all the ins and outs of the question with a view to providing a working group with material for discussion.

8. While the report did bring out the special characteristics of the topic, it was a little too general and abstract in some respects. Obviously, it was not possible to clarify every single point in a preliminary report, but a few illustrations at that stage would have been helpful. For instance, the Special Rapporteur had referred to the

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> See 2389th meeting, footnote 10.

ever, leave that delicate question to the Special Rapporteur and the working group to reflect upon.

15. A list of the concepts on which the Commission should focus its attention would help to pinpoint the complex phenomenon of nationality and its relation to international law. The first of those concepts—and it lay at the heart of the topic—was the right to nationality, its criteria and implications. An examination of that concept would enable a precise determination to be made of the rights and obligations of both States and individuals under international law, both conventional and customary. Among the other concepts that should command the Commission's attention were statelessness, non-discrimination and its scope, loss of nationality and its regime, effective nationality, the principle of non-retroactivity—nationality being the one area where that principle was sometimes thwarted—and the relationship between international human rights law and nationality. The task of a working group—the appointment of which he favoured—and, subsequently, of the Commission should be to identify the difficulties and possible solutions in regard to those concepts in the light of State practice, the rules of international law, both conventional and customary, and jurisprudence.

16. Mr. de SARAM said that he understood the Commission to be at the stage of a preliminary exchange of views and ideas as to the methodology of its work, as to possible general approaches, and as to questions, issues and implications to be identified for consideration. It was now quite clear that the working-group method was the appropriate one for a topic such as the one under consideration, but it had been very useful to hold such an exchange of views in plenary, before moving further consideration to a working group. It was to be hoped that the Commission would not be so overburdened with other pressing matters that it would be unable to reflect adequately on the working group's report.

17. As a first substantive observation, it seemed to him that the question of the impact of State succession on the nationality of natural persons should, for obvious reasons, not the least of which was want of sufficient time, be treated separately from the question of the impact on the nationality of legal persons. Yet the Commission could not entirely ignore the question of legal persons. Perhaps, at the current stage, some observations should be made in its reports on the type of legal questions that might arise in relation to the "nationality" of legal persons when there was a succession of States.

18. The impact of State succession on the nationality of natural persons was, of course, in itself a subject not without its problems: first, and perhaps principally, because it was difficult to isolate totally the purely legal issue from its non-legal context—or to put it more directly, from its political and social, and thus more emotional, surroundings. Moreover, considerations of relevance to cases of State succession in the past might no longer have the same relevance to contemporary cases of State succession. And each case of State succession had, as was well known, its own special context and its own sensitivities, and brought its own anguish to those who were badly affected. The fact that each case of State succession was in a sense unique was something that should be borne in mind, as must the fact that the

Commission's principal objective was the codification and progressive development of general public international law.

19. Difficulties of a technical nature could arise, and could cause confusion, in view of the variety of State succession scenarios that could be thought to come within the scope of the topic, as the present preliminary exchange of views had shown in some measure, and as might be shown in much greater measure in the debates in the Sixth Committee. Thus the reports of the Commission should eventually clearly set forth what State succession scenarios should be brought within the Commission's present consideration of the topic, and for what reasons.

20. Because of the differences in the scenarios considered, a number of questions, issues and implications would also arise with respect to each scenario, and those would need to be borne in mind as well. Hence it was important and worth repeating, that the Commission's reports should contain a listing—an itemized listing if possible—of the scenarios being considered, and of the questions, issues and implications that arose in relation to each one. That would not only be of considerable assistance in clarifying matters for the Commission as a whole; it would also be of invaluable assistance to Governments in identifying the various points on which their observations would be welcome, and were necessary. Indeed, it would be desirable, if the Commission was to progress with its work with the broadest possible understanding and support by Governments—and such was the essential objective of the consensus process, for Government observations on the various questions to be encouraged however and wherever possible.

21. In the present topic, as in others, the Commission would also encounter the inevitable "tension" between what some—in their view, with good reason—considered to fall properly within the domestic jurisdiction of a State, and what others—in their opinion, also with good reason—considered to be of non-domestic concern. While that certainly added to the legal and non-legal fascination of the subject, it would not make a difficult topic any easier to address. If it was any consolation, members of the Commission might care to remember that when their predecessors 40 years previously, having completed a draft convention on the elimination of future statelessness and a draft convention on the reduction of future statelessness, had turned in 1954 to the subject of present statelessness, they had completed seven draft articles on that subject.<sup>4</sup> In submitting them to the General Assembly, they had advised that, in view of the great difficulties of a non-legal nature which beset the problem of present statelessness, the Commission considered that the proposals adopted, though worded in the form of articles, should merely be regarded as suggestions which Governments might wish to take into account when attempting a solution of that urgent problem.<sup>5</sup> He did not recall that the General Assembly or the Commission had taken any further action on the matter.

<sup>4</sup> *Yearbook* . . . 1954, vol. II, document A/2693, chap. II, in particular p. 148, para. 37.

<sup>5</sup> *Ibid.*, p. 147, para. 36.

dissolution of some eastern European States and the implications it would have on nationality. It would have been interesting to have some specific examples of the problems encountered by those countries and of the difficulties faced by individuals.

9. Nationality was, of course, closely linked to internal law, which encompassed not only statute law but also constitutional law and case law. As a consequence, the relationship between a State and its nationals was of so special a nature that it was a delicate matter to determine precisely what relationship nationality maintained with international law. The difficulty stemmed, in particular, from three features of nationality.

10. The first feature was the statutory link: there was no contractual aspect to nationality, no contractual relationship between the State and its nationals. That statutory link provided the basis for the definition of the population and hence for the identification of the State. It was therefore surprising to note the statement by Hans Kelsen, in a lecture delivered before the Academy of International Law, that

For a State, within the meaning of international law, . . . it was not essential to have nationals, but only to have subjects, in other words, individuals living on its territory and on which the State system imposed obligations and conferred rights.<sup>3</sup>

Even more surprising, however, had been Kelsen's conclusion that the institution of nationality was not necessary, having regard to international law. That conclusion would no doubt perturb even the most enlightened. Kelsen's lecture had, however, been delivered in 1932, since which time international law had developed so that it was not just an assortment of abstract rules and norms but now had regard to the complexity of the situations actually encountered by States in the day-to-day exercise of their sovereignty, which included their relations with their own citizens. Moreover, when Kelsen had made his statements, international human rights law had been in its infancy. It had not reached its existing stage of development and had not had the same impact on the rules of international law. Kelsen's analysis of the position now would probably be quite different.

11. The second feature of nationality was its link with public law, for the attribution of nationality was a prerogative of the State and a manifestation of the exercise of its sovereign right. That was why States were reluctant—and even mistrustful—about binding themselves too strictly in that area, for that would interfere with their discretionary power to attribute—or not to attribute—nationality.

12. The third feature of nationality—closely allied to the second—was its link with internal law, inasmuch as every State determined the modalities for the attribution of nationality to natural and legal persons, in other words, decided whether or not to incorporate such persons into its national system of law. At the same time, the State had to have regard to those rules of international law that could influence the nature of the link. A State could adopt all the rules it wanted to nationally, but

refusal by other States, relying on international law, to give effect to those rules would act as a kind of limitation on the State in question. In other words, the State had to take account of the effectiveness of the rules on nationality not only on its own territory but also on that of other States. In that sense, nationality could be said to stand at a crossroads between internal law, public law, private law, public international law and private international law: the technical intricacies involved might perhaps call to mind the Commission's earlier work on the jurisdictional immunities of States. The Commission's task, therefore, was to identify those principles of international law that involved an interplay with national law and the sovereign power of the State, with specific reference to State succession and change of nationality.

13. In his opinion, the Commission should deal with the nationality of natural and legal persons, though not necessarily at the same time. Indeed, the work of codification might well be concerned more with the nationality of legal persons than with that of natural persons. In the latter case, the Commission would have to deal with a wide variety of different and delicate problems—with all the unfathomed depths of the human situation. Individual situations, moreover, might not be amenable to common solutions and might therefore have to be examined on a case-by-case basis. He was not suggesting that the Commission should refrain from studying the question of the nationality of natural persons, but it was more difficult to realize the codification of that part of the topic. The nationality of legal persons, on the other hand, offered more fertile ground. The practice of different States had much more in common and could thus provide a basis for discussion and perhaps for a codification endeavour. Accordingly, without prejudice to the outcome of the work done by a working group and the Commission, a study should be carried out in the case of the nationality of natural persons, and an outline of the relevant rules should be prepared for possible codification in the case of the nationality of legal persons. As to the method of work and the form the results of that work should take, the Commission should deal with both aspects of the problem, but on the basis of slightly different perceptions perhaps.

14. The existing terminology, as used in the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, could provide a basis for the initial work, and could, if necessary, be revised, as the study progressed. There was, however, an apparent inconsistency, since, as quoted in the first report, a previous Special Rapporteur for succession of States in respect of rights and duties resulting from sources other than treaties, Mr. Bedjaoui, had stated that in all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality. Yet the assumption adopted in the case of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts was that there was a succession. If this assertion was to be taken as the starting point for the Commission's discussion, it would seem that the terminology used for the topic would be based on a contradictory assumption. It might therefore be better to start out with special definitions suited to the topic under consideration. He would, how-

<sup>3</sup> H. Kelsen, *Recueil des cours de l'Académie de droit international* (Paris, Sirey), vol. 42 (1932), p. 244.

22. The final form of the work was a matter to be determined at a later date. Yet central to success or failure would be the way in which the Commission fashioned, if that were at all feasible, a satisfactory accommodation between, on the one hand, the position that a State's determination of the bases upon which its nationality was to be possessed was within its own domestic jurisdiction, having a crucial bearing on its social and political integrity as a State; and, on the other hand, the position that a State's determination as to who should possess its nationality might, on occasion, be so unsettling in degree as to be questionable at the level of humanitarian concerns.

23. It might, however, be extremely difficult at the current stage for the Commission to find formulations and terminology to put into textual form what would certainly have to be a very fine consensus balance between the two now seemingly contrary positions. It was for that reason that he found so persuasive Mr. Bowett's suggestion (2387th meeting) that the Commission should consider aiming at an eventual listing of the considerations which a predecessor State and a successor State might have to keep in mind in working towards a mutually satisfactory accommodation between the two contrary positions. Moreover, a beginning for such an accommodation might be possible: it was to be hoped that all States were aware that, if a State's nationality determinations went beyond what was generally regarded by States as reasonable (not necessarily as a matter of law but as a matter of good sense), then such determinations were unlikely to be sustainable if they ever became the subject of consideration in a non-domestic forum.

24. There was one further point which he raised with some hesitancy, as he was not entirely certain about its validity. It seemed to him that the "humanitarian" consequences of inappropriate nationality decisions were in themselves so obvious that it might well be unnecessary to introduce "human rights" considerations into one's reasoning in order to give additional force to a point being made. Moreover, when seeking fully to appreciate the point of view of those emphasizing the domestic jurisdiction aspects of the questions before it, the Commission should recognize that there were a number of matters that a State would need to address and weigh in making nationality-related determinations. Human rights considerations, though very persuasive, were just one of a number of aspects a State would need to address. Moreover, a general reference to "human rights" considerations without legal particularity would not take the point one was attempting to make very much further. Also, if it were to become embroiled in a debate as to what particular provisions other than treaties in force in the human rights field were binding upon a State as a matter of law, in the sense of general practice accepted as law, the Commission would be venturing into an area of extreme difficulty.

25. Where purely legal issues could become enmeshed in difficult social, political and human considerations, perhaps the best approach was to begin by ascertaining what public international law—within the meaning of Article 38 of the Statute of ICJ—now provided on the relevant matters: treaty law and the present status of adherence to the relevant treaties; such further rules as re-

flected a general practice accepted as law; general principles of law; and judicial decisions and writings of legal publicists, as a subsidiary means for determination of the rules of law. Of course, there might well be questions of relevance on which public international law might be inadequate. They would need to be listed as questions on which progressive development of the law might be desirable. However, the Commission had constantly reminded itself that it could not be insensitive to the views of Governments and the practice of States. He tended to agree with Mr. Idris (2388th meeting) that it was important that the opinions of Governments should be obtained as widely as possible and as early as possible.

26. Perhaps the Special Rapporteur would clarify two points. First, what State succession scenarios were to be included in the Commission's consideration of the topic? As he saw it, there were at least four possibilities for a State succession: (a) one State dissolving into two or more States; (b) two or more States merging into one State; (c) a part of one State becoming an independent State; and (d) a part of one State joining another State. The second point concerned the definitions that the Commission should utilize, having regard to the definitions incorporated in the above-mentioned Conventions. Mr. Idris had noted that, when dealing with definitions, one was setting out the scope of the subject to be considered, and both Mr. Idris and Mr. Mahiou had pointed out that the sole emphasis in those Conventions appeared to be on the relations of States with other States at the international level, whereas in the present topic, much—perhaps the overwhelming weight—of the emphasis concerned the relations of States with those who were to possess its nationality. Perhaps the Commission was in some way shifting the weight it should be giving to conflicting positions. They were not easy questions, and he would be grateful if the Special Rapporteur could respond to them.

27. Mr. YAMADA said that the Special Rapporteur's first report provided an excellent basis for a preliminary study to be submitted by the Commission to the General Assembly pursuant to Assembly resolution 49/51. Nationality was a prerequisite for the full enjoyment of human rights. Any limitation of the traditional principle of State freedom in determining nationality must be carefully studied in the light of the development of human rights laws.

28. He supported the proposal that the Commission should separate the issue of the impact of State succession on the nationality of legal persons from that of the nationality of natural persons, and that it should study first the impact on natural persons. As to the principle of effective nationality, it was widely accepted that the general rule required a "genuine link" between an individual and a State as a basis for conferring nationality. The Special Rapporteur's analysis of that point, in chapter IV, section A, of his report, was quite instructive. Application of that principle to collective naturalization in the case of State succession might result in undesirable situations. He believed that the Commission should, as the Special Rapporteur suggested, study the criteria for establishing a genuine link for each different category of State succession. It might also study the question whether the territorial sovereignty of a successor State

entailed the responsibility of that State for protection of the inhabitants in its territory, and how it affected the question of the nationality of that population.

29. Another point was the question of "option of nationality". The Special Rapporteur cited Opinion No. 2 of the Arbitration Commission of the Conference on the Former Yugoslavia,<sup>6</sup> pointing out that the function of the option of nationality was among the issues that must be clarified in the Commission's study. In that Opinion, the Arbitration Commission stated that where there were one or more groups within a State constituting one or more ethnic, religious or language communities, they had the right to recognition of their identity under international law. The—now peremptory—norms of international law required States to ensure respect for the rights of minorities. Opinion No. 2 also stated that article 1 common to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights established that the principle of the right of self-determination served to safeguard human rights. By virtue of that right, every individual might choose to belong to whatever ethnic, religious or language community he or she wished. The Arbitration Commission concluded that such rights included the corollary right to choose their nationality. The right of option of nationality had been accorded in treaties of cession. Could one say that that right had come to be recognized by general international law?

30. There was another aspect to the question. Nationality provided the holder with the basis for political and civil rights. At the same time, it entailed duties on the part of nationals *vis-à-vis* the State. Did human rights or the rights of minorities include the right to refuse nationality? In other words, did the successor State have the obligation to recognize the existence of a large group of non-nationals in its territory? He hoped that the working group to be set up to consider the topic would be able to make an in-depth study of the many questions posed by the Special Rapporteur.

31. Mr. HE said that, although the valuable first report on the topic was intended to be only preliminary in character, it clearly demonstrated the importance, complexities and sensitiveness of the issue, at a time when the world was changing with dramatic rapidity and the emergence of new States had made the issue of nationality a matter of concern and special interest to the whole of the international community. Those developments justified the effort to produce a study on the rules concerning nationality that might be applicable in the case of State succession.

32. It must first be stressed, and was also generally recognized, that the question of nationality was governed primarily by internal law. It was the sovereign right of a State to determine who was, and who was not, to be considered its national. However, such a right was not unlimited, and States should take into account the constraining factors stemming from requirements at the international level, even though the role of international law with respect to nationality was very limited.

33. Thus, with regard to State succession, States should resolve satisfactorily such questions as the loss of nationality, the acquisition of nationality, and conflict of nationality, so as to avoid dual or multiple nationality and to reduce statelessness. Furthermore, while some authors insisted that nationality should be granted irrespective of the wishes of individuals, the right of option, subject to compliance with certain conditions on the part of individuals, should also be respected. Change of nationality had also to meet the requirements of the principle of non-discrimination.

34. As the report was a preliminary study, some issues still had to be clarified and merited further examination. The main task of the Commission's study was to ascertain what specific rules of international law would have an effect on the power of the State to determine nationality in the event of State succession. The Convention on Certain Questions relating to the Conflict of Nationality Laws referred only to the limitations imposed by international conventions, international custom and the principles of law generally recognized with regard to nationality. The precise content of that provision had still to be further explored in the study of the topic.

35. As to the categories of State succession, the Special Rapporteur was right to address separately the problem of nationality in the context of different types of territorial changes. The Special Rapporteur proposed using the three categories incorporated in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. It was debatable, however, whether those categories were appropriate for State succession in respect of nationality, and particularly, changes of nationality. The problem should be studied further.

36. A number of other issues were also worthy of further consideration, notably reduction of conflicts of nationality both positive (dual or multiple nationality) and negative (statelessness); constraints on the granting of nationality; the right of option; and the matter of deprivation of nationality and international law. Concerning deprivation of nationality, article 15 of the Universal Declaration of Human Rights<sup>7</sup> stated: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Because of the adjective, a distinction was drawn between "arbitrary deprivation" and deprivation in general. It remained to be seen how that provision would fit in with the nationality laws of those countries that retained the capacity to deprive individuals of nationality.

37. The Special Rapporteur was right to say that the Commission should first take up the most urgent aspect, namely the nationality of natural persons, and leave the question of the nationality of legal persons for later. In that way, the study could be done more efficiently, on a step-by-step basis. He also agreed that the Commission should use a flexible approach and discuss the form of the final outcome of its work after it had conducted an in-depth study of the relevant issues. As a first step, the Commission's work would have the character of a study to be presented to the General Assembly in the form of a

<sup>6</sup> See 2389th meeting, footnotes 6 and 7.

<sup>7</sup> General Assembly resolution 217 A (III).



report. Establishing a working group would be a suitable way to proceed towards that goal.

38. Mr. KUSUMA-ATMADJA said that the first report provided an excellent basis for the Commission's work. The Special Rapporteur had been criticized for adhering to the classical doctrine according to which the determination of nationality was an attribute of State sovereignty. It had been said that that doctrine could leave the door open for abuse, and that a humanitarian approach should be used instead. He agreed with those sentiments, but wondered how they could be put into practice in an international system essentially based on relations between sovereign States.

39. The Commission's objective could be seen as one of limiting the opportunities for misuse or abuse of the discretionary power of the State with regard to nationality or of mitigating the consequences. An important limitation on opportunities for abuse was the right to nationality as embodied in the Universal Declaration of Human Rights. The possible detrimental effects on individuals of conferral of nationality following State succession fell into three categories: a nationality not desired by the individual; dual nationality; or statelessness.

40. Those situations had to be averted, though he agreed with the Special Rapporteur that there was very little international law could do in that regard: it could not prevent a State from conferring nationality or refusing to grant nationality in a specific case. The Commission's task was, therefore, to enhance the opportunities for individuals to choose their nationality or, in the case of collective conferral of nationality following State succession, to strengthen the right of option in international law. The practice of States in respect of the right of option could shed some light on how the Commission should proceed. Essentially they applied a bilateral approach.

41. The right of option should be strengthened for individuals and, if necessary, should transcend the requirement of a genuine link. A person could have a genuine link with a territory but, because of State succession, could be placed in severe difficulties by continuing to possess the nationality of that territory. In such instances, individuals should be given the right to opt for another nationality.

42. As for definitions, he would restrict nationality to effective nationality in the sense of full citizenship—nationality as the basis for realizing the full potential of a human being—and would not wish to confuse the term with concepts like *ressortissant* and *Staatsangehöriger* that were often encountered in citizenship laws dating from colonial times.

43. An example from such times could, however, be usefully cited as an illustration of how the right of option could solve nationality problems. The agreement signed in 1950 between Indonesia and the Netherlands on the assignment of citizenship between the two countries provided for a right of option for citizens of the two countries for a two-year period.<sup>8</sup> The right had operated on

the basis of residence: individuals who had still been in Indonesia on the expiry of that period had acquired Indonesian nationality. The right had been further refined by drawing a distinction between minors, who automatically acquired the nationality of their parents, and juveniles or adolescents, who had been given the option to choose their nationality on reaching 18 years of age. Another refinement had been introduced when it had been found that some individuals who had gone to live in the Netherlands and had opted for Dutch nationality had subsequently decided they wished to regain Indonesian nationality. In order to avoid lengthy naturalization proceedings, the two countries had agreed that Indonesia would enact a special law enabling those who had chosen their citizenship in the early 1950s to revert to their earlier nationality within two years of the law's entry into effect in 1976.

44. As for the operation of the right of option where groups were concerned, invoking human rights in a general sense could raise serious problems. In some countries some groups that were minorities were subjected to persecution. In former colonial countries, however, there were often powerful, dominant groups whose members were far too numerous to be deemed a minority and who were in no way in need of protection. In fact, it was often other population groups that needed protection from them. Furthermore, minorities were often created through the importation of indentured labour, and their position was quite different from that of oppressed minorities in, for example, eastern European countries.

45. Another problem that could arise in connection with the impact of State succession on groups was one of dual nationality or statelessness. The Treaty on Dual Nationality had been concluded between Indonesia and China on the abolition of dual nationality.<sup>9</sup> The treaty had not succeeded in preventing statelessness—one of its stated objectives—because a number of people of Indonesian origin at that time would have preferred to become citizens of Taiwan and, rather than become citizens of the Republic of China, had opted for statelessness.

46. All of the examples he had cited merely showed that no matter how many categories, definitions and concepts were devised, problems still cropped up, largely because of deficiencies in the international legal system. It was only in coping with individual situations, and particularly through the bilateral approach, that real solutions would be found. The Commission should nevertheless endeavour to discover how the right of option could be strengthened through international law.

47. Mr. THIAM said that the Special Rapporteur's remarkable work on a very delicate subject augured well for the Commission's future endeavours.

48. The topic was a difficult one indeed, as it was situated at the crossroads of public international law, private international law and internal law. He for one regretted the minimal role played by public international law in nationality matters and hoped that the Commission's

<sup>8</sup> Signed at The Hague, 29 November 1950 (*Treaty Series of the Kingdom of the Netherlands*, 1951, No. 5).

<sup>9</sup> Signed at Beijing, 13 June 1955 (*Indonesian Official Gazette*, 1958, No. 5).

work would tend towards expansion of the emphasis given to public international law in the area of nationality law.

49. He agreed that the Commission should first concentrate on the nationality of natural persons. Nationality was something that had a profound effect on individuals in terms of their deepest feelings and beliefs, their cultural affinities, their very fibre. Legal persons in any event were merely theoretical inventions. Accordingly, the impact of nationality on natural persons, as opposed to legal persons, had to be discussed separately, and separate rules had to be devised.

50. He endorsed the categories suggested by the Special Rapporteur with one exception. Special provision had to be made for the newly independent States. Decolonization was a fairly recent phenomenon and had greatly marked certain countries, particularly in nationality matters. People were still being torn between their allegiance to the former colonial Power and to the formerly colonized country, and were still facing painful choices. The matter had to be scrutinized and rules had to be worked out to deal with it.

51. In the subject under consideration, no one disputed the fact that internal law held pride of place. States had sovereignty over individuals and could determine who was or was not to be included among their nationals. Yet State sovereignty could also be abused—and had been in far too many cases. Some countries openly distinguished between their nationals, placing them in categories of full or less than full citizenship. France, for example, had formerly separated “active” citizens from “passive” ones. Colonial Powers had distinguished between full citizens and non-citizens. Such measures went directly against international law: full civil and political rights had to be provided for all citizens.

52. The Commission should therefore look very closely into nationality issues and try to strengthen the relevant rules of international law. Individuals must be given some form of support or recourse against the all-powerful State; otherwise, they were simply being thrown into the lion’s den. What if apartheid were to re-emerge—in a different country, perhaps, and under a different name? Should individuals be forced to live under a system of unequal civic rights? He agreed very strongly with Mr. Al-Baharna (2389th meeting) that it was not enough for nationality law to be analysed on the basis of existing laws. It should also be progressively developed, notably by introducing rules on human rights.

53. As to the final form of the Commission’s work, he was convinced that it was necessary not only to draft a report for submission to the General Assembly but above all to elaborate positive rules of international law on nationality. Only in that way would the Commission be performing a real service for the international community.

54. The CHAIRMAN, speaking as a member of the Commission, said the objective of the Commission’s work must be to ensure that the creation of new States did not result in statelessness. Dual nationality was a matter to be handled by nationality law rather than by laws on State succession. Both legal persons and natural

persons had to be covered in the Commission’s analysis of the impact of State succession on nationality, even though the problem of natural persons was obviously the most complex and important one.

55. Within the category of natural persons, the case of collective naturalization was more complex than that of naturalization of individuals, something that was generally regulated by the principles of *jus soli* and *jus sanguinis*. The issue was probably the most pressing of all in the case of persons who had chosen to live in a successor State but wished to claim the citizenship of the predecessor State some time after the effective date of succession. State practice and nationality laws should provide the necessary guidance to enable the Commission to identify solutions. Special cases should be noted, without entering into generalities. Uniform or universal principles were less likely to be accepted by States in nationality matters because of the variety of existing laws and variations in factual situations.

56. Few cases cited in the report appeared to be central to the issues that were likely to arise in the context of State succession. Cases actually negotiated through treaties and agreements between States, cases decided by national courts and laws and regulations adopted by new States after their creation would be more pertinent.

57. The Commission’s report to the General Assembly should focus on factual situations arising out of State succession and should indicate the variety of solutions adopted by States in the past. He fully endorsed Mr. Mahiou’s recommendation that the Commission should approach the topic in a less general and abstract way and make an illustrative analysis of issues affecting particular regions. He also agreed with Mr. Kusuma-Atmadja that most problems of nationality were better left to bilateral regulation, which had in the past been found to be the most effective method.

58. Finally, he would recommend that, before any in-depth analysis of the issues involved was undertaken, States should be allowed to respond to the preliminary report to be produced by the Commission at the end of the present session.

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

[Agenda item 2]

59. The CHAIRMAN announced that the Drafting Committee was suspending for the time being its work on the draft Code of Crimes against the Peace and Security of Mankind and on 29 May would start its consideration of the draft articles on State responsibility which were still pending, so as to take advantage of the Special Rapporteur’s presence in Geneva during the next two weeks. The members of the Drafting Committee for the topic of State responsibility were Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Lukashuk, Mr. Pellet, Mr. Razafindralambo, Mr.

\* Resumed from the 2379th meeting.



Rosenstock, Mr. Szekely and Mr. Yamada. The Special Rapporteur, Mr. Arangio-Ruiz, was a member *ex officio*.

60. Mr. THIAM said that he had no problem with the suspension of the work on the draft Code, but would like to know how many meetings of the Drafting Committee would be available later for that work.

61. Mr. YANKOV (Chairman of the Drafting Committee) said the original plan had been for the Drafting Committee to assign 14 meetings to the draft Code; it had spent 16 on that topic so far. He hoped that not more than three more meetings would be needed; certainly, at least two would be required to tidy up the text and reconsider any issues pending. The Committee's report on the topic would probably still be a preliminary one, requiring finalization at its forty-eighth session in 1996.

62. Fourteen meetings of the Committee had been envisaged for the topic of State responsibility. The Committee would make use of all available time, and he hoped that some progress would be made. In his opinion, the work should begin with the draft articles on countermeasures. However, subject to any specific suggestion the Special Rapporteur might have, it would be better for the Committee itself to decide on the order of its work. Mr. Villagrán Kramer had kindly undertaken to act as Chairman when he, Mr. Yankov, was away from Geneva from 14 to 22 June.

63. Mr. ROSENSTOCK said that he took it that the only material before the Drafting Committee at present was part three of the draft articles proposed by the Special Rapporteur, the discussion of which had been concluded in 1993.

64. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested that the Drafting Committee should start with part three because it was the most neglected part of the draft. After its consideration of part three, the Committee should devote perhaps two meetings to article 12 and to some minor matters relating to articles 11 and 13, which were raised in his seventh report (A/CN.4/469 and Add.1-2),<sup>10</sup> as well as to any draft articles on crimes which the Commission sent to the Drafting Committee.

65. Mr. MAHIOU said that he supported the Special Rapporteur's suggestion because of the importance and complexity of the question of countermeasures, on which the Commission must try to find the best possible compromise.

66. Mr. ROSENSTOCK said that the Commission was under an obligation to finish its first reading of all the draft articles within the present quinquennium. The Drafting Committee had adopted the draft articles on countermeasures at the forty-fifth session in 1993<sup>11</sup> but, at the request of the Special Rapporteur at the following session, it had agreed to take another look at them, on the clear understanding that if there was no agreement on a revision of draft article 12 the existing text would stand.<sup>12</sup> Despite a number of meetings allocated to the matter at the forty-sixth session, the Drafting Committee had been unable to find a form of language satisfactory

to itself and to the Special Rapporteur. The decision that article 12 should stand as drafted had therefore been confirmed. However, all the draft articles were still being considered on first reading, and there might be a need to revert to some of the articles in part two once the drafting of the articles on crimes had been completed. But to decide now to go back yet again to article 12 and to bits and pieces of articles 11 and 13 would not be remotely consistent with the obligation to do everything possible to complete the first reading within the quinquennium.

67. Mr. ARANGIO-RUIZ (Special Rapporteur) said Mr. Rosenstock seemed to be agreeing that the Drafting Committee could take another look at the articles in question provided it had first completed its consideration of the articles on crimes. He agreed that the Committee should begin its work with the articles on crimes and he hoped that it would be able to complete them. Once it had done that, it would be close to completing the whole undertaking and could allocate some meetings to a final tidying up of the text. Mr. Rosenstock's apprehensions therefore seemed unjustified, unless he had some particular reason for not wishing to return to articles 11, 12 and 13.

68. Mr. VILLAGRÁN KRAMER said he shared Mr. Rosenstock's understanding of the situation but thought that the Drafting Committee could return to part two after its consideration of part three and look at the Special Rapporteur's suggested amendments.

69. Mr. ROSENSTOCK said he was not suggesting that the Drafting Committee should revert to articles 11, 12 and 13 when it had finished considering the new material, but rather that the whole text would have to be looked at again in the light of that new material. There should be no differentiation in the Drafting Committee's position *vis-à-vis* article 12 and any other article. The Commission should adopt article 12 in plenary sooner rather than later, in order to submit to the General Assembly a complete set of draft articles adopted on first reading.

70. Mr. AL-KHASAWNEH said that he was only half convinced by Mr. Rosenstock's arguments. Of course, he would like the first reading of the draft articles to be completed within the quinquennium, but that aim would not be thwarted if the Drafting Committee spent two or three meetings on the articles which the Special Rapporteur regarded as so important and which had a bearing on the other parts of the text. The Special Rapporteur's suggestion was sensible and warranted support.

71. Mr. PAMBOU-TCHIVOUNDA said that a discussion of the question of countermeasures in the Drafting Committee would make it easier to conclude the consideration of other draft articles. The Committee could allocate two meetings to articles 11, 12 and 13, as requested by the Special Rapporteur, without prejudicing consideration of the new material. In any event, the Commission should try to meet the Special Rapporteur's wishes.

72. Mr. YANKOV (Chairman of the Drafting Committee) said that paragraph 350 of the Commission's report to the General Assembly on the work of its forty-sixth session<sup>13</sup> confirmed Mr. Rosenstock's position. However, he could go along with the general feeling

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

<sup>11</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 35, document A/48/10, para. 204.

<sup>12</sup> *Ibid.*, vol. I, 2353rd meeting, para. 42.

<sup>13</sup> *Yearbook . . . 1994*, vol. II (Part Two).

that, while priority should be given to part three, if time permitted, consideration could also be given to article 12 and perhaps article 11.

73. In fact, article 12 as such had not been referred to the Drafting Committee. The report stated that the Commission "had deferred taking action on article 12", that "article 11 might have to be reviewed in the light of the text that would eventually be adopted for article 12"<sup>14</sup> and that, pending adoption of article 12, the Commission had decided not to formally submit articles on counter-measures to the General Assembly in 1994 but expected to be able to do so in 1995.<sup>15</sup> That did not mean the Drafting Committee should rearrange its priorities. On the other hand, it should not rule out the possibility of making an effort to comply with the Commission's recommendations.

74. Mr. ROSENSTOCK said there was no doubt that article 12 was not before the Drafting Committee unless the Commission now decided to refer it. Such a decision would be wrong and he would insist on a vote on the issue. If the Commission voted to refer article 12 to the Drafting Committee the Commission would bear a cumulative responsibility for the outcome.

75. Mr. TOMUSCHAT said that he sympathized with Mr. Rosenstock's position but thought that some corrections to earlier articles might be needed in the light of new articles 15 to 20. Some review of the articles already adopted, perhaps only a technical one, therefore seemed inevitable. But the Drafting Committee should certainly begin its work with part three.

76. Mr. ROSENSTOCK said that the need for a review would apply without distinction to articles 1 to 14. The implications of that were horrendous. Article 12 should not be given special treatment. In any event, the Commission's decision must be a formal one. On that understanding, he could go along with Mr. Tomuschat's position.

77. The CHAIRMAN asked the Chairman of the Drafting Committee whether he needed a decision on the matter immediately or whether the Drafting Committee could begin its work on part three of the draft articles pending further consultations on the fate of article 12.

78. Mr. ROSENSTOCK, speaking on a point of order, said that the Commission needed to bite the bullet and not waste more time by putting off a decision. It was most regrettable that the whole problem had resurfaced despite the gentlemen's agreement reached in 1994.

79. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the wisest thing would be to let the Drafting Committee begin its work on part three and, as the Chairman had suggested, leave the question of article 12 open without biting any bullets. The Drafting Committee would be able to decide whether to revert to any of the articles adopted earlier, with a view to making minor changes.

80. Mr. EIRIKSSON said that the current discussion in plenary had not uncovered the whole history of the issue. Perhaps the question of reopening it should be left open.

81. Mr. MAHIOU said that he endorsed the position taken by Mr. Tomuschat.

82. Mr. YANKOV (Chairman of the Drafting Committee) appealed to the Chairman to end the discussion. The Drafting Committee's first priority was part three. If time allowed, other articles, including article 12, could be considered. Further consultations would just waste more time. The Drafting Committee should be allowed to take its own decisions on the order of its work in the light of the recommendations contained in the Commission's report.

83. The CHAIRMAN said that Mr. Rosenstock was pressing for a vote on the issue. As Chairman, he would prefer to avoid a vote because a consensus did seem to be emerging on how to proceed. He suggested that the Drafting Committee should begin its work with part three and that he should hold informal consultations on the present difficulty.

*It was so agreed.*

*The meeting rose at 12.50 p.m.*

## 2391st MEETING

*Tuesday, 30 May 1995, at 10.10 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State succession and its impact on the nationality of natural and legal persons (*continued*)**  
(A/CN.4/464/Add.2, sect. F, A/CN.4/467,<sup>1</sup> A/CN.4/L.507, A/CN.4/L.514)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR  
(*concluded*)

1. Mr. MIKULKA (Special Rapporteur), summing up the debate, thanked the members of the Commission for

<sup>14</sup> Ibid., p. 86, para. 352.

<sup>15</sup> Ibid., para. 353.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

having received his first report (A/CN.4/467) favourably. Their comments and criticisms had given rise to an interesting discussion on which the future working group could draw.

2. The topic, situated as it was at the crossroads of public international law, private international law and internal law, was certainly difficult and complex. It involved not only inter-State relations, but also relations between the State and the individual. The majority of members recognized that, in the present case, the Commission, which was not required to codify and harmonize internal law, should focus its work on the consequences of changes in sovereignty on nationality under international law. That was not to deny the importance of internal law, however: that law formed the very basis of the concept of nationality, which had certain consequences at the level of international law. It was precisely those consequences to which the Commission must direct its attention. He had therefore decided that it would be useful to refer at the outset to the various concepts of nationality that existed under internal law, even though the distinction was not relevant to international law. For the purposes of the preliminary study envisaged it was rather a question of the prerogative of the State.

3. Although it was agreed that a degree of priority should be given to the question of the nationality of natural persons, the Commission apparently did not wish to omit from the preliminary study the question of the nationality of legal persons. Some members had pointed out that it was perhaps in that area that codification prospects were most promising. But at the same time it had been recognized, particularly by those who emphasized the humanitarian aspect of the exercise, that the problem was most urgent in the case of individuals.

4. It was his understanding that the majority of the members of the Commission agreed with his proposal to abide by the definition of certain basic concepts contained in the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. That choice, of course, stemmed solely from the need for pragmatism in that its purpose was to facilitate the Commission's work by avoiding a return to accepted formulas, particularly since the aim at present was to draft a preliminary study, not a legal instrument. It would therefore more than suffice if the existing definitions were retained.

5. It was also his understanding that the Commission endorsed his proposal that the study on categories of succession should be based on the Vienna Convention on Succession of States in respect of State Property, Archives and Debts rather than on the Vienna Convention on Succession of States in respect of Treaties, subject, of course, to some additions and clarifications to take account of the problems specific to nationality. Some members of the Commission had wondered, however, whether the category of newly independent States, namely, States that had emerged following decolonization, should not be retained. He had merely proposed that that category should not be taken into consideration for the purposes of the preliminary study, although State practice should be borne in mind, since its dimensions

were more general and that could help to explain certain rules that applied to all cases of territorial change and not just to cases of decolonization. Moreover, as some members of the Commission who shared that view had pointed out, the fact that the problems of neocolonialism could not be completely ignored had little practical significance when it came to nationality because the decisive moment, for nationality, was the moment of decolonization: it was the moment when the problem of the status of individuals arose. Neocolonialism itself no longer had any effect on the personal status of individuals, which was already well defined. It was, rather, on other grounds that it was of concern to the international community. In his view, in the case of nationality, there were no pressing needs connected to that phenomenon.

6. As many members of the Commission had pointed out, the right to nationality, as set forth, *inter alia*, in article 15 of the Universal Declaration of Human Rights,<sup>2</sup> must be the core of the study. And the wealth of references made in that connection could suggest that it was an undisputed right, a right that was simply there. None the less, the working group should start by examining closely the concept of right to nationality with a view to defining its precise features. That was undoubtedly a difficult task: the formula used in the Universal Declaration of Human Rights was far more ambitious than those used in the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and certain other instruments, which showed that the concept of the right to nationality could not a priori be understood in its broadest sense.

7. Some members, who had made the point that every right had as its counterpart an obligation, rightly wondered what the counterpart to the right to nationality was. In Mr. Bowett's view (2387th meeting), it was the obligation on States to negotiate. His own view was that the obligation to negotiate could also flow from the instruments that had been drawn up on the question of succession. Thus, in particular, the Vienna Convention on Succession of States in respect of State Property, Archives and Debts provided that the successor States or the predecessor State and the successor State or States had to settle certain questions of succession by bilateral agreement, and set forth certain general principles to be applied in that regard. That was a further element that militated in favour of the application of the obligation to negotiate in the settlement of questions of nationality. Naturally, such an obligation should be examined both from the standpoint of the relations between the successor States, should the predecessor State disappear and should there be several successor States, and from the standpoint of the relations between the predecessor State and the successor State or States. Indeed, it was conceivable that the predecessor State might withdraw its nationality on a massive scale, while the successor State might grant its nationality on a very restrictive basis, the effect being to make part of the population stateless.

8. It would be difficult to envisage a direct obligation to grant nationality, unless it was closely circumscribed. To transpose concepts borrowed from the human rights sphere, in the event of a wholesale change of nationality,

<sup>2</sup> General Assembly resolution 217 A (III).

would pose a problem: to what extent could concepts that were supposed to apply to individual cases automatically apply at the international level in the event of a collective change of nationality? Conversely, would certain limitations provided for in the human rights field for individual cases apply at the international level? The only conclusion to be drawn in that particular case was that it was not possible to apply to situations involving a collective change of nationality all the principles embodied in the human rights instruments in order to resolve individual cases. Perhaps there were other principles, other rules, to be taken into consideration. Also, the working group should explain, in the study it was to make, to what extent the right to nationality applied in the same way to adults and to children.

9. The questions raised concerning the consequences that failure to observe the rules of international law in the matter could have at the level of internal law, as well as the possible nullity of acts carried out under internal law, should, in his view, be examined very closely, particularly since the judgment delivered by ICJ in the *Nottebohm* case<sup>3</sup> dated back nearly half a century, so that it was not possible to arrive at relevant conclusions. In that case, ICJ had relied on the principle of non-opposability, never questioning the fact that Nottebohm had been a national of Liechtenstein under that country's internal law. In other words, in raising the question of the nullity of acts carried out under internal law, the Commission would be breaking fresh ground.

10. In response to some members of the Commission who considered that he had underestimated the humanitarian factor, he would point out that he had dealt with it in virtually the same way as with the other factors and that he had devoted about the same number of paragraphs in his report to the role of human rights rules with regard to nationality and to the principle of effective nationality. Other members of the Commission had, however, pointed out that, if the Commission laid undue stress on the role of the rules relating to human rights, it might be counter-productive. He shared that view. That did not mean, however, that the role of obligations in the human rights field should be underestimated. It should not be ignored, but, in that particular case, it was not decisive. The Commission was not in fact supposed to study only the relations between the obligations of the State in the human rights field and their consequences for nationality: it was also supposed to examine the complex problems of State succession and the effects of territorial changes on nationality. It could not confine itself to considerations of a humanitarian nature, which had a place among the other considerations in the matter, but without taking precedence over them.

11. As to the way in which the transitional status of individuals should be approached at the international level—in other words, their status between the time when the old State disappeared and the new State enacted its law on nationality—the proposal to rely on presumption rather than to formulate rigid principles and rules was extremely interesting. It would be a good idea for the working group to look into that proposal.

12. Two major trends had emerged in the Commission with regard to the question of the choice of individuals and the role to be given to their wishes with respect to nationality, one of which underlined the importance of such a choice and such a role, while the other and more prudent one placed the emphasis on the element of effectiveness. It was difficult for the time being to arrive at any conclusions on that question, which the working group would have to analyse in detail.

13. The comments concerning the academic character of the report were warranted. It could not have been otherwise, for, at the time when the report had been prepared, the replies of Governments on recent practice in the matter had not been available to him. But, naturally, he agreed that the preliminary study should not be based purely on an academic analysis.

14. As to the form that the results of the work could take, for the time being, the General Assembly, in resolution 49/51, had called for a preliminary study. In any event, the form would depend on the content. If the Commission wished to lay down certain general principles for submission to States, a declaration would be entirely indicated. If, on the other hand, it wished to draw up a specific instrument, limited to a particular subject, for instance, statelessness, it could contemplate a more ambitious instrument or even an amendment or additional protocol to the Convention on the Reduction of Statelessness, which already contained an article, but couched in general terms, on the problem of statelessness in the event of territorial changes. Some members of the Commission had taken the view that other possibilities could be envisaged if the Commission decided to deal with the question of the nationality of legal persons. It was therefore premature to dwell on the question of the form the results of the work could take. It would be better instead to wait before doing so until the working group had submitted its report, in which various options could be proposed, to plenary. The Commission could then discuss it and make proposals for submission to the General Assembly so that it could take a decision in full knowledge of all the facts.

15. Mr. YANKOV said he wondered whether the Commission could not provide the working group with some guidance on the scope of the study and its main components and whether the working group could not submit an initial outline of the envisaged preliminary study to the Commission so that, at the next session, it would have a firm basis on which to work.

16. The CHAIRMAN said that, while Mr. Yankov's point was well taken, he understood that the Commission wished to allow the working group complete freedom in deciding how to proceed.

## Cooperation with other bodies

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN  
LEGAL CONSULTATIVE COMMITTEE

17. The CHAIRMAN invited Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee, to address the Commission.

<sup>3</sup> See 2385th meeting, footnote 15.

18. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that he was grateful for the opportunity to address the Commission. As members of the Commission were aware, the Asian-African Legal Consultative Committee attached great significance to its long-standing ties with the Commission. It had been honoured by the attendance of Mr. Villagrán Kramer at its thirty-fourth session, held in Doha in April, and had expressed its immense satisfaction at the comprehensive account Mr. Villagrán Kramer had given there of the work of the Commission at its forty-sixth session. That account, together with Mr. Villagrán Kramer's statements, had underlined the significance the Commission attached to its links with the Committee and the spirit of cooperation between the two bodies. He trusted that the existing cooperation and ties would be further strengthened.

19. The Committee had welcomed with much appreciation the completion of the Commission's work on the draft statute for an international criminal court and on the law of the non-navigational uses of international watercourses. The items currently on the Commission's agenda were all of particular interest for African and Asian States. At its thirty-third session, the Committee had concurred with the Commission's view that consideration of the two topics of the law and practice relating to reservations to treaties and State succession and its impact on the nationality of natural and legal persons responded to a need of the international community and that the international climate was propitious for their consideration.

20. The item of international rivers had been on the Committee's work programme for a long time. At its thirty-fourth session, the Committee had commended the draft articles on the law of the non-navigational uses of international watercourses together with the commentaries thereto as adopted by the Commission on second reading.<sup>4</sup> It had requested the General Assembly to consider adopting a framework convention on the non-navigational uses of international watercourses based on those draft articles. The international rivers item continued to be on the Committee's work programme and the secretariat proposed, *inter alia*, that inter-State water agreements in the Afro-Asian region should be studied.

21. The secretariat of the Committee, mindful of the interest shown by the legal advisers of the Committee's member States in the establishment of an international criminal court and the debate in the Sixth Committee on the draft statute prepared by the Commission, had organized a seminar on the international criminal court. Mr. Yamada and the Chairman would perhaps recall the lively discussions which had taken place during the seminar, which had been held in New Delhi in January 1995. The draft statute had also been discussed at some length at the latest session of the Committee, which had expressed appreciation of the draft articles as adopted by the Commission<sup>5</sup> and proposed to monitor closely the progress of the work of the Ad hoc Committee established by the General Assembly in resolution 49/53. The

secretariat of the Committee would continue to prepare notes and comments on substantive items considered by the Commission so as to assist the representatives of Committee's member States in the Sixth Committee in their deliberations on the report of the Commission at its forty-seventh session. An item entitled "The report on the work of the International Law Commission at its forty-seventh session" would then be considered by the Committee at its thirty-fifth session.

22. Presenting an overview of some of the substantive items considered at the thirty-fourth session of the Committee and of the current work programme of its secretariat, he said that an item entitled "United Nations Decade of International Law" had been on the agenda of the Committee since the adoption by the General Assembly of its resolution 44/23. The secretariat of the Committee was in the process of finalizing a summary of the Committee's activities aimed at the achievement of the objectives set for the third part of the United Nations Decade of International Law. The summary would be forwarded to the Legal Counsel of the United Nations.

23. At its thirty-fourth session, the Committee had also noted with satisfaction that the United Nations Convention on the Law of the Sea had entered into force on 10 November 1994. It had welcomed the establishment of the International Sea Bed Authority and the decision relating to the establishment of the International Tribunal for the Law of the Sea. The Committee had urged its member States to participate fully in the work of the International Sea Bed Authority in order to protect and safeguard the legitimate interests of the developing countries and to promote the principle of the common heritage of mankind. It had also reminded its member States that they should give consideration to the need for the adoption of a common policy and strategy for the interim period before commercial exploitation of the deep seabed became feasible and had called on its member States to take an evolutionary approach to the initial function of the Authority. The secretariat of the Committee would continue to cooperate with relevant international organizations in the fields of ocean and marine affairs and would endeavour to assist member States.

24. One of the most complex problems facing the Asian-African region was that of refugees and displaced persons. The Committee had examined the issues relating to the status and treatment of refugees. At its latest session, it had, in particular, examined the possibility of a framework for the establishment of a safety zone for displaced persons in their country of origin so as to provide safety and security for such persons in times of armed conflict. The Committee secretariat had drafted a model legislation on the status and treatment of refugees in the light of the codified principles of international law and the practice of States in the region. The model legislation had been transmitted to all member States for their comments prior to its consideration at the next annual session of the Committee. It should be noted that the secretariat of the Committee was working closely on that matter not only with UNHCR, but also with OAU.

25. In the field of international economic and trade relations, the Committee had, at its thirty-fourth session, urged its member States to consider the UNCITRAL

<sup>4</sup> Yearbook . . . 1994, vol. II (Part Two), p. 89, para. 222.

<sup>5</sup> Ibid., p. 26, para. 91.

Model Law on Procurement of Goods and Construction<sup>6</sup> when reforming or enacting their legislation on procurement. It had also called on member States to consider adopting, ratifying or acceding to other texts prepared by UNCITRAL. That recommendation, formulated by the Committee at its thirty-fourth session, had followed in the wake of an international seminar on globalization and harmonization of commercial and arbitration laws which the Committee secretariat had organized on the eve of the Committee's annual session with a view to standardizing commercial law and practices in the Afro-Asian region within the context of the ongoing liberalization of national economies.

26. As the members of the Commission were aware, ICJ would celebrate its fiftieth anniversary in April 1996. The secretariat of the Committee was proud to have been invited to organize a regional seminar to promote awareness of the Court's work in the Asian region as a part of the commemoration programme. The secretariat of the Committee also proposed to organize, in conjunction with the Court and UNITAR, an international seminar on the work and role of the Court. He invited the Chairman and other members of the Commission to take part in the seminar, which was to be held in November 1995.

27. In conclusion, on behalf of the Committee and on his own behalf, he invited the Chairman of the Commission to participate in the thirty-fifth session of the Committee to be held in 1996. After thanking the Commission for allowing him to address it, he said that he looked forward to even closer collaboration between the Committee and the Commission in the future.

28. Mr. VILLAGRÁN KRAMER said that he had been most happy to take part in the thirty-fourth session of the Asian-African Legal Consultative Committee held at Doha. The interest shown by the participants in topics under study by the Commission and other matters of international law dealt with elsewhere had been most striking. The fact that regional bodies such as the Committee were dealing with important issues of international law in a constructive and positive manner, with great seriousness and from many different angles, was to be welcomed.

29. He had also been struck by the fact that participants in the Committee's session had included not only legal specialists and lawyers, but also Ministers of Justice, members of prosecutor's offices and legal staff of Ministries of Justice. It was to be welcomed that the work of the Commission and the consideration of that work by the Sixth Committee were of interest not only to officials of Ministries of Foreign Affairs, but also to those of other ministries and departments, such as those of justice. The draft statute for an international criminal court, in particular, had aroused great interest among Ministers of Justice. It should be noted that ministers and the States they represented tended to approach the draft statute for an international criminal court from the point of view of the internal impact which the establishment of

such a court would have in practical terms and to think of the responsibilities they would have in such a case.

30. He also welcomed the fact that the Committee kept its member States informed of UNCITRAL activities and the model laws it drafted. There again, it was extremely encouraging that work carried out at the international level was being considered from the viewpoint of its practical application by States. The Commission could only welcome the fact that the Asian-African Legal Consultative Committee was considering the work of the Commission attentively and closely following the discussions on that work in the Sixth Committee.

31. Noting that his fellow Latin Americans and he were accustomed to thinking on a Latin American scale, just as North Americans tended to see things on the scale of the northern part of the American continent and Europeans on a European scale, he said that the Asian-African Legal Consultative Committee, composed as it was of countries from two of the world's major regions, contributed a viewpoint that was extremely original and enriching. Although it could not always be easy to deal with problems on so vast a scale, the Committee's work and activities were undeniably extremely fruitful and of excellent quality. In conclusion, he thanked Mr. Tang Chengyuan for his highly instructive statement.

32. Mr. KUSUMA-ATMADJA, speaking on behalf of the members of the Commission from Asian States, referred to the third and fourth sessions of the Asian-African Legal Consultative Committee which he had attended in Colombo in 1960 and Tokyo in 1961, respectively, and recalled that a former member of the Commission, namely, Francisco V. Garcia Amador, of Cuba, had attended the Committee's sessions even then.

33. Ever since that time, he had been impressed by the firm will of Asian and African lawyers to contribute to the progressive development and codification of international law. Well-known examples of such contributions by the Committee were to be found, in particular, in the areas of the law of the sea and the law of treaties.

34. After hearing the statement of the Secretary-General of the Committee, he was convinced that the tradition of cooperation between the two bodies would be maintained.

35. Mr. BOWETT, speaking on behalf of the members of the Commission from the Group of Western European and Other States, thanked the Secretary-General of the Asian-African Legal Consultative Committee for his statement. The Committee's activities were of considerable interest in view of the geographical importance of the region concerned and the scope of the views and practice of the countries represented. He therefore hoped that the Committee's work would continue with success and would be given the widest publicity.

36. Mr. KABATSI, speaking on behalf of the members of the Commission from African States, thanked the Secretary-General of the Asian-African Legal Consultative Committee and expressed his congratulations on his statement and his report, which had ranged over many important topics of international law, including those on the Commission's agenda.

<sup>6</sup> Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), annex I.

37. The Committee was an intergovernmental organization which was composed of 44 African and Asian countries and maintained close relations with the Commission. Each of the two bodies followed the other's work with close attention and sent a representative to its annual sessions. Moreover, the Committee's annual report, which described the viewpoints and practice of the States of the Asian-African region, was an important source of information on many topics of interest to the Commission.

38. Mr. LUKASHUK, speaking on behalf of the members of the Commission from Eastern European States, thanked the Asian-African Legal Consultative Committee for the work it was doing.

39. For many years, as President of the Institute of International Law of Kiev State University, he had received foreign students who had come principally from Asia and Africa and most of whom had been excellent.

40. Russia, which was located astride Europe and Asia, attached great importance to international law and was convinced that the role of international law would increase steadily in the future and that non-governmental and intergovernmental organizations would be called on to contribute more and more extensively to that common cause.

41. The CHAIRMAN welcomed the distinguished Secretary-General of the Asian-African Legal Consultative Committee to the Commission. After hearing his statement on the Committee's activities, he was convinced that cooperation between that body and the Commission would not only be maintained, but deepened.

42. Having participated in the work of the Committee as a member, he had been greatly impressed by the impetus and intellectual dynamism imparted to the Committee by its Secretary-General, as well as by the active participation of its members. He wished the Committee and its Secretary-General every success in their activities with a view to the codification and progressive development of international law.

**State responsibility (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>7</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)**

[Agenda item 3]

#### SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

43. Mr. ARANGIO-RUIZ (Special Rapporteur), introducing his seventh report on State responsibility (A/CN.4/469 and Add.1 and 2) and drawing attention to a correction, said that in paragraph 26 the words "contained in subparagraph (d)" should be amended to read "contained in subparagraphs (c) and (d)". With regard to the substance of the report, he explained that it had been his intention to distinguish between two sets of problems. The first was the determination of the special

or supplementary consequences that were or would be attached to international crimes of States, a problem he roughly characterized as merely normative. The second was the determination of the entity or entities that were or should be called upon to preside, in one manner or another, over the implementation of such legal consequences. That aspect of the problem could be described as institutional.

44. Both problems had emerged from his earlier reports and from the previous year's debate, when they had both been addressed, more or less generally, by members who opposed, as well as by those who favoured, the preservation of article 19 of part one of the draft.<sup>8</sup> It had also been generally agreed that both sets of problems presented a relatively high degree of progressive development or, in other words, that they involved *de lege ferenda* issues.

45. So far as the normative problem was concerned, he had tried to follow the same distinction with regard to crimes as that proposed for delicts between substantive consequences and instrumental ones, the former being cessation and the various forms of reparation and the latter consisting essentially of countermeasures. In both areas, he also distinguished between "special" and "supplementary" consequences of international crimes. Indeed, on the one hand, there was the question whether any of the consequences of internationally wrongful acts referred to in articles 6 to 14 extended to crimes and, if so, whether any such consequences should be modified by aggravating the position of the wrongdoing State and strengthening the position of injured States. That was what he meant, for want of a better term, by "special" consequences of crimes. The other question was whether any further consequences should be attached to crimes over and above those dealt with in articles 6 to 14. He would describe such consequences, again for want of a better term, as "supplementary". Examples of supplementary consequences were those given in draft article 18, as proposed and commented on in the seventh report.

46. By way of introduction to the regime of the consequences of crimes, he proposed article 15 in his seventh report, which read:

"Without prejudice [In addition] to the legal consequences entailed by an international delict under articles 6 to 14 of the present part, an international crime as defined in article 19 of part one entails the special or supplementary consequences set forth in articles 16 to 19 below."

He left it to the Drafting Committee, should the draft articles be referred to it, to choose between "Without prejudice" and "In addition" or, perhaps, to decide to say both ("Without prejudice and in addition . . .").

47. To begin with the substantive consequences, no adaptation seemed to be necessary in the case of the articles relating to the general rule of cessation and reparation in a broad sense (inclusive of restitution, compensation, satisfaction and guarantees of non-repetition). Those general obligations were incumbent in principle

<sup>7</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>8</sup> *Yearbook* . . . 1976, vol. II (Part Two), pp. 95 *et seq.*



on the perpetrators of a crime, as well as on those of a delict. The difference, in the case of such general obligations of principle, was that any crime injured all States, while only some delicts, namely, *erga omnes* delicts, injured all States. Those two general points should be consigned to an introductory paragraph in the article dealing with substantive consequences.

48. Article 16, paragraph 1, as proposed in the seventh report read:

“1. Where an internationally wrongful act of a State is an international crime, every State is entitled, subject to the condition set forth in paragraph 5 of article 19 below, to demand that the State which is committing or has committed the crime should cease its wrongful conduct and provide full reparation in conformity with articles 6 to 10 *bis*, as modified by paragraphs 2 and 3 below.”

49. An adaptation should, in his view, be envisaged with regard to some aspects of restitution in kind. It should relate to the two limitations to the wrongdoing State's obligation contained in article 7, subparagraphs (c) and (d).<sup>9</sup> Subparagraph (c) dealt with the limitation of “excessive onerousness” and subparagraph (d) with the “political independence and economic stability” safeguard.

50. With regard to the first of those points, he recalled that article 7, subparagraph (c), provided that the injured State would not be entitled to claim restitution in kind where that would involve “a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation”. Considering the *erga omnes* relationship resulting from a crime, most injured States would probably not derive any individual substantive benefit from compliance by the wrongdoing State with its obligation to make restitution. There would thus be little sense, if any, in comparing the situation of the wrongdoer, on the one hand, and that of one or a few injured States, on the other. The prevailing consideration should be that the wrongdoing State must restore to the fullest possible extent a situation the preservation of which was of essential interest—in conformity with the notion set forth in draft article 19 proposed in the seventh report—to the international community. That obligation could not be evaded even if a heavy burden was thus placed on the State which had jeopardized that situation by infringing fundamental rules of international law.

51. The removal of the “excessive onerousness” limitation should not, however, jeopardize the existence of the wrongdoing State as an independent member of the international community, its territorial integrity or the vital needs of its people. He nevertheless had some doubts about an absolute preservation of territorial integrity. Exceptions might have to be envisaged; and he suggested further reflection by the Commission and by himself.

52. The other provision to be reconsidered in its application to crimes was the limitation of the obligation of

restitution in kind contained in article 7, subparagraph (d), which was intended to safeguard the wrongdoing State's “political independence and economic stability”.

53. Referring to economic stability, he noted that it did not seem equitable that a State which had committed a crime should be able to deprive the direct victims of the breach and the entire international community of the right to full restitution on the ground that compliance would affect its economic stability. Such an excuse would be particularly odious where the “criminal” State had enhanced its economic prosperity by the very crime it had perpetrated. An example could be that of a State having drawn a major economic advantage, in the area of trade relations with other States, from a policy of exploitation of labour to the detriment of an ethnically, ideologically, religiously or socially differentiated part of its population in massive breach of obligations relating to fundamental human rights. Another example could be that of a colonial or quasi-colonial power enhancing its economic prosperity by pursuing a policy of ruthless exploitation of the resources and the population of a dependent territory. The wrongdoing State could not in such cases be relieved of the obligation to make restitution, that is to say to restore the original situation, by claiming that compliance with that obligation would have a substantial negative impact on its economic stability. The only appropriate excuse for limitation should be the need not to deprive the wrongdoing State's population of its vital necessities, whether physical or moral.

54. As far as “political independence” was concerned, a distinction should be drawn between political “independence” and political “regime”. The independence of a State or, in other words, its existence as a distinct sovereign entity was surely one thing and the so-called “freedom of organization” which every sovereign State was entitled to enjoy in the choice of its government was another. While he could agree that independent statehood would have to be preserved, together with territorial integrity, subject to the doubts he had expressed earlier, even at the price of relieving a “criminal” State, totally or in part, from the obligation of restitution, the same might not be true for the regime of that State. Especially in the case of aggression, which was often perpetrated by despotic Governments, it was far from sure, in his view, that the obligation to provide full restitution could be limited simply because compliance with it could jeopardize the continued existence of a condemnable regime. Neither should it be overlooked that the continued existence of a condemnable regime would not be compatible with restitution or with the wrongdoing State's obligations in cases of crimes relating to self-determination, decolonization or human rights. The preservation of a regime responsible for serious breaches of essential international obligations in that respect could not constitute ground for limiting the obligation of restitution.

55. He said that in the report he had given some examples of demands of restitution in kind which States responsible for the breach of fundamental rules relating to self-determination and racial discrimination could not evade by alleging “excessive onerousness” or “prejudice to economic stability”.

<sup>9</sup> For the text of articles 1 to 6, 6 *bis*, 7, 8, 10 and 10 *bis* of part two, provisionally adopted by the Commission at its forty-fifth session, see *Yearbook . . . 1993*, vol. II (Part Two), pp. 53 *et seq.*



56. He had thus been led to conclude that the limitation of the obligation of restitution contained in article 7, subparagraphs (c) and (d), should not be applicable in the case of a crime unless full compliance with that obligation would put in jeopardy either the existence of the wrongdoing State as a sovereign and independent member of the international community, or its territorial integrity (always with the above-mentioned reservation), or the vital needs of its population. The term “needs” was used by him in a broad sense to cover essential requirements of both a physical and a moral nature. The relevant proposed provision was to be found in draft article 16, paragraph 2.

57. Unlike restitution in kind, compensation under article 8 needed no adaptation to the crime hypothesis. For a crime, as well as for a delict, the amount due from the wrongdoing State could, in principle, be neither more nor less than full compensation.

58. Special treatment seemed instead to be called for with regard to the wrongdoing State’s obligation to give satisfaction and guarantees of non-repetition. A significant adaptation seemed indeed to be required in article 10, paragraph 3, which ruled out any demands of satisfaction that would impair the dignity of the wrongdoing State. Such a limitation would be utterly inappropriate in the case of a crime. Although article 10 *bis* (Assurances and guarantees of non-repetition) did not contain the same limitation, he took the view that the close interrelationship between that remedy and satisfaction would have justified a similar treatment from the viewpoint of the “dignity” limitation. Be that as it might so far as delicts were concerned, he would be inclined to treat both remedies in the same way in the case of crimes. Guarantees of non-repetition frequently appeared to be identical with certain forms of satisfaction. Thus, like demands of satisfaction in a narrow sense, demands of guarantees of non-repetition should not be subject to the “dignity” limitation. A wrongdoing State responsible for a crime could not escape its obligations by invoking respect for a dignity it had itself offended.

59. However, the “dignity” proviso seemed to be much too vague not to call for some specification with regard to the hypothesis of satisfaction and guarantees of non-repetition to be provided by the perpetrator of a crime. Although the concept of “dignity” seemed to be appropriate in the case of delicts, where the forms of satisfaction or guarantees usually claimed were of an essentially formal or symbolic nature, it appeared inappropriate in the case of crimes. The demands of satisfaction and guarantees to be addressed to the author of a crime would presumably be so substantial as to affect more sensitive areas than merely the wrongdoing State’s “dignity”, such as its sovereignty, independence, domestic jurisdiction and liberty. It followed that the exclusion of the mitigating effect should be extended, for the case of crimes, to any more substantial attributes or prerogatives of a State, other than mere dignity, that the wrongdoing State might be tempted to invoke in order to protect itself from demands it should not be permitted to resist. The formula to be adopted should therefore provide that the author of an international crime should be deprived not only of the benefit of any limitations deriving from articles 10 or 10 *bis*, the latter, perhaps, to be revised so

as to extend the “dignity” proviso to the guarantees of non-repetition, but also of the benefit of any further limitations which might derive, in its favour, from any rules or principles of international law relating to the protection of its sovereignty, domestic jurisdiction or liberty. Such greater severity should not, however, go so far as to affect the preservation of the wrongdoing State’s existence as a State, the vital needs of its people or—again, perhaps with some provisos—its territorial integrity.

60. The text of draft article 16, paragraph 3, as proposed in the seventh report read:

“3. Subject to the preservation of its existence as an independent member of the international community and to the safeguarding of its territorial integrity and the vital needs of its people, a State which has committed an international crime is not entitled to benefit from any limitations of its obligation to provide satisfaction and guarantees of non-repetition as envisaged in articles 10 and 10 *bis*, relating to the respect of its dignity, or from any rules or principles of international law relating to the protection of its sovereignty and liberty.”

61. He said that in the seventh report, he had cited certain types of demands that a “criminal” State could face, subject to the previously mentioned provisos, by way of satisfaction or guarantees of non-repetition and the report contained some tentative illustrations corresponding to the four kinds of crimes envisaged in subparagraphs 3 (a) to 3 (d) of article 19 of part one.<sup>10</sup>

62. Turning to the instrumental consequences of crimes, he stressed that, regardless of any specific provisions, those consequences were obviously aggravated by the fact that, in any case of a crime, all States were entitled to react by adopting countermeasures. Combined with the aggravations of substantive consequences dealt with in article 7, subparagraphs (c) and (d), and article 10, paragraph 3 (extended to article 10 *bis*), and also with the “hue and cry” effect of the condemnation which, it was hoped, would follow a crime, that numerical factor quite considerably increased the weight of the countermeasures which a “criminal” State could expect. As in the case of substantive consequences, the article dealing with countermeasures against crimes should open with a *chapeau* paragraph echoing the general provision on countermeasures laid down in article 11.<sup>11</sup> That *chapeau* paragraph would be paragraph 1 of draft article 17 proposed in the seventh report. The fact that it was modelled on article 11 as originally proposed was not due to any wish on his part to see his point of view prevail at any price, but, rather, to the hope that the wording of article 11, as worked out by the Drafting Committee, could be reviewed taking into account the impact of the specificity of crimes on such elements as the “response” of the wrongdoing State and, more particularly, the function of countermeasures.

<sup>10</sup> See footnote 8 above.

<sup>11</sup> For the text of articles 11, 13 and 14 of part two provisionally adopted by the Commission at its forty-sixth session, see *Yearbook* ... 1994, vol. II (Part Two), pp. 151-152, para. 352 and footnote 454.

63. The adaptation to crimes of the provisions of article 12 should not give rise to any serious difficulties. However, the gravity of crimes would justify the setting aside, in principle, of the requirements of prior summation or prior resort to available means of dispute settlement. Once the existence/attribution of a crime had been ascertained by the proposed procedure, the absence of "adequate response" should suffice to justify a recourse to countermeasures. Considering that no prior recourse to third-party settlement was to be required, there seemed to be no reason to extend to reactions to crimes a provision such as that contained in revised article 12, paragraph 2 (a), as proposed by the Special Rapporteur,<sup>12</sup> a provision which left open the possibility for the injured State to resort to urgent, temporary measures as required to protect the rights of the injured State or limit the damage caused by an internationally wrongful act even before resorting to the available dispute settlement procedure. The issue did not arise in the present context, bearing in mind that the condition of prior resort to dispute settlement procedures would not apply in the case of a crime. A problem did arise, however, with regard to the requirement of a prior pronouncement by an international body as a prerequisite for lawful reaction on the part of any one of the States injured by a crime. It seemed reasonable to say that, although, prior to such pronouncement, the *omnes* States injured by a crime were not entitled to resort to full countermeasures, they were nevertheless entitled to resort to such urgent interim measures as were required to protect their rights or limit the damage caused by the crime. He was referring in particular to measures aimed at securing immediate access to the victims for purposes of rescue and/or aid or preventing the continuation of a genocide, measures concerning humanitarian convoys, anti-pollution, passage facilities, and so on. The corresponding provision contained in draft article 17, paragraph 2, read:

"2. The condition set forth in paragraph 5 of article 19 below does not apply to such urgent, interim measures as are required to protect the rights of an injured State or to limit the damage caused by the international crime."

64. However, the option of unilaterally resorting to countermeasures should obviously be ruled out altogether in cases where the allegedly wrongdoing State submitted the matter to the binding third party adjudication procedure to be envisaged in part three. The relevant text was that proposed in the seventh report for article 7 of part three, which read:

"1. Any dispute which may arise between any States with respect to the legal consequences of a crime under articles 6 to 19 of part two shall be settled by arbitration on either party's proposal.

"2. Failing referral of the dispute to an arbitral tribunal within four months from either party's proposal, the dispute shall be referred unilaterally, by either party, to the International Court of Justice.

"3. The competence of the Court shall extend to any issues of fact or law under the present articles other than the question of existence and attribution previously decided under article 19 of part two."

65. Once an arbitral procedure or ICJ proceedings had been initiated (as provided in draft article 7 of part three) any measures would have to be subjected to the arbitral tribunal's or the Court's control. As to the article 12 requirement of timely communication, it did not seem that it should apply in the case of a crime, except perhaps in relation to particularly severe measures which might have adverse consequences for the wrongdoing State's population. Otherwise, a State which had committed or was committing a wrongful act of the degree of gravity of the crimes listed in article 19 of part one, presumably involving a measure of wilful intent, should not be entitled to a warning that might reduce the effectiveness of the countermeasures. Since any special form of reaction to a crime on the part of individual States or groups of States would in any case be preceded by open debates within one or more international bodies, it was unlikely that a wrongdoing State might be unaware of the possibility that injured States could resort to countermeasures.

66. As explained in the report, there seemed to be a problem with the requirement of proportionality as set out in article 13 because proportionality was to be measured, under that article, not only in relation to "the gravity of the internationally wrongful act", but also to "the effects thereof on the injured State". The second parameter, that of effects on the injured State, unduly emphasized—and that was also true, in his view, of delicts—only one of the aspects of the wrongful act's gravity to the detriment of other, no less important aspects listed in the report. To that general shortcoming of the existing wording of article 13, as provisionally adopted by the Commission at its forty-sixth session, should be added the even more serious difficulty of relying on the "effects ... on the injured State" in order to assess the gravity of a wrongful act which, as was the case with a crime, affected all States, possibly in a number of different ways, particularly where the crime consisted of massive violations of fundamental human rights or self-determination. That consideration should, in his view, lead to the deletion of the reference to "effects", not only for crimes, but also for delicts. In addition to the impropriety of stressing one element of gravity to the detriment of other equally relevant factors, delicts, if they were *erga omnes* breaches, could also affect all States. That was also the case with violations of human rights and self-determination, where the breach caused no direct damage to the legally injured States. Among the factors mentioned in the report, that of the element of fault, which so far had been too neglected by the Commission, acquired particular importance in the case of crimes. The relevant provision, draft article 17, paragraph 3, in which the "effects" element had been omitted, read:

"3. The requirement of proportionality set forth in article 13 shall apply to countermeasures taken by any State so that such measures shall not be out of proportion to the gravity of the international crime."

<sup>12</sup> *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/461 and Add.1-3, chap. I, sect. D.

67. No adaptation seemed to be necessary in connection with the prohibitions contained in article 14, subparagraphs (a) and (b), as provisionally adopted by the Commission at its forty-sixth session. It had only to be made clear, as was done by draft article 20, proposed in the seventh report, that the prohibitions on the threat or use of force and extreme economic or political measures did not apply either to forcible measures decided on by the Security Council under Chapter VII, or to self-defence under Article 51, of the Charter of the United Nations. The prohibitions set forth in article 14, subparagraphs (c), (d) and (e) (maintenance of diplomatic and consular relations, basic human rights and peremptory norms of general international law), were equally applicable to crimes because of the importance of the "protected objects" and despite the gravity of the crimes. That reduction in the weight of countermeasures was counterbalanced by the weight of measures such as those listed in Article 41 of the Charter, not to mention the moral weight represented by the condemnation to which the "criminal" State would be subjected by the mere fact of being accused of a crime and eventually found guilty through the institutional procedure that should be envisaged for the purpose. Lastly article 14 needed no adaptation in order to be applicable to crimes.

68. The "normative" part of the report ended with a consideration of what might be called the "supplementary" legal consequences of crimes. Those consequences included, first of all, a number of obligations additional to those relating to the reaction to delicts, which were incumbent on all injured States. Those additional obligations were laid down in draft article 18, paragraphs 1 (a) to 1 (g) as proposed in the seventh report. The other supplementary consequences included, in particular, the obligation imposed on the wrongdoing State, once it had been found to be in breach through the relevant institutional procedure, not to oppose fact-finding operations or observer missions in its territory for the verification of compliance with the obligations of cessation and reparation. That point was covered by draft article 18, paragraph 2.

69. With regard to the "institutional" aspect of the legal consequences of international crimes of States, he recalled that the question of the role of international institutions had been dealt with in his fifth report<sup>13</sup> and its importance had been acknowledged by almost all members of the Commission in the course of the debate at the preceding session. Clearly the question was not whether any institutions should be involved, but, rather, how deeply they should be involved, which of the existing institutions should be involved and whether any new institution should be envisaged for that indispensable task.

70. The theoretically conceivable degrees of institutional involvement were briefly identified in the report, while a number of instances of "organized" reactions by the General Assembly and the Security Council to grave breaches of international obligations were described from a more realistic point of view. In the report, it was expressly stated that, in referring to any such instances, he had deliberately left aside both the merits of

the United Nations reactions in each particular case and the precise legal qualification of each case from the viewpoint of State responsibility. Apart from the fact that the only bodies involved had been political organs, the relevant resolutions had not been intended by the General Assembly or by the Security Council as specific reactions to breaches of the kind defined as crimes in article 19 of part one; in any case, he had not seen those instances in that light.

71. With regard to the extent to which institutions should be involved, it could not in theory be excluded that, as envisaged in the report, a future convention on State responsibility might entrust to international bodies the whole range of decisions and actions necessary for the implementation of the legal consequences of crimes. That option seemed, however, far less likely to materialize in the foreseeable future than the second hypothesis, according to which the role of international institutions would be confined to the crucial aspect of determining the existence of an international crime and its attribution to one or several States. There had been a high degree of consensus at the preceding session that such a determination would be the minimum that was indispensable for avoiding arbitrary or discordant determinations and consequent conflicts among all States injured by an alleged crime. Several solutions could be envisaged to achieve that end.

72. The possibility of entrusting the determination in question solely to one of the principal organs of the United Nations—ICJ, the General Assembly or the Security Council—was explored in the report.

73. Considering the eminently legal nature of the issue, ICJ was the first organ that came to mind. It was endowed with the necessary technical capacity, it was reasonably representative and it was not only duty bound, but also used to motivating its pronouncements in fact and law. Nevertheless, a pronouncement of the Court alone could not be envisaged for at least two reasons. One was the absence of a public prosecutor institution side by side with the Court. Given the fact that cases would be brought by States before the Court, there would thus be no way of "screening" or "filtering" out accusations that were not sufficiently substantiated. Secondly, once the Court had been provided *ipso facto* with compulsory jurisdiction over issues involving crimes, it would be very difficult, if not impossible, to prevent any State from bringing to the Court any other issues of State responsibility, even if they involved mere delicts.

74. The second theoretically possible choice, for the reasons indicated in the report, would be the General Assembly. Those reasons were, first, the Assembly's relatively more representative character and, secondly, the broad scope of its competence *ratione materiae*, encompassing all the areas of international relations and law within the scope of which the four kinds of breaches contemplated in article 19, paragraph 3, of part one could fall. However, that solution too had certain drawbacks and, in particular, the fact that the Assembly had no power to make binding legal determinations in the area of State responsibility.

75. A third possible choice would be the Security Council. In addition to positive features, such as the

<sup>13</sup> Yearbook . . . 1993, vol. II (Part One), document A/CN.4/453 and Add.1-3.

Council's power to take binding decisions, although only in the area of international peace and security, such a solution would have a number of negative ones, namely, the Council's non-representative nature, its lack of competence in most of the four essential areas referred to in article 19, paragraph 3, of part one, and, above all, as was also the case with the General Assembly, the lack of power and technical capacity to deal with legal issues of State responsibility. The Council's function was to watch over the maintenance of international peace and security by making recommendations for the settlement of disputes or situations within the framework of Chapter VI of the Charter of the United Nations and by adopting recommendations or decisions in situations covered by Article 39 of the Charter and to do so while respecting all the relevant provisions therein. It was not the function of the Council to implement the law of State responsibility, whether for delicts or for crimes.

76. Apart from the specific features of the General Assembly or the Security Council, neither body could, alone, perform the function in question because of its essentially political nature.

77. The consequences of that basic fact were listed in the report, which drew attention to the difficulty of assuming that any competence in the area of State responsibility might have been acquired by the Security Council by virtue of its own practice. The same applied to the General Assembly. In either case, careful note should be taken, *inter alia*, of the comment made by the Swiss Government in connection with a well-known problem arising within the framework of the draft Code of Crimes Against the Peace and Security of Mankind. The Swiss Government pointed out that to suggest that decisions of the Security Council, a political organ if ever there was one, should serve as a direct basis for national courts when they were called upon to establish individual culpability and determine the severity of the penalty did not seem to be in keeping with a sound conception of justice.<sup>14</sup>

78. The only way to circumvent the respective inadequacies of each of the three principal organs would be to combine their political and judicial capabilities in such a manner as to achieve a satisfactory or at least a less unsatisfactory solution. Such a composite political/judicial determination of the existence/attribution of a crime was proposed in draft article 19, paragraphs 1, 2, 3 and 5, as contained in the seventh report. The provisions in question read:

"1. Any State Member of the United Nations Party to the present Convention claiming that an international crime has been or is being committed by one or more States shall bring the matter to the attention of the General Assembly or the Security Council of the United Nations in accordance with Chapter VI of the Charter of the United Nations.

"2. If the General Assembly or the Security Council resolves by a qualified majority of the members present and voting that the allegation is sufficiently substantiated as to justify the grave concern of the international community, any State Member of the United Nations Party to the present Convention, in-

cluding the State against which the claim is made, may bring the matter to the International Court of Justice by unilateral application for the Court to decide by a judgment whether the alleged international crime has been or is being committed by the accused State.

"3. The qualified majority referred to in the preceding paragraph shall be, in the General Assembly, a two-thirds majority of the members present and voting, and in the Security Council, nine members present and voting including permanent members, provided that any members directly concerned shall abstain from voting.

...

"5. A decision of the International Court of Justice that an international crime has been or is being committed shall fulfil the condition for the implementation, by any State Member of the United Nations Party to the present Convention, of the special or supplementary legal consequences of international crimes of States as contemplated in articles 16, 17 and 18 of the present part."

79. Some important issues arose from the crucial role of international institutions. One was whether the ICJ pronouncement ought not to be an advisory opinion rather than a judgment. The reasons for which he preferred the solution involving a judgment were explained in the report.

80. Another important question was what should be the legal answer if a case were brought before ICJ not on the basis of the jurisdictional link created by a future convention on State responsibility, but on that of the relevant provisions of such instruments as the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, all of which, with the possible exception of the International Convention on the Suppression and Punishment of the Crime of Apartheid, envisaged the compulsory jurisdiction of the Court, namely, jurisdiction involving the possibility of unilateral application. The issues arising in such a case were given in the report and answers were offered. The relevant provision was draft article 19, paragraph 4, which read:

"4. In any case where the International Court of Justice is exercising its competence in a dispute between two or more States Members of the United Nations Parties to the present Convention, on the basis of a title of jurisdiction other than paragraph 2 of the present article, with regard to the existence of an international crime of State, any other State Member of the United Nations which is a party to the present Convention shall be entitled to join, by unilateral application, the proceedings of the Court for the purpose of paragraph 5 of the present article."

81. By way of conclusion, the seventh report addressed three points which he considered very important. The

<sup>14</sup> Ibid., document A/CN.4/448 and Add.1.

first was a brief recapitulation of the arguments for and against dealing with the consequences of the wrongful acts singled out as international crimes of States in article 19 of part one. In that respect, the examples of breaches of essential international obligations contained in the report indicated with sufficient clarity that the wrongful acts in question were generally viewed as: (a) infringing *erga omnes* rules of international law, possibly of *jus cogens*; (b) being injurious to all States; (c) justifying a generalized demand for cessation/reparation; and (d) possibly justifying a generalized reaction in one form or another on the part of States or international bodies. It would therefore seem highly appropriate that something should be done by the Commission in order to bring such reaction under some measure of specific legal control within the draft on State responsibility.

82. Article 19 of part one represented a preliminary step in that direction. A second step had been accomplished with the provisional adoption of article 5 of part two,<sup>15</sup> which entitled all States to demand cessation/reparation and possibly to resort to counter-measures.

83. At present, draft articles 15 to 20 as they appeared in the report laid down the rules he deemed indispensable in order to specify the conditions, modalities and limits of the said generalized reaction. Those articles were meant to provide the legal control of that reaction within the framework of the law of State responsibility to which the matter properly belonged.

84. The other points made in the concluding remarks in the seventh report concerned two of the most essential features of the “institutional” aspect of the solution he was proposing. The first essential feature was that, for the reasons given in the report, the proposed two-phased procedure did not involve any modification of the two main existing instruments of international organization, namely, the Charter of the United Nations and the Statute of ICJ.

85. The second essential feature concerned the relationship of the proposed solution with the collective security system embodied in the Charter. On the one hand, there was the political role performed under the Charter by the Security Council and the General Assembly—especially by the former—with regard to the maintenance of international peace and security. On the other hand, there would be the role entrusted by the convention to either of those political organs and, more decisively, in view of the subject-matter, to ICJ. The preliminary political evaluation by the Assembly or the Council of the seriousness of the claims brought by the accusing State or States and the judicial pronouncement by the Court—seized unilaterally by the accusers or the accused—were the condition *sine qua non* of the implementation by States of the legal consequences of an international crime.

86. As explained in the report, in the area of security, where discretionary power, although not unlimited, and urgency of action were the primary considerations, the decision would ultimately rest solely with the Security

Council in its restricted membership. But in the area of State responsibility for very serious breaches of international obligations, where the judicial application of the law was primary, the decision, prior to that of the *omnes* States themselves, had to rest ultimately with ICJ. Absolute impartiality was obviously unattainable. But a relatively high degree of impartiality could be expected—in so far as a preliminary political pronouncement was concerned—from the General Assembly because of the two-thirds majority requirement and from the Council because of the mandatory abstention of the parties in the dispute. Indeed, the area pertained, of course, to Chapter VI and not to Chapter VII of the Charter. There was no need, before a gathering of lawyers, to stress the importance of that distinction.

87. The proposed regime of responsibility for international crimes of States should not, on the other hand, be any obstacle to the exercise, by the United Nations, of its functions relating to the maintenance of international peace and security. It was in view of this essential requirement that the powers of the Security Council in the maintenance of international peace and security, as well as the right of States to self-defence under Article 51 of the Charter, were preserved by the express provision of draft article 20 as contained in the seventh report.

88. He believed it was essential to stress, however, that the provision of draft article 20, as he had proposed, was not the same as article 4 of part two, as adopted by the Commission.<sup>16</sup> Article 4, as adopted, was so formulated as to bring about an inappropriate subordination of the articles on State responsibility to the “provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security”, particularly to the decisions of a political body such as the Security Council. The maintenance of such a provision would thus strike a serious blow to the rule of law in the relations among States, any international legal rights of a State becoming subject to overriding determinations of political bodies. He stressed that his reservations on the subject of article 4, which were stronger than Mr. Bowett seemed to think in his recent article,<sup>17</sup> had been expressed repeatedly since 1992, as was reiterated in the seventh report.

89. The distinction between the *law of collective security* and the *law of State responsibility* was of the greatest importance for the very survival of the law of State responsibility. It was firmly established *de lege lata* and had to be preserved *de lege ferenda*. Respect for that distinction depended in no small measure not only on the validity and effectiveness of the law of State responsibility, but also on the proper functioning and the credibility of what was known, for want of a better term, as the “organized international community”. The Commission would be ill advised if it failed to take due account of the distinction in its draft on State responsibility and to bring it fully to the attention of the General Assembly.

*The meeting rose at 12.05 p.m.*

<sup>16</sup> Ibid.

<sup>17</sup> D. Bowett, “The impact of Security Council decisions on dispute settlement procedures”, *European Journal of International Law*, vol. 5, No. 1 (1994), p. 89.

<sup>15</sup> For the text of articles 1 to 5 of part two provisionally adopted by the Commission at its thirty-seventh session, see *Yearbook*... 1985, vol. II (Part Two), pp. 24-25.

## 2392nd MEETING

Wednesday, 31 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

**Present:** Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (continued) (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)**

[Agenda item 3]

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

1. The CHAIRMAN invited the Commission to continue its consideration of the seventh report on State responsibility (A/CN.4/469 and Add.1 and 2) and asked whether members required any clarification of the introduction of the report by the Special Rapporteur at the previous meeting.

2. Mr. IDRIS said that, since the Special Rapporteur clearly attached importance to the obligation of the State which has committed a crime not to oppose fact-finding operations, perhaps the issue should have been included under "Substantive consequences" rather than under "Other consequences of crimes".

3. Mr. ARANGIO-RUIZ (Special Rapporteur) said that under "Other consequences of crimes" he had meant to assemble all those consequences which did not belong definitely to one of the other two categories. In fact, the obligation in question straddled the demarcation line between substantive and instrumental consequences and he had therefore included it under "Other consequences".

4. Mr. ROSENSTOCK said that the Special Rapporteur was a friend and mentor and had been for many years. It was therefore with regret that he had to record his basic disagreement with what was proposed in the seventh report. In his view, the entire scheme set forth in the report was based on a false premise as reflected in article 19 of part one<sup>2</sup> and on the neologism "crimes of States". The scheme was, even if not based on a false

premise, flawed and unnecessary and likely to be "virtually unacceptable to the 185 members of the General Assembly. It was one thing to be forward-looking, but another to be unrealistic. The Special Rapporteur had ignored the warning signs of the divisive debate on article 19 of part one which had taken place in 1994<sup>3</sup> and had included in his report a defence of article 19. Personally, he was not convinced by that defence. The notion embodied in article 19 of part one was not supported by State practice. One could perhaps find a basis for a continuum, ranging from minor breaches to very serious breaches affecting the international community as a whole, or even conceive of some qualitative distinction based on the effect on that community—but not if the term "crime", resonant as it was of domestic law, was used.

5. Furthermore, it was no answer to the relevance of the maxim *societas delinquere non potest* to cite the case of private companies found guilty of crimes under domestic law. Quite apart from the problem of punishing a people rather than its leaders, the analogy between private corporations and States was extremely tenuous. What was more, the existence of a domestic criminal law system of prosecution and enforcement merely served to underline the distance that would have to be travelled before the "criminal" responsibility of States, in any formal sense of the term, were to be viable—assuming that it was a good idea, which, in his view, it was not.

6. The suggestion that article 5 of the draft Code of Crimes against the Peace and Security of Mankind, entitled "Responsibility of States",<sup>4</sup> implied the criminal responsibility of States was not only unconvincing but little short of disingenuous. If anything, article 5 pointed to a distinction between the criminal responsibility of individuals and the civil responsibility of the State. The Special Rapporteur also failed to say why he had ignored Mr. Vereshchetin's wise advice in 1994 that the matter of article 19 of part one and its possible consequences should be deferred until the second reading, when both could be evaluated together. As Mr. Vereshchetin had further noted, that would have the advantage of enabling the Commission to complete the first reading of the draft in the current quinquennium.<sup>5</sup> It was clear that since article 19 proclaimed, for no apparent reason, that States could not treat crimes as delicts even if they wished to, an express decision would be required if Mr. Vereshchetin's suggestion was to be followed.

7. The report made no mention of the adverse effect on *erga omnes* obligations in general of the creation of a class of *erga omnes* violations which merited special treatment. In that connection, the energy and scholarship which had gone into the seventh report could perhaps have been more productively used to address the problem of directly and indirectly affected States—an approach that might have provided a better response to the problem of *erga omnes* situations in general, without creating insurmountable problems of the kind created by

<sup>3</sup> *Yearbook* . . . 1994, vol. II (Part Two), paras. 230-346.

<sup>4</sup> For the text of the draft articles provisionally adopted on first reading by the Commission at its forty-third session, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 94-97.

<sup>5</sup> See *Yearbook* . . . 1994, vol. I, 2348th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> See 2391st meeting, footnote 8.



the scheme set forth in the seventh report. If there was some basis for retaining provisions that responded to the curious notion of “crimes” by States, some of the provisions of article 18 of part two, as proposed by the Special Rapporteur in his seventh report, could perhaps be added.

8. One question that repeatedly came to mind was whether, notwithstanding the terms of article 19, there really were sufficient extremely grave *erga omnes* situations or “crimes” that did not involve a threat to the peace. Having regard to precedents such as those provided by Security Council action with respect to South Africa, Rhodesia, Somalia and Rwanda, and by some of the resolutions relating to human rights aspects of the Iraqi and Yugoslav situations, he for one believed that virtually all of what could conceivably be accepted as extremely grave *erga omnes* violations—or “crimes”—involved threats to the peace, if not acts of aggression. To the extent that that was true, there was already a system in existence and it was beginning to work. There might, in fact, be no need for a grandiose new scheme even if an acceptable form for such a scheme could be designed. The Special Rapporteur’s proposed scheme would not, however, be acceptable even if its defects were remedied, for the problems were systemic.

9. As to specific aspects of the report, the Special Rapporteur’s proposed adjustments to articles 7 and 10 of part two<sup>6</sup> would not be inappropriate if it was decided to have a category of “crimes”, but they certainly did not justify the existence of such a category. A somewhat more creative reading of article 10 (Satisfaction), paragraph 2 (c), and bearing in mind that article 13 (Proportionality)<sup>7</sup> would operate as a limitation, might be a simpler way of meeting the needs. It might even have been worth exploring the possibility of exemplary damages in the context of the conduct that some would designate as “crimes”. The S.S. ‘*I’m Alone*’ case<sup>8</sup> could be regarded as a platform for any such approach. Some progressive development along those lines would seem to be more promising than the quantum leap proposed.

10. Whether or not the notion of “crimes” was retained, consideration could, for example, be given to introducing a phrase such as “subject to the gravity and breadth of the effect of the wrongful act” in order to lessen the constraint imposed by article 10, paragraph 3.

11. The examples of past action by the Security Council cited in the report were interesting in that they established that, in the case of truly serious situations of wrongful conduct by States, there was an existing and effective mechanism. They were not, however, as the Special Rapporteur stated, theoretically conceivable measures but real life examples of action which negated the need to invent a new system.

12. The Special Rapporteur stated that one of the main characteristics of the instrumental consequences of “crimes” was that the option of resort to countermeasures extended to all States. Did that not, however, apply to all *erga omnes* violations and were not all States injured States in the case of an *erga omnes* violation? That, together with the availability of means to deal with situations that constituted threats to the peace, seemed to strip the Special Rapporteur’s conclusion—that the factors he cited justified the creation of a special category of wrongful acts and the designation of that category as “crimes”—of its compelling force.

13. The Special Rapporteur’s reference to article 11 as having been “tentatively” adopted was misleading, since it had in fact been provisionally adopted in plenary, like all the other articles.<sup>9</sup> His reference to a version of article 12 that had been twice rejected by the Drafting Committee was also curious. His suggestion that the words “the effects . . . on the injured State” should be deleted from article 13 seemed inadvisable, since it was essential to include that concept in calculating the acceptable level of countermeasures. There were also precedents which supported the existence of that concept, such as the case concerning the *Air Service Agreement*.<sup>10</sup> There were, of course, no precedents concerning “crimes” because there was no State practice in that respect, the neologism having been invented only relatively recently. Quite apart from the lack of precedent, which in itself indicated a dearth of interest on the part of States, the Special Rapporteur’s arguments were unconvincing. At one point, he stated that to single out the effects on the injured State was to denigrate the many other factors. At another point, he seemed to suggest that the effect on the injured State was an invalid criterion. At all events, if a category of “crimes” was accepted, article 13 as drafted and provisionally adopted remained necessary so far as delicts were concerned.

14. The Special Rapporteur’s apparent failure to deal with article 14, subparagraph (b),<sup>11</sup> in the context of “crimes” seemed odd. To allow that provision to stand was tantamount to suggesting that State A could apply extreme economic or political coercion on State B but that, in addition to the valid requirement of proportionality under article 13, State B was barred from responding proportionally. That was strange in the case of delicts but even stranger in the case of “crimes”, if indeed such a category was retained.

15. Draft articles 17 and 18, as proposed by the Special Rapporteur in his seventh report, contained various additional consequences, some of which also seemed distinctly odd. Article 18, paragraph 1 (e) for example, imposed an obligation on the part of the victim State as well as on the wrongdoing State to extradite or prosecute. No reason was given for the inclusion of such a notion. It seemed to be a fugitive from the draft Code of Crimes against the Peace and Security of Mankind.

<sup>6</sup> See 2391st meeting, footnote 9.

<sup>7</sup> Ibid., footnote 11.

<sup>8</sup> Decisions of 30 June 1933 and 5 January 1935 (Canada v. United States of America) (United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1609 *et seq.*, in particular, p. 1611).

<sup>9</sup> See 2391st meeting, footnote 11.

<sup>10</sup> *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 417 *et seq.*).

<sup>11</sup> See 2391st meeting, footnote 11.



16. The provisions proposed for article 18, paragraph 1, subparagraphs (a), (b) and possibly (c), raised the question why they should not apply to delicts as well. The effect of including a reference to them in the opening clause of the article was to rule out even the most serious delicts. That, at least, seemed to call for an explanation.

17. The Special Rapporteur, who was to be commended on the imaginative sweep and personal commitment behind his grand scheme, had recognized that empowering States to accuse one another of crimes and to take drastic action was a dangerous game. Very understandably, he had sought to invent a system to contain what he had created. The question, however, was whether it made sense to empower all States equally or whether there should be a differentiation between those directly affected and others. In that connection, it might be worth considering whether such a scheme was necessary if it were recognized that any wrongful acts worth categorizing as the most serious breaches were those that constituted threats to the peace. After all, a functioning mechanism did exist to deal with such problems.

18. The Special Rapporteur's proposed scheme raised numerous problems and, in particular, seemed to be inconsistent with, *inter alia*, Articles 12, 24, 27 and 39 of the Charter of the United Nations. However, to point out possible defects in the scheme was in no way to suggest that curing those defects would make the scheme acceptable.

19. The inconsistency with Article 12 of the Charter, already apparent from the wording of draft articles 18 and 19, was brought out unmistakably by the statement in the report that accusing States under paragraph 1 of draft article 19, as proposed, may seize either the General Assembly or the Security Council or both at the same time. That would create precisely the situation that Article 12 of the Charter was designed to prevent, namely, a potential conflict between the Assembly and the Council. The somewhat glib comment that "any divergence between the Assembly and the Council would be settled by the Court's judgement" hardly resolved the constitutional crises so blithely facilitated. The casual reference to ICJ seemed to ignore at least the spirit of the decision taken at San Francisco not to provide for some form of de facto judicial review of actions taken by the political organs of the United Nations. There were some who seemed committed, no matter what, to seeing the Court as the answer to all problems: they had been referred to as "judicial romantics".

20. Article 24 of the Charter, whereby Members were required to "confer on the Security Council primary responsibility for the maintenance of international peace and security" was also ignored by the Special Rapporteur.

21. Draft article 19 provided that the members should bring a claim to the attention of the Security Council under Chapter VI of the Charter, whereas it could reasonably be assumed that most, if not all, "crimes" by States would involve threats to the peace, and therefore be a matter for Chapter VII of the Charter. It was intriguing to imagine a convention on State responsibility that, by some alchemy, would transport Article 39 of the Charter

from Chapter VII to Chapter VI; if the alchemy was not effective, the last phrase of draft article 19, paragraph 3, would be contrary to Article 27, paragraph 3, of the Charter.

22. The complexities of the role of ICJ in the Special Rapporteur's grand scheme were described to some extent in the report, though not all of the problems were addressed or resolved. Draft article 19, paragraph 4, provided that "any other Member State of the United Nations which is party to the present Convention shall be entitled to join, by unilateral application, the proceedings of the Court". Quite apart from the fact that there was no guidance as to how such a system would be managed, there was the question why the right to join the queue of States should be limited to States Members of the United Nations. For that matter, why was paragraph 1 of draft article 19 limited to States Members?

23. There was also the issue of the concept of "interim measures" as set forth in draft article 17, paragraph 2. The problems of applying that concept, one which had been borrowed from Article 41 of the Statute of ICJ, had been considered and the concept twice rejected by the Drafting Committee in the context of delicts. Were the problems any less in the context of crimes? A more detailed analysis of the nature of the jurisdictional link created by General Assembly or Security Council action, and of whether such a link solved all potential *locus standi* issues, might be informative. The present report also failed to suggest any basis for believing that States which had so far shown reluctance to accept the jurisdiction of ICJ under Article 36, paragraph 2, of the Statute, would suddenly embrace such a role for the Court. In his view, far more crucial issues were at stake than those involved in the original ICJ/*jus cogens* package which had formed a package deal for many States in 1969.

24. As the Special Rapporteur had rightly said, the whole approach to the consequences of a "crime" depended on a scheme such as the one he had developed being accepted in its entirety. Quite apart from its defects and from the fact that it was an unnecessary response to a self-induced problem, that scheme could not conceivably command wide acceptance by States. The work of the Commission over the past three decades on the topic might well come to naught if the Commission allowed its reach to exceed its grasp, and it included anything like such a fascinating scheme in its recommendations to the General Assembly.

25. Mr. LUKASHUK said that the Special Rapporteur's reports had already become part of a "golden fund" of research on the topic of State responsibility. In recent times he had not found a single work on the topic which did not refer to or quote the Special Rapporteur. The reports were based on past experience and sought to respond to contemporary requirements, but they were essentially forward-looking, perhaps to the twenty-first or even the twenty-second century. They were full of optimism and amounted to a jurist's dream. Nevertheless, he himself would like to see, within his lifetime, the Special Rapporteur's proposals become part of doctrine and of positive law itself. He therefore asked the Special Rapporteur to consider preparing a short text, covering perhaps only part of the topic, which the Commission could

quickly put before the General Assembly. The Commission could then continue its work on the other parts.

26. The proposed articles were revolutionary and far from consistent with States' sense of international law. He had no basic objection to the seventh report but wished to note an important general point. The report, like other reports of the Commission, was based almost entirely on European doctrine and practice. However, the Commission must always try to ensure the representation of the main forms of civilization and the world's principal legal systems. Of course, one special rapporteur could not know all languages, but many countries issued international law publications in English or French which would be fully accessible to any special rapporteur. He did not wish to overstate the importance of the question. European doctrine, and to some extent practice, were not so different from that of Asian and other countries. It was, nevertheless, wrong to disregard entirely the doctrine and practice of regions other than Europe. For example, it would be impossible to solve problems such as State succession and citizenship without taking account of the doctrine and practice of the countries of central and eastern Europe. One solution might be for the members of the Commission to serve as channels for information about doctrine and practice in their countries and regions.

27. With respect to the progressive development of the law of State responsibility, the Commission must certainly take account of the views of world society. The statement just made by Mr. Rosenstock showed that the draft articles would encounter serious difficulties. There had been no great difficulty while the topic dealt mainly with diplomatic and consular law, but the recognition in the draft articles of *jus cogens* treaties had generated a storm, even though *jus cogens* could not be compared with some of the revolutionary texts prepared by the Commission. For example, if the draft statute for an international criminal court, the draft Code of Crimes against the Peace and Security of Mankind, and the draft articles on State responsibility were all adopted in the near future, they would fundamentally change the nature of international law, especially in its weakest area—the machinery for implementing it.

28. State responsibility was a new concept, unknown to traditional international law. Even as late as the early twentieth century, State responsibility had been regarded as incompatible with sovereignty and alien to international law. In the past, special rapporteurs had written about State responsibility in a very special context: responsibility for damage caused to foreigners in a State's territory as a result of exceptional events such as uprisings. In other words, it was a question not so much of the public as of the civil legal responsibility of States. When the League of Nations had taken up the topic of State responsibility it had done so in the context of civil law. Yet even in that limited context, nothing had been achieved.

29. Accordingly, the complexity of the Commission's task was obvious. Just as in the past there had been reluctance to accept State responsibility as compatible with sovereignty, now there was equal reluctance to accept the concept of crimes of States in international law. The

facts showed that States were not ready for more effective international law, especially a more effective implementation machinery. The destiny of the draft articles would not be an easy one. Interestingly enough, the Special Rapporteur had taken account of the situation in all his reports and had convincingly demonstrated the lack of justification of most of the criticisms offered in the Commission and the Sixth Committee. But what convinced the Commission would not convince everyone. States had their own logic, a logic not of international law but of political interests.

30. Commenting more specifically on the seventh report, he would point out that many legal systems did not recognize the concept of criminal responsibility of legal persons. Other systems did, and indeed the Nürnberg Tribunal had recognized a number of legal persons as criminals. The action taken by the United Nations against Iraq was a typical action to deal with the criminal responsibility of a State guilty of the crime of aggression. All the previous special rapporteurs had also advocated acceptance of the concept of international crimes of States, thus reflecting the prevailing opinion in world doctrine. At the present stage, the recognition of that concept still did not mean the "criminalization" of international law. It was instead a question of identifying in a special category the most heinous wrongful acts inflicted on the whole international community. The point was well illustrated in the decision of ICJ in the *Barcelona Traction* case.<sup>12</sup> In fact, one of the most important marks of an international crime was its *erga omnes* nature. With regard to the consequences of international crimes of States, he noted that unlike many national legal systems international law did not make a strict distinction between the criminal and civil consequences of a wrongful act.

31. "Restitution in kind" seemed to mean essentially restitution in full, but experience had shown that such a degree of restitution was often impossible and even undesirable. The Second World War peace settlement had taken account of the sad experience of the Versailles settlement which had become one of the causes of the later war. A system of partial restitution had been established, and the level of compensation linked to considerations of democratic development. Accordingly, the Special Rapporteur's idea of attributing special significance to democratization as a guarantee of non-repetition of a crime was extremely important.

32. He had some doubts about draft article 16, paragraph 3, as proposed by the Special Rapporteur in his seventh report. It was perhaps too severe to specify that a State which had committed an international crime was not entitled to benefit from any rules or principles of international law relating to the protection of its sovereignty and liberty; it was certainly too severe with respect to liberty. The provision gave the impression that such a State was being placed outside the law, but even criminals had their rights.

33. He did not agree with the widely held view, shared by the Special Rapporteur, that under general international law the implementation of the consequences of

<sup>12</sup> See 2388th meeting, footnote 14.

crimes remained in the hands of States. The reaction to violations of international law was already a joint reaction by States and the United Nations. He fully agreed with the Special Rapporteur on the need to use existing international organs, but the proposed arrangement was not fully consistent with the Charter of the United Nations. He would simply suggest that, acting on a declaration by a State or on its own initiative, the General Assembly should determine that a crime had been committed and recommend appropriate action. It had already acted in that way in connection with a number of international crimes. Admittedly, Assembly resolutions were only recommendations, but the role of such recommendations in legitimizing the behaviour of States and organizations was already recognized and it would be quite sufficient in the present case. Of course, the Security Council could adopt emergency measures under Chapters VI and VII of the Charter in order to resolve disputes about countermeasures. As far as ICJ was concerned, at the request of a State the Assembly would refer the issue for an advisory opinion. It was already the case that, in disputes between organizations, the Court's advisory opinions were legally binding.

34. Mr. TOMUSCHAT said that he concurred with many of the suggestions made by the Special Rapporteur in the seventh report and, in particular, that it was necessary to have an institutional framework to deal with specific legal consequences of the commission of crimes. It was not enough to draft substantive rules. He was not in fundamental disagreement with the Special Rapporteur concerning the word "crime", which he took to mean a particularly serious violation of international law; for him, the word "crime" in that context had no criminal connotation whatsoever.

35. He agreed with the basic proposition set forth in draft article 16, according to which an internationally wrongful act of a State had all of the consequences which were also entailed in the commission of an ordinary delict of a State. It was clear that reparation was a general obligation, although he did not agree with some of the language used in the report in that connection. For example, the Special Rapporteur stated that any State should be entitled to obtain reparation, whereas draft article 16, paragraph 1, which was correctly worded, stated that every State was entitled to demand that the State cease its wrongful conduct. It was important to ensure that all States had a right to demand that the law-breaker behave in a correct manner and in accordance with the rules of international law. In that regard, it was right to say that one of the main difficulties lay in article 5,<sup>13</sup> which had created a general category of injured States and was fundamentally wrong. What was needed was a distinction between States that had suffered tangible injury and other States that had been injured only in the legal sense, their right to demand compliance with treaty obligations having been breached. Two different categories were involved and should not have the same rights.

36. Plainly, a State which had committed a particularly serious internationally wrongful act was required to

make restitution in kind. But it was difficult to understand why, in that connection, the Special Rapporteur had discussed restrictions on the independence of a State as a member of the international community. In his view, if a State was required to make restitution in kind, it must certainly not lose its status as an independent member of the international community or its territorial integrity. He would also stress the vital needs of the people, an important precedent which was to be found in Security Council resolutions on Iraq, under which Iraq was required to pay only 30 per cent of its oil revenues to the International Compensation Fund.<sup>14</sup> That was a very wise decision and a beacon for the work of the Commission.

37. As to compensation, as Mr. Lukashuk had rightly pointed out, after major disasters like the Second World War and even the aggression by Iraq, it was generally impossible for full compensation to be paid for all of the harm done. Mr. Lukashuk had also mentioned the peace settlement following the First World War in which the vanquished were burdened with heavy obligations that had led to financial disaster. Compensation, therefore, was a highly relevant factor, and provision for it should be included under article 16. Strangely enough, the Special Rapporteur had suggested no rule in that regard.

38. Again, it was obvious that satisfaction and guarantees of non-repetition should be a normal consequence of the commission of a crime. While he supported the Special Rapporteur's very interesting ideas on the question, it had to be stressed that the Special Rapporteur's suggestions as a whole could not be dealt with in the context of a bilateral relationship between States of the sort to which his suggested rules were essentially confined. Of course, he did suggest that institutions of the international community should also play a role: there might be a decision by the General Assembly or the Security Council, followed by a decision of ICJ. Thereafter, however, implementation was left to States acting individually (art. 19, para. 5). In his opinion, that was wrong: States acting individually could not handle the imposition of far-reaching measures such as demilitarization or the acceptance of fact-finding missions on the territory. What would happen, for example, if States made conflicting demands on the wrongdoing State? In such cases, a decision of the Council acting on behalf of the entire international community was clearly needed.

39. With reference to the relationship between the substantive and the procedural provisions, he favoured a clear distinction between, on the one hand, measures States were authorized to take individually, acting in the interests of the international community (as *defensores legis*), and, on the other hand, measures appropriate solely for action by the international community. Admittedly, there were few international institutions with jurisdiction or competence in that field. It was one of the flaws of the present-day structure of the international community. Reverting to draft article 16 in that connection, he did not see the need to require that a State wishing to make demands, as mentioned in paragraph 1 of that article, should obtain a prior determination by ICJ

<sup>13</sup> For the text of article 5 of part two, and commentary thereto, provisionally adopted by the Commission at its thirty-seventh session, see *Yearbook* . . . 1985, vol. II (Part Two), pp. 25-27.

<sup>14</sup> See, in particular, Security Council resolution 705 (1991) of 15 August 1991, para. 2.

under draft article 19, paragraph 5. When an international crime had been committed, should not each and every State call for corrective measures to be taken? Further, third States not directly injured should also have the right to make demands for reparation and compensation. In such cases, a determination by ICJ would be far too cumbersome. If, however, one were to go further and to burden wrongdoing States with obligations to give far-reaching guarantees of non-repetition, those demands did not automatically derive, *ipso facto*, from the internationally wrongful act or the commission of the crime. Such demands must be specific, and tailored to the situation. There again, to leave it to 185 individual States to make specific demands for guarantees of non-repetition would lead to a chaotic situation. Clearly, a decision by an appropriate organ of the international community was required. In addition, he failed to see why the requirements listed in draft article 18, paragraphs 1 (a) and 1 (b), should be subject to a decision of ICJ. Those matters should be an automatic consequence of the commission of an international crime. Nor was paragraph 1 (c) very helpful: why did States need assistance in fulfilling their obligations under paragraphs 1 (a) and 1 (b)? There was no such necessity. On the other hand, draft article 18, paragraph 1 (f), went much too far. By way of an example, he would point out that, for a long time, there had been disagreement in the United Nations about the best way to abolish apartheid. The great majority of third world States had wanted to isolate South Africa, while other States had preferred to pursue a policy of active involvement. Eventually, the pursuit of those two policies in parallel had led to the desired outcome. No group should be able to impose its political views on any other group. Accordingly, he could not endorse paragraph 1 (f).

40. Draft article 18, paragraph 2, signified a specific determination to be made by the Security Council. Again, according to the logic of the draft system submitted by the Special Rapporteur, that would be left to the discretion of individual States. Here, too, there should be a single determination by the international community, not a large number of demands addressed to the alleged wrongdoer by individual States.

41. Draft article 19 raised difficult issues regarding constitutionality under the Charter of the United Nations and the Special Rapporteur was well aware of them. It was incorrect to state that the General Assembly was a more democratic organ than the Security Council. Under the current system whereby every State had the same voting power, one very large State could be out-voted by two or three diminutive States. Of course, if a system of weighted voting were to be introduced, then matters would be different.

42. As for draft article 19, paragraph 3, a decision according to which a State was subjected to the jurisdiction of ICJ did not come within the scope of Chapter VI of the Charter: such a determination necessarily fell within the scope of Chapter VII. Consequently, the permanent members of the Security Council would be able to exercise their power of veto. The question was, could a State bind itself, with regard to future determinations, not to use its power of veto? Personally, he very much doubted it.

43. Draft article 19, paragraph 5, was not satisfactory because, although an institution of the international community was involved, it provided only for a bilateral procedure. There was, however, another problem. Quite simply, ICJ could not handle such a full docket. Too much reliance was placed on the Court, which could not be expected to deal with all the conflicts arising around the world.

44. Article 5 might lie at the heart of many misperceptions and must be reviewed, for it was not possible to lump together States directly injured and those acting as *defensores legis*. Moreover, he would be grateful if the Special Rapporteur would clarify whether the special consequences were punitive consequences. If that was so, he fundamentally disagreed with the proposal. The system to be established should not entail punitive consequences. The Commission should also recall that under article 5, third States had many rights. They were injured States. In the case of human rights treaties, the Commission had defined any other third State party to such treaties as an injured State. Would those specific rules on crimes also apply to those other injured States? Would they be free to act under the general provisions? The rules suggested by the Special Rapporteur were perhaps well suited to cases of aggression, but as far as serious human rights violations—also one of the categories listed in article 19 of part one<sup>15</sup>—were concerned, the rules were not at all appropriate. The third State should have the right to demand that the author State should desist from its unlawful course of action, but it should not be able to make specific demands for restitution, compensation and so forth. Such matters must be settled by those directly concerned. In the case of South Africa, for example, a solution to the consequences of the apartheid regime must be hammered out by South Africans themselves. Third States had no role to play in that regard. Chile was another example of a country still dealing with the consequences of its past. That was a matter the Chilean people itself must address.

45. For his own part, he could envisage a somewhat different system. The Special Rapporteur, as seen from draft article 20 proposed in the seventh report, wished to keep the system under the future convention on State responsibility and the system for the maintenance of international peace and security separate from one another. However, particularly with regard to crime, that was hardly possible. In instances where international peace and security were at stake, any decision must be left to the Security Council. Outside that area, however, some simpler system could be envisioned. A third State wishing to take action against an alleged wrongdoer could be required to notify its intention to the States parties to the Convention, which, by a majority or by a two-thirds vote, could enjoin the vigilante to desist from its plans. Afterwards, if the vigilante insisted on its right, one could give it the right to seize ICJ. The advantage would be to make the first stages of the procedure swift and easy, and avoid imposing too weighty a burden on the Court.

<sup>15</sup> See 2391st meeting, footnote 8.

46. Historical disasters could not be settled in the way accountants settled a claim. There must be a lot of political discretion, which could only be entrusted to responsible international institutions. Essentially, the Special Rapporteur was still on the path of bilateralism. In his view, such a system was not workable.

47. Mr. FOMBA said that the Special Rapporteur had been faced with the difficult task of envisaging a legal system of State responsibility which was broadly compatible with the global legal or institutional balance secured under the system of the Charter of the United Nations, and which preserved the international political and legal status quo while introducing a legitimate dose of adaptability and innovation, so as to reconcile the desirable with the possible. In his view, the Special Rapporteur had achieved that difficult and finely balanced objective. For the rest, he broadly supported the logic behind the theoretical arguments developed by the Special Rapporteur in his seventh report, which, furthermore, tended to be backed up by the practice of the main United Nations organs. In the report, the Special Rapporteur tried to take account of the specific nature of international crimes as compared to delicts, so as to draw the substantive and instrumental consequences in terms of legal logic and, especially, of political reason. He supported that commendable effort, and reserved the right to make further specific comments on the report at a later stage.

48. Mr. BOWETT said that, at the previous session, he had tried to persuade the Commission not to deal with crimes under the present topic, and to exclude article 19 of part one from the draft articles. He had produced a paper designed to persuade the Commission that that was the right course. He had failed in that attempt and had had to accept the Commission's view, although his own remained unchanged, namely, that international society was not currently structured to deal with crimes.

49. That being said, in the light of the Commission's opinion that it must now deal with crimes, he welcomed the Special Rapporteur's seventh report as a bold attempt to deal with the consequences of such crimes. The report contained many features which were very attractive, and a number which were distinctly problematical. Among the attractive features, he had liked the requirement that a resolution expressing the "concern" of the international community should be adopted, either by the Security Council or by the General Assembly, as a precondition or trigger to any further sanctions or consequences which might flow from a crime. Secondly, he had liked the notion that a finding that a crime had been committed, as opposed to a mere expression of concern, should be a finding of guilt by a judicial body—that the crime of State should be found to be such by ICJ. Thirdly, he liked the notion that, although the precondition or trigger operated with regard to sanctions which all States could take on their own authority, that did not affect the powers of the Council, acting under Chapter VII of the Charter, to authorize sanctions by States, and for States to apply them without waiting for a judicial finding of guilt. Lastly, generally speaking he had liked the way in which the Special Rapporteur had dealt with the additional consequences attaching to crimes—the way in which he envisaged amendments or alterations to the articles dealing

with consequences. He did, however, accept the need for care in that regard and had considerable sympathy with some of the points raised by Mr. Tomuschat.

50. The problematical features arose primarily from selecting ICJ as the traditional organ that would find that a crime of State had been committed. There were profound difficulties about that assumption. First, there was the difficulty that the whole scheme presupposed an acceptance of compulsory jurisdiction for ICJ with regard to crimes. Frankly, he saw no possible chance of such a scheme being accepted.

51. Secondly, there was a difficulty over timing. It was common knowledge that the Court currently took about four years to give its judgment in a case. He could not see that the Court would want to take less care, or less time, over a matter as serious as an allegation of a crime of State. If the States of the international community were to be required to wait four years before applying sanctions other than those already authorized by the Security Council and any interim measures taken, they would inevitably lose interest in applying sanctions. Four years was simply too long a period, and a much more expeditious process was needed.

52. Thirdly, there was the difficulty that, in an allegation of a crime of State, fact-finding would play a vital role. Yet ICJ had no adequate techniques for independent fact-finding. That was one of the difficulties it had experienced in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.<sup>16</sup> Reliance by the Court on such facts as the parties might choose to bring before it would be aggravated by the fact that the accused State might not be willing to participate. Consequently, the presentation of facts before the Court might very well be one-sided. Lastly, there was the disadvantage that, under the present scheme, the Special Rapporteur envisaged the institution of proceedings as depending upon a complainant State. Consequently, some State would have to complain, and to shoulder the burden of prosecution. It seemed to be a chancy process and he was by no means sure that a complainant State, which, by definition, was far from unbiased, would be the right prosecutor in a case alleging a crime of State.

53. Selecting the Court as the judicial organ could perhaps be avoided. One possibility would be that the political organ registering the initial concern—the General Assembly or the Security Council—should at the same time appoint an independent commission of jurists and a special prosecutor, who would then take charge of prosecution of the complaint on the basis of such evidence as the independent special prosecutor could procure. The use of an independent commission of jurists had not been a feature of United Nations practice. It had, however, been a prominent feature of League of Nations practice. The establishment of an independent commission of jurists and the appointment of a special prosecutor presented a number of advantages. To begin with, as the commission would be a subsidiary organ of the United Nations, the problems currently encountered with respect to compulsory jurisdiction would not arise.

<sup>16</sup> See 2381st meeting, footnote 9.

Again, the institution would be capable of acting rapidly, as it would be convened on a full-time basis, something that was not true of ICJ. Moreover, through the office of the special prosecutor, the institution would have better facilities for fact-finding than were currently available to ICJ. And finally, the involvement of a special prosecutor would ensure that cases were prosecuted with impartiality, professionalism and effectiveness.

54. Mr. ARANGIO-RUIZ (Special Rapporteur) said that all of the comments were of the greatest interest to him and he thanked the members of the Commission who had participated in the debate so far. He wished at present merely to take up some terminological issues raised by Mr. Tomuschat.

55. He had tried many ways of avoiding the use of the word "crimes", but they had all proved too cumbersome. He sincerely doubted that a proper euphemism for the term could ever be found. For his part, he had no difficulty with the notion that States committed crimes—his own country had certainly done so, both before, and during, the Second World War.

56. As to whether the special or supplementary consequences of crimes outlined in the report entailed any punitive connotations, that was for scholars to decide. He had made a deliberate effort, however, to avoid bringing in any punitive issues and to keep the word "punitive" out of the text, precisely because he knew that created problems for some members of the Commission.

57. Mr. Tomuschat had once again referred to the difficult problem of States being indirectly, as well as directly, harmed by wrongful acts. In the case of aggression, all States were affected because of their common interest in prevention of and opposition to that act, though some States were more directly, physically, touched by aggression than were others. Violations of human rights, crimes against humanity and obstruction of the right to self-determination could well have no ill effect on States, but they would deeply harm individuals. It was important to stress the wide repercussions of the international crimes of States, even if the direct consequences were felt by a limited contingent. In such cases, what was paramount was a collective rebuke from the international community.

58. On the question of how "democratic" the various international bodies were, he would point out that the membership of ICJ was elected by the two main political bodies of the United Nations: the General Assembly and the Security Council. The Court was made up of jurists from all over the world and, all things considered, it was a fairly representative body. The Assembly was relatively democratic, as its membership included all States Members of the United Nations, though it was regrettable that no acceptable solution had yet been found to the need for a more adequate form of representation of the Member States and their peoples. The Council, however, was aristocratic: it had a number of special powers under the Charter of the United Nations, but that did not mean it represented the inter-State system any better than did the Assembly.

59. Mr. PELLET said that the Special Rapporteur had taken up three basic issues, two of which were specifi-

cally related to the topic—the terminology used and the problem of fault in general (to which he would revert at a later meeting)—and the third, which was somewhat marginal, namely, international democracy.

60. As to international democracy, care should be taken not to confuse the concepts, for some could not be transposed to international society. In the present instance, the notion of democracy was not suited to the United Nations. Democracy, by the traditional definition, was government of the people by the people and for the people, a notion which had no bearing whatsoever on the principle of State sovereignty, since "one State, one vote" did not make for democracy. If democracy was to be properly transposed to international society, China should be given a billion votes and San Marino a few thousand, and on the understanding that States were all democratically governed, in other words, that Governments actually expressed the will of the people, something which remained to be seen. Accordingly, it was never a valid argument to contend that one body was more democratic than another. It was better to find concepts other than those suited to domestic society, but unsuited to international society, in order to express ideas grounded in the same requirements.

61. With reference to the problem posed by the use of the word "crime", many members of the Commission were troubled to find the use of a term which, in their eyes, had criminal law connotations. On that point he was, on the contrary, entirely in agreement with the Special Rapporteur, for the term seemed appropriate. It would be hypocritical and awkward to abandon it at the present stage, for one advantage was that it had the negative connotations of blame that attached to the commission of particularly serious internationally wrongful acts. Such reprobation was, naturally, primarily moral and political, but it was legitimate in that it was reflected in the law and the word "crime" was its extension at the legal level.

62. The problem of fault was one of those which had always confronted the Special Rapporteur when, in his previous reports, he had introduced the notion of fault into international responsibility. A priori, a State's international responsibility was neither civil nor criminal; it was international, since fault had nothing to do with it. Responsibility was incurred by something objective, by a breach of the law. But that was true only for delicts. For crimes, fault was entirely relevant. A crime was distinguished from a delict more particularly by intent, by the deliberate will to violate international law, a constituent element of fault in the context of a crime. (Neither genocide nor aggression happened by chance.) The link between fault and crime warranted the very word "crime", and hence the problem of a State's criminal responsibility. There too, the Special Rapporteur was right to say that Nazi Germany, Mussolini's Italy—one could add Saddam Hussein's Iraq and, nowadays, the Pale Serb regime in Bosnia and Herzegovina—were criminal regimes which had committed or were committing unpardonable intentional crimes in violation of the law of nations. The three States in question and the minority concerned in the latter instance had incurred or were incurring responsibility, which could only be regarded as criminal responsibility at the international level.



63. Accordingly, he was pleading not only for the word "crime" to be maintained but he also thought that the real problem lay in the word "delict", which also had a negative, criminal law connotation, whereas, in contrast to international crimes, delicts did not involve any kind of notion of fault and did not call for any particular moral rebuke. Paradoxically, therefore, the problem was not the word "crime", but rather the word "delict", which, paired with crime, created the impression that the Commission had an entirely criminal law concept of international responsibility, something which would be quite wrong.

64. Were there grounds for finding a term other than "delict" to designate internationally wrongful acts that were not crimes? In all honesty, he thought that it was too late and that the distinction between crime and delict had taken an established place in international law, that the two words were commonly used by internationalists and that care should be taken to avoid systematically bearing in mind the analogy with internal law. In both cases, notions with specific meanings in international law were involved and the time had come to put an end to that terminological issue.

65. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked Mr. Pellet for his penetrating remarks, but pointed out that in his report, the word "democratic" was placed in quotation marks, which indicated that he had been using the term advisedly. Words had to be understood in context, and in relative terms. He agreed that the concept of democracy could not be transposed entirely intact from the national to the international context. That did not imply, however, that it was inappropriate to stress that an organ such as the General Assembly was more "representative" than one of limited composition. That difference should not be ignored.

66. Mr. ROSENSTOCK said the problem of how the terms "democratic" and "crime" were defined could not be pushed aside by saying that words meant what one wanted them to mean in a given situation.

*The meeting rose at 12.55 p.m.*

## 2393rd MEETING

*Thursday, 1 June 1995, at 10.20 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 2]

1. The CHAIRMAN reported on the Enlarged Bureau's discussions of the organization of the Commission's work on the following agenda items: "International liability for injurious consequences arising out of acts not prohibited by international law" and "State succession and its impact on the nationality of natural and legal persons".

2. With regard to the first item, the Enlarged Bureau recommended that the Commission should hold only two plenary meetings so that the Drafting Committee could continue and speed up the consideration of the draft articles on the topic begun at the preceding session. In keeping with the Special Rapporteur's wishes, a working group would also be established whose composition would be announced at a later date and which would help him consolidate and systematize his proposals. The consideration of the topic would thus take place in plenary (9 and 13 June), in the Drafting Committee (for the draft articles) and in a working group.

*It was so decided.*

3. The CHAIRMAN, referring to the second item, said that the Enlarged Bureau recommended that a working group should be established, to be chaired by the Special Rapporteur on the topic and composed of the following members of the Commission: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bowett, Mr. Crawford, Mr. Fomba, Mr. Idris, Mr. Lukashuk, Mr. Mikulka, Mr. Rosenstock, Mr. Szekely, Mr. Tomuschat, Mr. Vargas Carreño and Mr. Yamada, it being understood that the working group would be open to the other members of the Commission who wished to contribute to its work on an occasional basis.

*It was so decided.*

4. The CHAIRMAN said that the Enlarged Bureau also recommended that the working group so created, which would meet on 8 and 12 June in the afternoon, 14 and 15 June in the morning and 20 June in the afternoon, should be instructed to identify questions raised by the topic and to classify them according to their relationship with it, to advise the Commission on questions that it would do well to consider first in view of contemporary concerns and to suggest a timetable to that effect. It would then be up to the General Assembly to give the Commission instructions for its further work on the topic.

*It was so decided.*

**State responsibility (continued)** (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

## SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. PELLET said that the successive reports of the Special Rapporteur on State responsibility had consist-

\* Resumed from the 2379th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).



ently provoked impassioned responses, whether positive or negative. That could easily be explained by the nature of the topic, which was at the very core of international law, a State's responsibility being what ensured that international law was, in fact, law, but also by the nature of the reports themselves, which were an expression not only of the Special Rapporteur's skills and wisdom, but also his convictions, those of a man who wanted a better world and who tried to work to that end by improving international law. The seventh report (A/CN.4/469 and Add.1 and 2) was no exception to that rule. A number of members of the Commission, some emphatically and others with moderation, had drawn attention to the parts of the Special Rapporteur's proposals that they regarded as unrealistic, but, for his part, the sole criticism that he would make was that the report was, if anything, too timid.

6. A crime differed in nature, and not only in degree, from a mere delict; there were two main reasons for that. First, a delict was simply an objective breach of international law for which any reprobate or moral connotation was excluded, whereas the concept of fault, of delictual intent, of criminal intent, one might say, was implicit in a crime. Secondly, whereas any breach of the law was unfortunate, in most cases, only the victim had grounds for lodging a complaint. The situation was quite different with crimes, which threatened the very foundations of the nascent international community. The latter was hardly integrated, but, as a result, only a small number of violations of a small number of rules could be considered crimes under international law. Article 19, paragraph 3, of part one of the draft<sup>2</sup> contained examples in an open-ended list. The Special Rapporteur recognized that fundamental distinction and dealt with it in his draft, hence his own broad agreement with a number of the Special Rapporteur's analyses, but the Special Rapporteur, in a reversal of sorts, made the implementation of that concept subject to so many conditions that it was to be feared that its effectiveness would be all but lost.

7. The overall logic of the Special Rapporteur's approach was rigorous and irreproachable; working on the assumption that a crime was more serious than a delict, he very logically concluded that the consequences of a crime must be added to those of a simple delict (draft art. 15). Just as logically, he then listed those consequences, which, on the whole, did not pose any particular problem (draft arts. 16-18). Lastly, the Special Rapporteur provided for a very complicated mechanism (draft art. 19) involving first the General Assembly or the Security Council and then ICJ, their involvement being a *sine qua non* condition for the implementation of the special provisions of draft articles 16, 17 and 18. It was the very principle of that mechanism, set up in advance by draft article 19, that puzzled him, in that it would appear to delay the response to the crime.

8. If, for example, genocide was being committed and a State held another responsible for that crime, for it to be able to take appropriate action, it must first bring the matter to the attention of the General Assembly or the Security Council (art. 19, para. 1), which, secondly, decided, by a qualified majority, that the matter deserved

consideration (art. 19, para. 2); thirdly, the State must then bring the matter to the attention of ICJ, which, not known for its rapidity, must, fourthly, determine the existence and attribution of a crime. In the meantime, the perpetrators of genocide would have finished their work. Inasmuch as the whole point in such a situation was to prevent the extermination of the victim population, it was self-evident that a mechanism that was unable to do so was no solution. In reality, if a crime was committed, it must cease and it must cease forthwith. In the absence of a world executive, there was only one way to arrive at that goal: States, each to the extent that it was concerned, must react. In the current state of affairs, States alone had the means to react effectively and with the necessary speed. One must conclude that, far from facilitating that response to the crime, to the "heinous wrongful act", the system proposed by the Special Rapporteur might well paralyse such a response, even creating the paradoxical situation in which States might react rather easily or, indeed, too easily, to cases of a delict, whereas, in cases of a crime, they would have to wait for the successive hypothetical approval of the Assembly or the Council, followed by ICJ. Clearly, it was not the Special Rapporteur's intention to make it impossible to react to a heinously wrongful act, it having just been agreed that a response was urgently necessary.

9. There was, however, no need to be resigned to the anarchy of today's international society. The mechanism proposed by the Special Rapporteur was not devoid of merits, provided that it was simplified and lightened and was used a posteriori to justify or condemn the response to a crime and not actually to prevent that response a priori. When the existence of a crime or its attribution was contested, there was nothing wrong with making provision for a compulsory procedure to settle the dispute and at the same time to decide whether the response or responses to the alleged crime were lawful. Such a shift from a priori to a posteriori involvement would have a number of consequences. In the first place, draft article 19 (and, probably, draft article 20 as well) would no longer belong in part two; and part three would include a provision on dispute settlement that was more binding for crimes than for simple delicts. Secondly, the slowness of the procedure would be somewhat less inconvenient in the case of a posteriori involvement. Thirdly, the system of prior political "filtering" would serve no further purpose and it would then be possible to dispense with the involvement of the General Assembly or the Security Council, whose shortcomings from that point of view had been very nicely described by the Special Rapporteur. It would then suffice to include a provision in part three of the draft which would be modelled on article 66, subparagraph (a), of the Vienna Convention on the Law of Treaties and which in substance would say that all parties to a dispute on the application or interpretation of draft articles 16 to 18 of part two might apply to submit the dispute to ICJ for a decision, unless the parties decided by mutual consent to submit the dispute to arbitration. What had been agreed on for *jus cogens* could logically be transposed to crimes. Lastly, as the fourth consequence, the jurisdiction of United Nations bodies must be maintained in full with regard to peace-keeping and international security, as well as, possibly, in the other areas referred to by the

<sup>2</sup> See 2391st meeting, footnote 8.

Special Rapporteur. Accordingly, a provision comparable to draft article 20 would in fact have its place in the draft, more sensibly in part three. In the final analysis, the "a posteriori" system that he had outlined was not very far removed from the concerns raised by the Special Rapporteur, which he shared, but it would make it possible to ensure that the mechanism to be set up did not actually produce the opposite of the results desired: the effective punishment of crimes. In that regard, the proposal by Mr. Bowett (2392nd meeting) to create a "world prosecutor" of sorts contained the same defects—it was unwieldy, slow and premature, but, there again, the mechanism might be of interest if it was used a posteriori, perhaps as an auxiliary to the Court, to help settle disputes.

10. From a technical point of view, the mechanism proposed in draft article 19 also contained drawbacks that had to do with the "constitutional" powers of the General Assembly, the Security Council and ICJ. It was quite possible to confer on those bodies tasks which, although not expressly provided for in the Charter of the United Nations, were in conformity with their general function, but it did not seem possible to impose on the Assembly or the Council through another treaty special majority conditions, for example. Either the conditions provided for by the Special Rapporteur were in conformity with the provisions of the Charter and there was no need to repeat them, or they were not, and, in that case, they could not prevail over the provisions of the Charter, if only because of its Article 103. Likewise, there was reason to doubt that draft article 19, paragraph 4, might open up possibilities of involvement by ICJ other than those covered by Articles 62 and 63 of the Court's Statute.

11. In closing, he said that he fully shared the general philosophical outlook expressed in the seventh report and agreed with the wording proposed for draft article 15, provided that it was understood that the special consequences of crimes were in fact "supplementary", that is to say that they were "in addition" and not "without prejudice" to those of delicts. On the other hand, he disagreed with the position expressed by the Special Rapporteur on draft article 19 in that that article made the implementation of consequences specific to crimes subject to prior intervention by United Nations bodies—what was more, under constitutionally questionable conditions. However, he saw no objection—for crimes, but not for delicts—to providing for a compulsory jurisdiction for ICJ under the same conditions as those laid down by article 66 of the Vienna Convention on the Law of Treaties for disputes relating to *jus cogens*. As to the "positive" consequences specific to crimes, the Special Rapporteur's analysis was persuasive on the whole, with the exception of a number of points to which he would return at a later meeting.

12. Mr. MAHIOU expressed his warm congratulations to the Special Rapporteur on his clear, detailed and cogently argued analysis. His proposals, along with the set of logical, consistent and complex draft articles, were highly interesting, as was the way in which he had made use of article 19 of part one of the draft.

13. It was now up to the members of the Commission not to add to the obstacles on what was already heavily mined ground and not to make certain questions even more difficult and explosive. In the area of terminology, for example, he was surprised at the turn that the discussions on the word "crime" had taken. He knew full well that the word understandably evoked a whole set of theories, concepts and, indeed, ulterior motives. But he doubted whether there was any point in bringing them into play at the present time or whether it would help advance the Commission's understanding of the concept. Assuming that article 19 of part one did not exist or had been discarded and that the word "crime" had been abandoned, as Mr. Rosenstock had wished (*ibid.*), that did not mean that the emotions aroused by the term and everything it encompassed would subside or that the real problems underlying the article would be solved. Were all delicts—a term that had the same penal connotation as "crime"—equivalent and did they have the same instrumental, substantive and institutional consequences? To be even more specific, it went without saying that the violation of an international tariff provision was not to be treated in exactly the same way as genocide or the occupation of the territory of another State. Those acts were not comparable, any more than their consequences were. The situation of so-called third States, or of the international community, depended on the type of wrongful act committed. There could be no difference of opinion on that point.

14. Instead of making a fetish of words, the Commission should see specifically what they meant. There were internationally wrongful acts that required special responses by the States concerned, by other States or by the international community, whether in an organized form or not. On that point, there could be no disagreement either. Differences of opinion emerged when it came to drawing a distinction between grave wrongful acts and those that were less so, between what, for the sake of convenience, the Commission called crimes and delicts, and, in that regard, subjective elements automatically came into play. While believing that the concept of fault was involved in the issue under consideration, it was at that level that he disagreed with both the Special Rapporteur and Mr. Pellet, but for different reasons.

15. As he understood it, for Mr. Pellet, the concept of fault did not apply in the case of delicts, but played a particularly important role for crimes, because it was impossible to commit a crime without criminal intent, without a politically, morally or even legally wrongful intent; in that sense, the crime was simply the embodiment of that fault. He was not convinced by that argument, for the simple reason that, in his view, wrongful intent was also present in the delict, albeit perhaps to a lesser extent: in actual fact, offences were a continuum which went hierarchically from the simplest delict to the most serious crime. There was a point at which the delict involved intent: when they committed a delict, most States in any event did so intentionally. Hence, he had some difficulty making intent the sole criterion for distinguishing between crimes and delicts.

16. He agreed with the Special Rapporteur that fault, or intent, was already present in delicts, but that led him to draw somewhat different conclusions. It was perhaps

unnecessary to look for the fault of the perpetrator of the wrongful act because what counted was the seriousness of the act's consequences. Distinctions between crimes and delicts should be drawn as a function of the degree of seriousness of those consequences and the Commission might find answers to the difficult questions that had arisen by proceeding from the seriousness of the injury sustained and by considering the degree and the extent of the material, legal and moral harm caused to other States, individually or collectively, and to the international community, whether organized or not. The Special Rapporteur had shown that, with the help of a calm, objective and realistic examination, that exercise was not insurmountable.

17. With regard to the report under consideration, he endorsed the Special Rapporteur's overall analysis of substantive consequences. He generally agreed with the Special Rapporteur's approach and with a number of his conclusions. He recalled that, during the consideration of the sixth report,<sup>3</sup> he had pointed out that the consequences arising from a crime clearly were additional to the consequences arising from a delict. A State which had committed a crime was not to be spared: it must be treated with greater severity during procedures relating to cessation, restitution in kind, compensation, satisfaction and guarantees of non-repetition. However, as noted by the Special Rapporteur, such severity could not be unlimited. Such restrictions concerned two consequences in particular: restitution in kind and satisfaction and guarantees of non-repetition. In theory and a priori, it was reasonable and logical that the consequences of a crime should not jeopardize the existence of the wrongdoing State, violate its territorial integrity or threaten the existence of its population. He could not, however, endorse the Special Rapporteur's position on the issue of territorial integrity. It was not obvious that the territorial integrity of the wrongdoing State must be protected under all circumstances. For example, where a State had committed genocide against part of its population living in part of its territory while claiming the right to self-determination and if the international community took action against that State for the purpose of ending the genocide, should the exercise of the right of self-determination be entirely ruled out for the victim population? He did not think so. Two principles, each equally important, were at stake: the principle of territorial integrity and the right to self-determination. The problem was to strike a balance between the two. He could accept the idea that limits should be set to keep the consequences of a crime within a legal and legitimate framework, but only if such limits were qualified by certain exceptions so that other principles of equal value would not be violated.

18. As far as instrumental consequences were concerned, he would comment only on the reactions of States and the conditions under which countermeasures could be taken. With regard to the first point, while it was true that a crime committed by a State usually involved a violation of an *erga omnes* obligation and therefore concerned all other States, all States still did

not have the same rights. The Commission had already established a distinction between directly and indirectly injured States. That a distinction had to be reflected in the instrumental consequences in the sense that certain actions could be taken by all States and others could be taken only by directly injured States. Yet that distinction was made neither in the seventh report nor in the proposed draft articles. In that connection and with regard to article 5, paragraph 3,<sup>4</sup> even admitting that, in the event of a crime, all States were injured States, they were not all injured in the same way, the nature and degree of the injury varied from State to State and the consequences could therefore not be absolutely identical for all States. There was a subjective aspect and an objective aspect of the effects of a crime that had to be taken into account. Moreover, he failed to find in the proposed rules the spirit of draft article 5 *bis* which had been proposed by the Special Rapporteur in his fourth report<sup>5</sup> and referred to the Drafting Committee, and which read:

Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles.

19. With regard to the conditions under which there could be resort to countermeasures, the Commission should bear in mind that it was dealing with very serious acts—crimes—the effects of which were either unbearable or difficult for the injured State or States to bear. Indeed, no injured State would allow excessive procedural complications to prevent it from reacting rapidly, first by taking interim measures and also by taking appropriate measures and even appropriate countermeasures. The point was to determine, before taking legitimate action and before setting in motion a highly complicated mechanism, whether a crime had actually been committed. Therein lay the entire problem. Who was to characterize the wrongful act, since it had given rise to grave consequences and could not be evaluated solely by the injured State(s). What procedure should be used and within what time limit, so that the crime was not rewarded? He invited the Commission to consider that institutional aspect of the implementation of the consequences of a crime while bearing in mind the current structure of the international community and the wishes of States, which might not always be the same.

20. To his great credit, the Special Rapporteur had submitted realistic proposals in that regard which were both cautious and bold in that he had tried to fit his proposed system into the existing institutional framework. He had chosen the most modest, although perhaps the most complex course, because the point was not to develop the perfect institutional model for determining the existence of a crime, but to find a procedure that would be acceptable to States and prevent the anarchy which was bound to reign if every State was allowed to characterize an internationally wrongful act. In his view, the criteria the Special Rapporteur had followed were reasonable and convincing: first, the proposed system must be part of the existing institutional framework, which was that of the United Nations, even if it was far from

<sup>4</sup> See 2392nd meeting, footnote 13.

<sup>3</sup> *Yearbook* . . . 1994, vol. II (Part One), document A/CN.4/461 and Add.1-3.

<sup>5</sup> *Yearbook* . . . 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3, p. 49, para. 152.

perfect, because it was the most appropriate and the most practical; secondly, the possibilities offered by the United Nations system, in terms both of texts (the Charter of the United Nations) and of practice, should be used to the best possible advantage; thirdly, it was important to take full advantage and respect the competence of the organs of the United Nations which were in a position to intervene, namely, the General Assembly and the Security Council (political bodies) and ICJ (legal body); fourthly, it was useful to propose innovations that were acceptable to States and to move them carefully towards the progressive development of the law in that area. The problem was to determine whether such additional procedures were really what the Commission had in mind. The procedure for determining the existence of a crime might, unfortunately, be long, cumbersome and complex, whereas the commission of a crime called for a rapid response. However, he did not think that an entirely satisfactory solution could be found. Imperfect solutions would have to do. For the injured State or States, the reliability and credibility of any system for determining the existence of a crime would be judged on the basis of its swiftness and effectiveness. It might therefore be useful to provide, in addition to the mechanism proposed by the Special Rapporteur, for an alternative system, which might be different. Two proposals had already been made—one by Mr. Bowett (2392nd meeting) and one by Mr. Pellet—and they both warranted close attention. The various proposals were not mutually exclusive. The Special Rapporteur's proposed system could be used and perhaps simplified in certain respects and a more efficient procedure could be added that would enable certain consequences to be implemented rapidly so that the crime could be stopped or its effects mitigated.

21. It was also true that the decision-making process used by ICJ was lengthy and that its fact-finding procedure was not always satisfactory. However, that was not reason enough to rule out a role for the Court. It should be present, it should intervene—even if that meant changing its procedure and, naturally, raising the question of its compulsory jurisdiction.

22. It was obvious that no practical, operational system could be entirely satisfactory. It would, by definition, be a compromise reflecting the international community's strengths and weaknesses. That should not, however, prevent the Commission from proposing various solutions to States, beginning with the crucial phase of determining the existence of a crime and leaving aside for the moment the question of the implementation of consequences, on which he would speak at a later time, particularly as it was only at the stage of the first reading and did not have to strive immediately for perfection.

23. Mr. BOWETT said that he would be grateful to Mr. Pellet for clarifying two points. First, if the response of States was not subject to a prior judicial determination of the existence of a crime, could States set in motion during the initial phase not only the normal consequences of any delict, but also the special or supplementary consequences of crimes? Secondly, assuming that the judicial decision or arbitration took place a posteriori, which State would make such a request? As he had understood it, under the proposed system, States could, from the start, implement the punitive consequences which were attached to crimes and, conse-

quently, the applicant was likely to be the State subject to those consequences. If that was in fact true, which State or States would be the defendant? Might it be the international community as a whole?

24. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had listened with great interest to the suggestions and ideas that had been put forward.

25. In response to the concerns of those who feared that the mechanism proposed in draft article 19 might prevent States and the international community from reacting rapidly, he drew attention to draft article 17, paragraph 2, according to which the condition set forth in draft article 19, paragraph 5, namely, that a decision of ICJ that an international crime had been or was being committed would fulfil the condition for the implementation, by any State Member of the United Nations party to the convention on State responsibility, of the special or supplementary legal consequences of international crimes of States as contemplated in draft articles 16, 17 and 18 of part two, did not apply to such urgent, interim measures as were required to protect the rights of an injured State or to limit the damage caused by the international crime. While perhaps not entirely satisfactory, those provisions of draft article 17 should to some extent meet the concerns of those who feared that States would be unable to act until the Court had handed down its decision.

26. With regard to the slowness of proceedings before the Court—surely a problem—it was not an insurmountable obstacle. Once an appropriate role was recognized for ICJ by a convention on State responsibility, ways and means could be found to ensure a more expeditious treatment of breaches singled out as particularly grave infringements of essential values to the international community. An increase in the number of judges would facilitate, for example, the setting up of a special chamber once a particular case so demanded.

27. Mr. Pellet's suggestion that a judicial decision concerning the existence of a crime might be made a posteriori rather than a priori was worthy of attention.

28. With regard to the unfortunate case of Bosnia, to which Mr. Pellet had referred, the least that could be said was that the international community had failed to demonstrate an ability to respond rapidly. Would some States have been encouraged to act if there had been a prior judicial decision in that regard? It was difficult to say, but it could not be excluded. A Court finding would have been the best way, however, from the viewpoint of the rule of law in the international community.

29. Mr. BOWETT said he did not think that an increase in the number of judges of the Court would be any kind of solution to the problem of the slowness of its procedures. A complaint relating to the genocide in Bosnia and Herzegovina had been brought before the Court some time previously and the Court did not expect to consider it at all during the current year.

30. Mr. PELLET said that the two parties involved—Bosnia and Herzegovina, the applicant and the Federal Republic of Yugoslavia (Serbia and Montenegro), the defendant—were mostly responsible for the slowness of the work of the Court.

31. He would come back to draft article 17, paragraph 2, in detail at a future meeting. For the time being, he simply wished to note that those provisions gave rise to questions about the need for draft article 19. Was it absolutely necessary to have the cumbersome procedure provided for in that article when article 17 would enable States to do what was essential and when it would be enough for the Court to intervene a posteriori?

32. In reply to Mr. Bowett, he said that his idea would be to enable States, without prior determination of the existence of a crime, to implement not only the consequences of any delict, but also the special consequences of crimes. In the case of a crime, it was vital that States should be able to implement special consequences, the most important of which was the cessation of the crime. In the case of a crime, States must be able to react quickly and firmly, on the condition that they were bound to come before an impartial body which would decide whether their reaction had been justified and appropriate because a crime had in fact been committed or whether it had been legally indefensible or disproportionate because a crime had not been committed.

33. In the second phase, the situation would be analogous to that provided for in article 66 of the Vienna Convention on the Law of Treaties: any party to a dispute could apply to the Court; the applicant State would be either the State which was victim of the situation arising from the crime or the State which did not accept the response to the wrongful act and the defendant State would be the other State or States. That was similar to what might happen with regard to *jus cogens*: the defendant State could be either the State which claimed that the treaty was contrary to *jus cogens* or the State which wished to implement a treaty which had been terminated or unilaterally denounced on the grounds that it was contrary to *jus cogens*. If the entire international community reacted to a crime, there might be 170 defendant States for one applicant State. However, in the case of such a massive reaction by the international community, the defendant State would probably not dare to bring the matter before ICJ. In the case where the two parties to a dispute seized the Court, they would be making actual counterclaims before ICJ. He reserved the right to revise and add to his replies at a later stage.

34. Mr. MAHIOU said that a sensitive issue on which the members of the Commission would probably have difficulty reaching agreement was whether each State had the right to decide for itself whether an act could be characterized as criminal. Allowing each State to characterize a particular act as a crime and to act accordingly could lead to international anarchy. As the Jean de la Fontaine fable *Le loup et l'agneau* showed, it was too easy for the stronger party to unjustly accuse the weaker party of a crime in order to justify sanctions it intended to inflict on the weaker party. Of course, any State which had characterized an act as a crime and had applied the resulting consequences would subsequently be responsible for its actions, but, in such a case, the question of time limits would work against the State held to be criminal even if it had not committed a crime. Was it acceptable that a State accused of a criminal act should have to wait four or five years before ICJ finally decided that the act in question was only a minor delict? Much

more thought should be given to that problem, to which there was no easy solution.

35. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was fully aware that the slowness of the procedures of ICJ was primarily the result of the fact that the Court depended on the parties to the dispute. As such might well prove to be true also in cases involving crimes, it might be appropriate to consider the possibility, as Mr. Bowett had suggested, of establishing a prosecuting authority which would be appointed by a political body and might be in a better position than States to speed up the proceedings. Be it as it might of the prosecuting organ—one such organ being indispensable anyway, he was somewhat hesitant about the idea of judges being appointed by political bodies. He would much prefer the elected regular members of ICJ, who would sit on the Court for many years and thus have experience and prestige.

36. In reply to a point raised by Mr. Mahiou, he recalled that he had expressed doubts as to whether the territorial integrity of the criminal State should be preserved at any cost (2391st meeting). Mr. Mahiou had referred to the situation in which it might be asked whether the State concerned did not deserve to have part of its territory severed for the greater benefit of the population involved and the international community as a whole.

37. Mr. THIAM said that the principle of the territorial integrity of States should be respected in so far as possible. And even granting that the principle did not have to be applied in every possible case, could some judicial body have the authority to order the severance of a State's territory?

38. Mr. ARANGIO-RUIZ (Special Rapporteur) said that that was a very difficult question to which the members of the Commission had to give careful thought before answering. He felt that, in any event, the principle of territorial integrity had to be applied not by a political body, but by a judicial body. However, the way in which such a judicial body would operate was still to be determined. In any case, his proposed draft articles on the consequences of crimes did not envisage any competence of ICJ to decide sanctions of any kind. ICJ finding of a crime and its attribution was only envisaged, in his draft articles, as a condition of the implementation by States themselves of consequences of a crime set forth in the future convention on State responsibility, as indicated in draft articles 15 to 18.

39. Mr. BOWETT said that he would have no hesitation in answering Mr. Thiam's question in the negative.

40. Mr. THIAM said that, even taking the view that respect for the principle of the territorial integrity of States should not in certain cases prevent the application of a sanction decided by a judicial body, it would be going too far to say that such a body could sever part of a State's territory. The Commission had to stop talking in the abstract and look at the consequences of international responsibility in terms of the situation in the modern-day world and in the light of the experience of international life.

*The meeting rose at 1 p.m.*

## 2394th MEETING

Friday, 2 June 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (continued)** (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. BENNOUNA, setting out his general impressions on the seventh report on State responsibility (A/CN.4/469 and Add.1 and 2), said it dealt with great intellectual honesty with a number of thorny issues and would certainly stimulate a productive debate.

2. The first difficult issue taken up in the report was the "special" or "supplementary" consequences of crimes committed by States. The Commission had already wrestled with a similar problem in its work on the draft Code of Crimes against the Peace and Security of Mankind. The Special Rapporteur believed that, when an international crime was committed, all States were injured—even those which, once the future convention on State responsibility had been adopted, were not parties to it. Consequently, any State, even one not bound by the convention, could—and probably would—react to such injury, even by the use of countermeasures. The question was whether the classical approach whereby States signed and ratified a treaty was best suited to the adoption of a legal instrument on crimes. With that classical approach, a treaty came into effect when a predetermined number of States had signed it. Yet in the case of State responsibility for international crimes, the treaty would function for the entire community of nations, not just the States parties. The treaty would confer certain powers upon the General Assembly, and decisions taken in exercise of those powers would be adopted by a two-thirds majority of the members. It was entirely possible, therefore, that decisions on matters covered by the treaty would be made by a majority of States not parties.

3. He had drawn attention to that issue and to the need for further reflection on its implications in an article on the international criminal court and State sovereignty, published in 1989.<sup>2</sup> Mr. Tomuschat, too, had just published a paper on the same theme.<sup>3</sup> They had both suggested that a new way should be found of adopting a legal text on crimes other than by incorporating it in a treaty. Perhaps the text could be adopted by consensus, or by a simple or two-thirds majority, within the General Assembly, it being understood that all Member States would subsequently be bound by it. To that end, it might be expedient to remove the articles on crime from the draft on State responsibility and put them in a separate instrument.

4. One of the Special Rapporteur's essential postulates—that all States were injured by an international crime—must be modified, as it simply was not true. Injury was relative, depending on a number of factors such as the State's physical location and whether any of its interests, property or nationals were directly affected. More consideration needed to be given to the question.

5. In the scheme proposed by the Special Rapporteur, a very large role was assigned to ICJ. But if each and every State Member of the United Nations was entitled to bring a case before the Court, the case-load would quickly become unmanageable. ICJ should indeed play a role, but not the one of primary importance. After all, it had many other areas of responsibility already. Perhaps the international criminal court, on which work was proceeding apace, could be given jurisdiction in matters of State responsibility, or, as Mr. Bowett had suggested (2392nd meeting), an independent commission of jurists could be set up.

6. With reference to what the Special Rapporteur termed the "substantive" consequences of international crimes, he could not agree with the reasoning given in the report to justify the waiver of the safeguards of political independence and economic stability. The distinction drawn between political independence and freedom of organization was by no means convincing. Freedom of organization was defined as the choice of political, economic and social regime—yet if that was not the very meaning of political independence, then what was? The examples cited to illustrate demands for restitution in kind were not all apt. For instance, the demand addressed to South Africa for an end to racial discrimination was really a demand for future action, not for restitution. In practice restitution in kind was rarely demanded in international affairs: it was much more common to demand compensation.

7. In the discussion on satisfaction and guarantees of non-repetition, the Special Rapporteur suggested that it was necessary to review the restriction on demands that would "impair the dignity" of the wrongdoing State. He did not agree with that assessment, particularly as it was

<sup>2</sup> M. Bennouna, "La création d'une juridiction pénale internationale et la souveraineté des États", *Annuaire français de droit international*, vol. XXXVI (1990), pp. 299-306.

<sup>3</sup> C. Tomuschat, "Ein internationaler Strafgerichtshof als Element einer Weltfriedensordnung", *Europa-Archiv, Zeitschrift für internationale Politik*, vol. 49, No. 3 (1994), pp. 61-70.

<sup>1</sup> Reproduced in *Yearbook . . . 1995*, vol. II (Part One).



usually the dignity of innocent people, and not of the guilty parties, that was impaired. The dignity of a wrongdoing State would be impaired only when it was dragged before an international criminal court and made to account for its crimes—something that had never happened yet, even for the crimes committed in the former Yugoslavia. In short, he had serious doubts about the modifications proposed in regard to the substantive consequences and thought they must be looked at very carefully.

8. The issue of countermeasures came to the fore in the context of instrumental consequences. The wording in the report appeared to indicate that any injured State, whether or not it was a party to the future convention, could apply countermeasures. Was that the Special Rapporteur's intention? Under Article 41 of the Charter of the United Nations, the Security Council had responsibilities for peace-keeping and collective security that enabled it to adopt certain measures. Yet States themselves could take virtually the same actions in the form of countermeasures under the regime for State responsibility. Hence there was a potential for conflict between the actions of the Council and of States. A conflict could also arise between the Council and ICJ. That problem, of relations between judicial and political organs at the international level, was among the most pressing now facing international institutions.

9. Another question relating to countermeasures was whether they came into play upon the adoption of a resolution by the General Assembly or the Security Council, or once ICJ had branded an act a crime? It would appear from the report that countermeasures were contingent on a finding by ICJ, though urgent measures could be adopted pending such a finding. There, too, problems could arise in relations between the Council and ICJ: the slow pace of legal proceedings could create difficulties. Mr. Bowett had once proposed a system whereby the Council, when dealing with matters that required a legal assessment of responsibility, would refer the matter to an independent institution for a legal opinion before adopting its own decision.

10. He fully endorsed the Special Rapporteur's remarks on the close link between the normative and institutional consequences of international crimes. The Commission, in its future work on the topic, should bear that interrelationship in mind.

11. The report also referred to the institutional interaction between the General Assembly and the Security Council. Politics would ultimately dominate such relations, being the central aspect—some might say the bane—of the existence of the United Nations. Even if the veto of a permanent member of the Council could be averted by the procedure under Article 27 of the Charter, whereby such a member would not participate in a vote, the member's allies among the permanent members could act in its stead.

12. The Special Rapporteur mentioned instances in which the General Assembly had taken decisions in response to an international crime—but there were many cases where it had passed over glaring violations in silence, often for political reasons. The system proposed by the Special Rapporteur would give the Assembly and

the Security Council powers that were not set out in the Charter, inasmuch as a case could not be brought before ICJ without first being submitted to one of those organs. The Special Rapporteur cited the procedures under 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 as creating relevant precedents. Those instruments did accord certain powers, but they were not at all comparable to the ones that would be conferred by the text on State responsibility. Article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide merely authorized contracting parties to ask the competent United Nations organs to perform the functions given to them under the Charter—it did not in any way expand the powers given to those organs. The International Convention on the Suppression and Punishment of the Crime of Apartheid merely mentioned information that was to be transmitted to the Commission on Human Rights and accorded no special powers to any United Nations body.

13. The fact that it was impossible to go to ICJ without passing through the General Assembly or the Security Council meant that the mandatory jurisdiction of the Court with respect to a number of countries would be established by the Assembly or the Council—a power not provided for in the Charter. Such an arrangement would be innovative and give rise to political problems because it provided a power of decision and not just a power of recommendation. It would have to be embodied in a convention adopted by all States.

14. Was there any other solution to the problem, assuming that the Commission agreed that an institutional arrangement was needed? He would have no difficulty if the future instrument was adopted by the General Assembly or by a procedure binding on all States but not if it was to take the form of a traditional treaty. In the latter case it might be better for the powers in question to be assigned to meetings of the States parties rather than to the Assembly or the Security Council. It was, after all, normal for the States parties to be responsible for managing a treaty. In any event, such an instrument would have to deal with the overlapping political and legal problems, and he agreed with Mr. Bowett's comments in that connection. If the Council accused a State of a crime without sufficient proof and if the Court did not sustain the charge, then the responsibility of the United Nations would be incurred because a decision of the Council would have been delegitimated by the Court. The same was true of countermeasures adopted by the Council when the Court did not subsequently confirm that a crime had been committed.

15. It was disturbing that the draft should contain a part on the mandatory jurisdiction of the Court and, in particular, that everything resulting from a decision of the Court would fall within the Court's competence. That would impose a great burden with which the Court might not be able to cope. The Commission might therefore consider something other than ICJ, some system combining flexibility with guarantees of proper functioning.



16. Lastly, he would stress that the report was a model of legal argument. It had engaged the Commission in a fundamental debate which must not be shirked. Whatever the outcome of that discussion, it would be enriching for the international community.

17. Mr. de SARAM said that the Special Rapporteur's seventh report and his recommendations reflected the sincerity of his convictions. Whatever the fate of the draft articles, the report would stand as a brilliant contribution to the doctrine on the topic.

18. He said he wished to comment on three broad groups of issues: first, the general difficulties that arose when the concept of "State crime" was introduced into the law governing inter-State relations, and the serious difficulties some members of the Commission had with the expression "crime"; second, the difficulties that arose when that same concept was introduced into the draft articles; and third, the necessity, if a concept of crimes was ever introduced into the draft, of making provision for an "adjudicatory" form of dispute settlement.

19. The problem regarding the first group of issues was not merely a matter of terminology. The argument that the term "crime" should be used because the Commission could not find a better one did not do sufficient justice to the concerns of those who regarded the use of "crime" in the present context as fundamentally incorrect and confusing. It was incorrect because in many national legal systems the concept of crime marked the great divide between two entire areas of national law: on the one hand, a legal system intended to compensate for harm caused, and on the other, a legal system intended not to compensate for harm but to punish acts deemed to be against the good order and well-being of the State. Criminal law had a number of unique characteristics: great precision of substantive law, very formal, even rigid, procedures concerning process and evidence; and special courts and systems of administration and enforcement. It was in that special sense that the word "crime" was used in the law of many regions of the world and that the public of those regions understood it, looking askance at those found guilty and even those who were only accused of a crime. Thus, to use the term in public international law in a sense other than the one used in national systems of law would be confusing.

20. It had been suggested with good reason that, for its present purposes, the Commission should forget about "crime" and consider the draft as if the expression did not occur therein. He had himself crossed out "crime" in his copy of the draft articles so that he could read them free of that term's connotations, yet the difficulties did not go away, largely because the present purpose of the draft remained not to compensate but to punish. It was hard to see what other term could be used. The "peremptory-norm" language of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, for example, did not have the necessary precision. Nor must it be forgotten that the purpose of introducing a system of punishment into inter-State relations was to punish States. However, crimes were committed not by States but by individuals. To use the legal fiction of

"attribution"—to make a State liable to compensate for damage caused by its officials—was one thing; to cast the shadow of crime over the entire population of a State was quite another matter, and one not sustainable either in fact or in reason.

21. Accordingly, the Commission should stick by the basic decision taken many years ago when it had adopted article 3, in particular subparagraph (b), that is to say that the basis of the obligation to compensate in the whole field of State responsibility must rest exclusively on a State's breach of an international obligation;<sup>4</sup> or as the Commission had stated later in less precise language, it was only on a breach by a State of a primary obligation that the secondary rules of State responsibility would come into play. Of course, breaches of international obligations came in a wide variety of forms and magnitudes. But if the Commission proceeded on the premise that the purpose of the draft articles was to compensate for harm caused, then the solution to breaches of great magnitude was to ensure that the draft allowed for the imposition of compensation of equal magnitude.

22. Difficulties also arose when an attempt was made to group breaches of international obligations, according to the severity of the harm, into the categories of "crimes" and "delicts". Such a grouping could never be precise. Moreover, as others had commented, in article 19 of part one<sup>5</sup> the Commission seemed to be entering the field of primary obligations in a set of rules which it had always maintained should be setting out secondary obligations arising from a breach of a primary obligation.

23. If the concept of State crime was introduced into the draft, a clear need arose for an adjudicatory system to determine that a crime had been committed. As Mr. Bowett and Mr. Bennouna had pointed out, such a system would have to cover all the stages of the adjudicatory process. Obviously, the diplomatic procedures available for dispute settlement were inadequate, since they depended on the agreement of the parties. Furthermore, judicial determinations would have to be made by a judicial body, and therefore neither the Security Council or the General Assembly could serve as satisfactory substitutes. On the other hand, ICJ might offer an appropriate forum and should be considered in that respect, but the Court's jurisdiction was essentially consensual and it might not have the necessary capacity in its present form. It was also hard to escape the conclusion that Governments would be most unlikely to agree that any tribunal should be vested with the authority to determine that a State might be guilty of a crime. Nor was there much hope that the institutional arrangements for giving effect to article 19 would be in place for many years to come.

24. The question of the substantive consequences of a crime ought to be relatively easy to resolve: cessation, restitution in kind without limitation, and trial of the individuals responsible, as well as non-recognition as legal

<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> See 2391st meeting, footnote 8.

of the results of a crime. The draft articles adopted by the Commission earlier would have to be reviewed in the light of the Special Rapporteur's new proposals, but it must always be borne in mind that the purpose of the draft articles was not to punish but to compensate for damage caused.

25. There were occasions in the Commission's work when matters of fundamental importance to the relations between States under public international law surfaced for debate, without there being any clear guidance in treaties, general practice accepted as law, or authoritative judicial or arbitral decisions. The present debate was one such occasion, and it was appropriate for the Commission to remember, as Mr. Thiam had stated (2393rd meeting), that in such circumstances there were certain fundamental principles of modern international law concerning the status, independence and integrity of all States set out in Article 2 of the Charter of the United Nations which must remain the legal parameters for the Commission's work.

26. Mr. AL-KHASAWNEH said that in 1976 the Commission had drawn a distinction between the great majority of internationally wrongful acts, which it had termed "delicts", and a small number of serious breaches of international law, which it had termed "crimes".<sup>6</sup> That distinction could not have been meant to serve a purely descriptive function but rather to fulfil a normative role in terms of the consequences attaching to the two categories. Having dealt in earlier reports with the consequences of delicts, the Special Rapporteur now sought to delineate the special or supplementary consequences of crimes. With prudent resort to progressive development of the law, he had produced a solution that would contribute to the establishment of the rule of law at the international level by regulating the reaction to crimes. That approach would further advance the purpose and principles of the United Nations, which included the settlement of disputes in conformity with justice and international law.

27. He supported the distinction between delicts and crimes as a useful system of classification and recognized that, even in the case of delicts, a punitive element was present, although usually more subsumed by a function of reparation than in the case of crimes. He joined Mr. Mahiou in disagreeing with Mr. Pellet (*ibid.*) that the difference between delicts and crimes was that only crimes elicited moral indignation or contained an element of fault. However, while he agreed with Mr. Pellet that crimes threatened the very fabric of international society, there again, widespread delicts could have the same effect. It was ultimately justifiable to distinguish delicts from crimes in order to delineate clearly the consequences of each category, thus helping to ascertain the applicable law. The arrangement also struck a happy compromise between those who advocated a number of differentiated regimes, which would lead to fragmentation—the antithesis of codification—and those who wished to encompass many breaches of obligations within a single regime.

28. As far as terminology was concerned, "crime" had long been current in legal parlance and its use would not gravely offend States. More important was the fact that some States had been subjected to criminal consequences, sometimes exceeding those normally attached to crimes, without their actions being designated as crimes. It was preferable to designate some conduct of States as criminal and to regulate the consequences through judicial review and the introduction of substantive rules to spare the population of the criminal State extreme hardship, rather than to leave that whole area of international relations unregulated, concealing the punitive element under the guise of restitution or guarantees against repetition.

29. He was in general agreement with the Special Rapporteur's approach to the consequences of crimes. The severity of those consequences had been achieved by modifying the rules that regulated the operation of the substantive consequences of delicts, which had already been adopted on first reading. Thus, it was fair, for example, that the factor of excessive onerousness, as a mitigating circumstance precluding insistence on restitution in kind instead of compensation, should not apply. The only cases in which the Special Rapporteur would not apply that more severe rule were where such an insistence on restitution in kind would jeopardize the vital needs of the population of the State concerned, on the one hand, and the very existence of the State or its territorial integrity, on the other. While he agreed with the Special Rapporteur as to the vital needs of the population and the continued existence of the State—for the death penalty could not be imposed on a criminal State—he had doubts similar to Mr. Mahiou's (*ibid.*) regarding the territorial integrity of a State which, for example, practised genocide. Obviously, that was an extremely sensitive issue and one that could wreak havoc on the inter-State system unless carefully regulated by the expression of the unambiguous will of the international community, as judicially assessed. It was no longer possible to pretend, in an age of post-modern tribalism in many parts of the world, that the territorial integrity of States should automatically override concern for a people subjected to genocide. In general, the substantive consequences of crimes presented few problems.

30. In dealing with the instrumental consequences of crimes, the Special Rapporteur started from the premise that crimes were by definition *erga omnes* breaches of international law. The complex relationship arising out of the multiplicity of injured States in itself called for a coordinated and reasonably speedy coherent reaction. A case in point was that of the Bosnian Muslims, which Mr. Pellet had cited (*ibid.*). Hence there was an inherent tension between the delay which was characteristic of the reactions of the "international community", especially having regard to the requirement that the reaction must be judicially assessable, and the need for an effective response to provide the remedies and to compel compliance and, indeed, to inflict punishment as a matter of retributive justice on the criminal State. Mr. Pellet had sought to deal with that response a posteriori, as it were, by subsequently legitimizing the incoherent reaction of a State or group of States. But such a scheme would allow States too much freedom to resort to force or to take the law into their own hands in an extremely sensitive

<sup>6</sup> *Ibid.*

area—for to be accused of a crime was no light matter. An institutionalized response to crimes which sought to eliminate the delay inherent in coordinating that kind of response would therefore be preferable. That was particularly true since Mr. Pellet's concern could be taken care of, partly at least, by providing for such urgent interim measures as were required to protect the rights of an injured State or to limit the damage caused by the international crime. The Special Rapporteur had, of course, endeavoured so to provide in draft article 17, paragraph 2.

31. Mr. Bowett, in introducing his suggestion, had described the Special Rapporteur's proposal as having some attractive and some problematic features. He said that, with respect, however, the same comment could be made of Mr. Bowett's proposal. The main difficulty with that proposal was that a juridical body, appointed directly by a political organ on a case-by-case basis, would not perhaps be perceived as being as conducive to due process as would resort to an established and permanent court. Another consideration was the proliferation of dispute settlement procedures. Moreover, the problem of the compulsory jurisdiction of ICJ and of fact-finding could be taken care of if the political organs empowered the Court accordingly. At all events, if it were agreed that the reaction to international crimes should be both institutionalized and speedy, the proposals of the Special Rapporteur, Mr. Pellet and Mr. Bowett were not mutually exclusive.

32. With reference to paragraph 1 (a) of draft article 18, perhaps the Special Rapporteur could explain why non-recognition of the situation created by the international crime and also nullity should be confined to international crimes. Nullity was, of course, an appropriate remedy under municipal law in delictual situations and would seem to apply to cases in which the internationally wrongful act took the form of legislation even if there was no allegation of criminal conduct. International practice was replete with examples of cases in which non-recognition was called for even though there had been no determination that a given line of conduct, though illegal, was criminal. It was doubtful that ICJ, in calling upon States not to recognize South Africa's illegal presence in Namibia, had based its opinion on considerations relating to reactions to crimes.

33. Lastly, he wished to pay tribute to the Special Rapporteur's commitment to strengthening the rule of law in international relations.

34. Mr. VILLAGRÁN KRAMER said that the Special Rapporteur's seventh report, which would afford an opportunity to review the articles on reprisals, had two major qualities—clarity and the fact that it raised a series of substantive issues. It was, however, marked by a degree of idealism and even by faulty perception. Unfortunately, therefore, he was unable to agree entirely with all its propositions.

35. The Special Rapporteur had chosen a valid premise for his articles, as reflected in draft article 15, which was both positive and constructive. It was none the less essential, above all, to be clear about the terminology used. In that respect, Spanish-speaking lawyers had certain problems. Unlike certain common law systems, the sys-

tems of law in which Spanish-speaking lawyers were trained did not make a distinction between felonies and misdemeanours but treated every offence (*delito*) as a crime. A distinction was, however, drawn between a culpable wrong (*delito culposo*) and a wilful wrong (*delito doloso*). Thus, if a person fired a gun by accident and killed someone without intent, that person would have committed culpable homicide—a *delito culposo*—whereas murder (*asesinato*) was a crime committed with the classic element of premeditation. It was a *delito doloso*. No doubt, similar problems could arise under other systems of law and at a recent United Nations conference he had noted the emphasis placed by some lawyers from Islamic countries on the importance of mutual understanding in regard to legal terminology. For the purposes of the topic under consideration, the distinction drawn was between delicts and the most serious crimes, but it was clear that there were in fact three categories: wrongful acts, also known as delicts; international crimes that were not serious; and serious international crimes.

36. It had for the time being been decided that, for a wrongful act to be characterized as a crime, it must have an element of gravity. But gravity was a subjective element and lawyers also looked to the objective elements. The decisions of the Nürnberg Tribunal provided useful indicators in that connection, as did the provisions of municipal law establishing penalties for crimes against the *jus gentium*. It was interesting to note that, in the late eighteenth century, a law had been enacted in the United States of America which had conferred jurisdiction upon its domestic courts to deal with crimes against international law. Pursuant to the law in question, United States courts had on three occasions assumed jurisdiction to try cases of torture committed outside its territory. Another objective source for characterizing a wrongful act as a crime was, of course, international treaties under which crimes such as genocide and apartheid were treated as international crimes. Such objective elements would enable the Commission to identify certain acts and omissions as being sufficiently serious for the international community as a whole to treat them as international crimes and, because of their seriousness, to establish a separate category of wrongful acts, thus increasing the international responsibility of the State concerned and broadening the range of reaction, both centralized and decentralized, accordingly.

37. The Commission had been attempting to classify certain acts as crimes against the peace and security of mankind, whose perpetrators would be punished as individuals. The original list of 21 such crimes had been cut down to 10, then again to 6, and there was now a feeling that it might be further reduced to 4. He wondered whether an attempt was being made to use that list to determine the aggravated international responsibility of the State or whether other crimes could also be used for the purpose. The Special Rapporteur could perhaps provide some illustrations of possible indicators that he used for classifying certain acts as crimes and thus aggravating responsibility. It was clear that, if the Commission approached the question from the angle of *lex lata*, the scope of crimes would be more reduced than if it did so from the angle of *de lege ferenda*.

38. Gravity could usually be better appreciated a posteriori, and in that respect it was akin to another subjective element, intent. There again, Spanish-speaking lawyers, who distinguished between *culpa* and *dolo*, were faced with a problem. It seemed to him that the Special Rapporteur, in dealing with international crimes, was thinking more in terms of *dolo* than *culpa*.

39. In the Commission's view, there were three components to the substantive and instrumental consequences of State responsibility in the field of crime: the normative, the procedural and the institutional. As to the first of those components, he was inclined to accept the idea of aggravated responsibility of the State for crimes and to consider that the result would be to produce *erga omnes* effects. Accordingly, the emphasis should be on the elements of aggravation. However, the Special Rapporteur offered a revealing spectrum in regard to the effects of responsibility. In the case of cessation of the act, whether a wrongful act or a crime, the same rules would apply. That was also true of compensation. On the other hand, in the case of restitution in kind, and also satisfaction and guarantees of non-repetition, a significant aggravating factor had been introduced. The Special Rapporteur stated in his report that the limitation of the obligations would not apply in the case of a crime, except where full compliance with the obligation would put in jeopardy the existence of the wrongdoing State as a sovereign and independent member of the international community or its territorial integrity, or the vital needs of the population. The differences established by the Special Rapporteur were, for all that, both valid and well-founded.

40. He had two reservations with regard to procedure. First, it was apparent from the report that an injured State, in the event of an international crime, was required to obtain authorization before resorting to countermeasures. In other words, the responsibility of the State would be aggravated and the initial resort to countermeasures would be made subject to certain conditions. As he understood it, therefore, in the case of a wrongful act, the State did not have to seek authorization before resorting to countermeasures.

41. He also had doubts about the *raison d'être* of the suggested pronouncement by one or more international bodies, referred to in the report. Such a pronouncement would be tantamount to imposing a condition for the exercise of countermeasures which, again, was not required in the case of wrongful acts. He would seek clarification on that point later. There was, however, one other point on which he was in complete agreement, namely, that when the wrongdoing State submitted to a peaceful settlement procedure all sanctions should cease apart from obligatory interim measures.

42. The Special Rapporteur had raised various doubts on proportionality, and his proposal that the Commission should review article 13 was worthy of consideration. However, perhaps it would not be wise to review a provision that had been adopted by the Drafting Committee and by the Commission.<sup>7</sup> Indeed, it might be better to establish separately on what bases proportionality could be

applied with respect to crimes, for he did not think that the Commission could encompass both wrongful acts and crimes, which constituted different situations, within one and the same legal formula.

43. With regard to the institutional aspects, which he would discuss more fully at a later meeting, he considered that the Security Council had the necessary powers to investigate any act or situation that posed a threat to world peace, and that an inspection regime of the sort envisaged by the Special Rapporteur thus already existed. He saw no reason to change that system, although it could of course be expanded.

44. The question was, did international crimes exist, or did they not exist? If they did, then they must result in aggravated responsibility. If the Commission decided that they did not exist, then that would be a valid conclusion. However, all the evidence seemed to suggest that they did, in which case the criminal responsibility was of course individual, but international responsibility lay with the State.

45. Mr. FOMBA said that the draft articles could be assessed on the basis of various criteria, including the degree of harm to the present foundation of international society and its law; their legitimacy, logic, and teleology; the acceptability and political feasibility of the mechanisms proposed; and the complexity, rapidity and effectiveness of those mechanisms. Reference to those criteria would ensure that the conclusions reached were as well grounded and judicious as possible. He none the less had no intention of embarking on such a risky venture and would be more modest in his objectives.

46. Draft article 15 was important since it set forth the principle that a particular category of offences entailed a special regime of legal consequences. That was indeed the basic assumption, and that article thus called for no particular comment. He had, however, taken note of the extremely interesting discussion between Mr. Pellet and Mr. Mahiou on the subtleties of the distinction between crimes and delicts, particularly with regard to the notion of fault (*faute*) and its place in that distinction. On a drafting matter, the words "*Sans préjudice*" should, as Mr. Pellet had pointed out, be replaced by "*En sus*".

47. Draft article 16, paragraph 1, concerned the right to react *ratione personae*. The commission of a crime by a State conferred on any State the right to demand cessation and full reparation, on condition that ICJ had already found that a crime had been committed. The paragraph raised two problems. The first concerned recognition of the right of every State to react. The solution adopted was the absolute objectivization of the injury. As Mr. Mahiou and others had pointed out, it was a logical but abstract solution, and it would be better to be realistic, and to draw a distinction between those States directly injured and those indirectly injured. The question was one that clearly merited further reflection. The second problem concerned the requirement for a prior finding by ICJ. The procedure had been criticized as cumbersome and slow, when in fact the need was for a flexible and rapid response. That criticism was pertinent, and it was gratifying to note that the Special Rapporteur did not take issue with it.

<sup>7</sup> Ibid., footnote 11.

48. He supported the substance of draft article 16, paragraph 2, concerning restitution in kind and his only reservation concerned the limitation about jeopardizing the wrongdoing State's territorial integrity. Mr. Mahiou's comments had been very relevant and the Special Rapporteur had described them as not incompatible with his own position.

49. Paragraph 3 proposed two rules. The first stipulated that the State which had committed an international crime could not invoke failure to respect its dignity as grounds for limiting its obligation to provide satisfaction and guarantees of non-repetition. The second rule stipulated that that State was not entitled to benefit from any principles or rules of international law relating to the protection of its sovereignty and liberty. Both rules were logical and legitimate in letter and in spirit.

50. Draft article 17, paragraph 1, set out a rule whereby any State whose demands under article 16 had not been satisfied was entitled, subject to a prior finding by ICJ, to resort to countermeasures under the conditions and restrictions set forth in paragraphs 2 and 3 of the article. The criticisms already voiced about the scope *ratione personae* of the right to react and the ineffectiveness of an intervention by the Court were also applicable to paragraph 1 of article 17.

51. Draft article 17, paragraph 2, proposed that the obligation concerning a prior finding by the Court did not apply to urgent, interim measures. That was only right, given the very nature and the potentially devastating effect of the crime. Under paragraph 3, the principle of proportionality was to apply to countermeasures taken by any State. The analogy between crimes and delicts was applicable in that context, for it was always dangerous to seek to stem the evil at its root. Clearly, those comments would have to be reviewed in the light of the proposals to be made by the Drafting Committee concerning articles 11, 12 and 13 of part two.

52. Draft article 18, paragraph 1, concerned the attitude to be observed by all States in the case of a crime. They must do or refrain from doing a number of things. However, the fact that those obligations came into effect only subject to a prior decision of ICJ would certainly impair the effectiveness and urgency of the reaction. There was thus a case for reviewing that provision so as to make it more efficacious.

53. He endorsed paragraph 2, under which the "criminal" State must not oppose fact-finding operations or observer missions in its territory for the verification of compliance with its obligations of cessation or reparation. Nevertheless, clarification was needed of its scope *ratione temporis*. Did that obligation come into effect from the moment when a crime was alleged by any State, or only after the finding by ICJ that a crime had been committed? Plainly, the measures would not be equally effective in either case.

54. As to draft article 19, paragraphs 2 and 3, he shared Mr. Pellet's reservations about the link between international law on responsibility and the constitutional law of the United Nations. Were those two legal regimes compatible, particularly in respect of the majority rule? He also shared the views expressed by Mr. Pellet with

regard to paragraph 4. Paragraph 5 had been repeatedly criticized, and rightly so.

55. Article 7 of part three, concerning the settlement of disputes relating to the legal consequences of an international crime, as proposed in the seventh report, could be considered as a positive step towards a mandatory international system of justice. However, the letter of that rule could be improved without betraying its spirit. He thus supported Mr. Pellet's proposal to reproduce in that article, *mutatis mutandis*, the wording of article 66 of the Vienna Convention on the Law of Treaties. In conclusion, he broadly supported the views expressed by Mr. Mahiou and Mr. Pellet on the various other questions raised.

56. Mr. MAHIOU said that he was not sure whether the question put by Mr. Thiam (2393rd meeting) had been addressed to the Special Rapporteur, to Mr. Bowett, or to himself. In the latter event, he should perhaps clarify his own position. Mr. Thiam's question had concerned, first, the relationship between territorial integrity and the right to self-determination; and secondly, what organ or authority might be empowered to decide to dismember a State. His own remarks had not addressed the latter issue. He had simply wished to point out that, when invoking a number of fundamental principles in the implementation of sanctions against a State, it was indeed legitimate to invoke the principle of territorial integrity, but that in some circumstances it could be equally legitimate to invoke the principle of the right to self-determination. In the event of a threat of genocide, for example, implementation of the right to self-determination might be one solution advocated.

57. Mr. ROSENSTOCK said that Mr. Mahiou's remarks were yet another illustration of the lack of any need for a notion of international crimes. The existence of a right of self-determination—which, if meaningful, included the right to independence—could not be conditional on the existence of some scheme of crimes and some complex mechanism based thereon.

58. Mr. VILLAGRÁN KRAMER said that, in the case of Kuwait and Iraq, the Security Council had determined the frontier between those States and had given Iraq a mandate to respect that demarcation of frontiers. If Iraq considered that its territory had been dismembered, then that was the view of one State; the fact remained that the Council had performed the function of demarcating a territory.<sup>8</sup>

59. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the question of territorial integrity reminded him that, when Mr. Thiam had asked what organ might be empowered to make a decision to dismember a State in the event of a threat of genocide, he had not been clear enough when he had stated that it would be for the Court to decide the issue. That had been an over-hasty response, which he now wished to qualify. His position was, in fact, that any matter pertaining to a dispute over territory would have to be settled within the framework of Chapter VI of the Charter of the United Nations, namely, of Articles 33 to 38, with particular attention

<sup>8</sup> Security Council resolution 687 (1991) of 3 April 1991.

paid by the Security Council to Article 36, paragraph 3, as well as to the advisory function of ICJ.

60. Mr. de SARAM said that many controversial questions of doctrine and State practice were being raised concerning interpretation of the Charter—an exchange of views that was very peripheral to the subject under consideration. The provisions of the Charter must be preserved. Difficult questions of interpretation did arise, on which there were differences of views. Since the Commission often referred to particular cases concerning which very few members had the fullest possible information, he intended in his own statements to follow the custom of referring to “State A”, “B” and “C”, and to purely hypothetical situations.

61. Mr. BOWETT said that to describe the issue as “peripheral” was unduly charitable. In his view, it was a red herring. The existence of a right to self-determination and the manner of exercising it were matters of political judgement, and not matters for a court to decide.

62. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, on the contrary, political bodies and the Court could both do a good deal within the framework of Chapter VI of the Charter. The Court could act for example, in given circumstances, in an advisory capacity and, if the Security Council recommended that the parties refer to it under Article 36, paragraph 3, of the Charter, and the parties did so, the Court could operate in a contentious capacity. But it all depended so much upon the nature of the dispute or situation, that it was difficult to express a general opinion. At any rate, to say that the decision was a political one did not mean that it must be put into the hands of a political body and that that was an end to the matter; nor did it mean that the political body could make a binding decision concerning a hypothetical situation such as the one to which Mr. Mahiou had referred.

63. Mr. MAHIOU said that Mr. Bowett’s reply had been elliptical. The problem of the right to self-determination was indeed essentially a political problem. Nevertheless, there were circumstances in which a court could pronounce on such matters. For example, ICJ had been seized of the question of the right to self-determination of the Sahraoui people.

64. The CHAIRMAN said it would be a good thing if, rather than use plenary meetings purely as a forum in which to deliver formal statements, members occasionally also engaged in informal interaction of the sort that had just taken place. As the Chairman, however, he appealed to members to follow the usual practice and avoid making reference to specific countries in their illustrative submissions. While there was obviously no intention to pass judgement on any case when all the relevant facts were not available and the advocates for all parties were not present, exercise of some restraint in that regard would none the less help the Commission to consider issues amicably and harmoniously.

*The meeting rose at 1 p.m.*

## 2395th MEETING

*Tuesday, 6 June 1995, at 10.05 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (*continued*)** (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

### SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to submit to the Commission a few considerations which might, in his view, help to clarify some of the questions raised during the debate. It seemed to him that certain issues, all of which relate to the institutional aspects, had perhaps not been sufficiently clarified either in his seventh report (A/CN.4/469 and Add.1 and 2) or in the articles he proposed.

2. The first issue was how to shorten the judicial phase of the proposed procedure. Concern had been expressed by a number of speakers with regard to the proposed role of ICJ in the existence/attribution determination procedure. As rightly pointed out, the Court was too slow in its pronouncements. In addition, to involve the Court would be to imply the attribution to it of a compulsory jurisdiction. Both drawbacks could be avoided, it had been suggested, if the legal phase were entrusted to an ad hoc commission of jurists appointed by the political body (the General Assembly or the Security Council). The League of Nations practice had been cited as an example.

3. While he agreed that a more expeditious procedure should be envisaged, he seriously doubted that a commission of jurists appointed ad hoc by the political body would really be a better choice. Admittedly, any politically appointed panel of jurists would be more likely to do the job more expeditiously, but it would inevitably be tainted with partiality. Those concerns could perhaps be met by using the suggested ad hoc idea in a different way. First of all, the General Assembly or the Security Council could appoint an ad hoc prosecuting body which

<sup>1</sup> Reproduced in *Yearbook . . . 1995*, vol. II (Part One).



would perform the functions of investigation/fact-finding and would also promote expeditious proceedings. Secondly, the President of ICJ could appoint—directly or following a vote by the members of the Court—an ad hoc Chamber of five judges that would be assigned exclusively to the case in question as soon as one or more States had seized the Court following the political body's "concern resolution". Given that such monstrous wrongful acts were a relatively infrequent occurrence, such an arrangement might suffice. If not, an increase in the number of judges of the Court—for example, by five additional judges—could be envisaged at some future stage so that the appointment of an ad hoc Chamber would not interfere with the performance of the Court's ordinary functions.

4. With regard to the problem of compulsory jurisdiction, a compulsion would be equally inherent in the judicial phase, whether the Court solution or the solution of an ad hoc commission of jurists was adopted. That phase would have to be accepted in the project as compulsory, whatever the nature—permanent or ad hoc—of the technical organ called upon to pronounce. Such compulsory jurisdiction would, however, be limited; and the limitation of its scope would be achieved, in both cases, by the requirement of a preliminary "screening" of accusations effected by the General Assembly or the Security Council in order to prevent possible abuse of the compulsory procedure to which he referred in his seventh report. It was to prevent the extension of the Court's competence beyond the area of crimes, and notably to delicts, that the possibility States had of seizing the Court was made subject to the condition, as provided for in paragraph 2 of draft article 19, of a prior vote of the General Assembly or the Security Council resolving, by a qualified majority, that the allegation justified "grave concern".

5. The second issue concerned the "constitutionality" of paragraphs 2 and 3 of draft article 19, about which some members had expressed concern. In particular, one member had pointed out that the voting and majority rules, in both the General Assembly and the Security Council, were laid down under the Charter of the United Nations or the rules of procedure of each organ. Although he did not think that the two paragraphs in question really raised constitutional issues, an express reference to those requirements in the draft article might not be indispensable.

6. The third issue concerned the participation of "third" States in the proceedings under paragraph 4 of draft article 19. Concern had been expressed by one speaker with regard to the title of "third" States' participation in proceedings before ICJ in the hypothesis contemplated in that paragraph. According to that speaker, third States should intervene under Article 62 or 63 of the Statute of ICJ. He (the Special Rapporteur) had, however, deliberately excluded the possibility of intervention under Articles 62 and 63 of the Statute of the Court because, in such a case, the intervening State was not a principal party to the proceedings. In the hypothesis he envisaged, "third" States should participate as "principal" parties alongside the original applicants under Article 36, paragraph 1, of the Statute of the Court.

7. The fourth issue related to the delicate problem of "differently injured States". A number of speakers had rightly referred to the importance of the question whether and how account should be taken, in setting forth the legal consequences of crimes, of the fact that not all States were necessarily injured in the same way and to the same extent. Although the issue was not exclusively relevant to the consequences of crimes, special concern was justified. The difficulty of the problem did not, however, exclude the need to deal in the draft with the consequences of crimes.

8. Before attempting to define a solution, the real dimensions of the problem of differently injured States must first be more clearly assessed. First, the differentiation did not exist in every case. As he had noted in his fourth report,<sup>2</sup> marked differences existed in a case of aggression or of massive environmental pollution. Between the plight of the direct victim of aggression or the plight of the State whose coasts were affected by the consequences of massive sea pollution, on the one hand, and the injuries suffered by States that were, geopolitically or geographically, very distant, on the other, there would be decreasing degrees of material injury. But if the environmental crime reached the "global commons", all States would be equally affected and equally injured.

9. At all events, no unequal injury could derive, as between States, from violations—whether "criminal" or "delictual"—of international obligations relating to human rights, self-determination or racial discrimination. In such cases, the nationals or the population of the wrongdoing State, or a minority inhabiting the wrongdoing State's territory, were directly affected, but not other States. However, all States were legally injured by the internationally wrongful act, whether it was a delict or a crime. To deny that point would be tantamount to throwing overboard not merely a problem relating to the consequences of crimes, but also the problem of the consequences of any *erga omnes* breach, whether it was a delict or a crime. The concept of *erga omnes* breaches had, rightly or wrongly, been universally accepted, at least since ICJ had for the first time laid down the concept of an *erga omnes* obligation, notwithstanding the obvious difficulties of its application.

10. The problem was therefore to determine in what sense injured States were equal and in what sense they differed from the standpoint of the legal consequences (substantive and instrumental) of an *erga omnes* breach, whether criminal or delictual. In what sense were they equal or different, from the standpoint of demanding cessation/reparation and eventually applying countermeasures? Draft article 5 *bis*, which he had proposed in his fourth report<sup>3</sup> and which had been before the Drafting Committee since 1992, answered those questions only in part. It answered the basic question whether all States were equally entitled in law to demand cessation/reparation and eventually to react with countermeasures. The question "in what sense do the injured States differ when they differ" remained, of course, unan-

<sup>2</sup> *Yearbook* . . . 1992, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3, see especially pp. 45-46, paras. 135 to 139.

<sup>3</sup> *Ibid.*, p. 49, para. 152.



swered. His tentative answer to that question was that, while all injured States were equally entitled to demand cessation/reparation and eventually to take countermeasures, they were not necessarily entitled to demand for themselves or to take measures for their own material benefit. Specifically, they were entitled to demand cessation/reparation for the benefit of each injured State in so far as it was injured and to resort, if necessary, to sanctions. In his view, it was by a rule of that kind that article 5 *bis* should be completed by the Drafting Committee and placed in the initial section of part two of the draft, where it belonged. The reason why he had not himself completed article 5 *bis* was that he had been waiting for a collective reaction to that first attempt which, he trusted, would soon be forthcoming. He was inclined to believe, subject to correction, that an article 5 *bis* so completed should apply *mutatis mutandis* in the case of crimes. A provision to that effect, once article 5 *bis* had been worked out by the Drafting Committee, could be inserted in the draft articles on the consequences of crimes as set forth in his seventh report.

11. Some of the subparagraphs of paragraph 1 of draft article 18 could prove useful, subject to further reflection on them in the Drafting Committee, in dealing with the issues raised by the multiplicity of injured States. Subparagraphs (c), (f) and (g) could, in particular, be useful in securing, in the case of crimes, forms of cooperation and coordination among the injured States that might less easily be made the object of obligation in the case of delicts.

12. The fifth and last issue was whether States should not be entitled to implement the legal consequences of a crime prior to the judicial determination of existence/attribution. He had taken good note of the suggestion made by one member of the Commission that the judicial determination envisaged in draft article 19 should follow and not precede the implementation by States of the legal consequences of crimes defined in draft articles 15 to 18. In view of the importance of that issue, he believed that it should be carefully explored by the members of the Commission, in which connection he thought it necessary to make three essential points that were perhaps overlooked by the objectors.

13. First, he trusted that, in considering the said suggestion, as compared to his proposed solution, due account would be taken of the provisions of draft article 17, paragraph 2, relating to interim measures, as well as of draft article 18, paragraph 1, subparagraphs (f) and (g). Those provisions should help to reduce the concern to ensure as early an implementation as possible of the legal consequences of the crime, especially in certain cases. Secondly, in his view, the abbreviation of the judicial determination he had proposed might speed up the procedure, and thus also help to minimize the concern in question. Lastly, he trusted it would not be forgotten that, in all cases of crime, and although the injured States had to wait, following the decision of a political organ, for a judicial determination before implementing the legal consequences of crimes, namely, the special or supplementary consequences under draft articles 15 to 18, as proposed in the seventh report, they were of course entitled, without waiting for compliance with the condition laid down in draft article 19, to implement the legal con-

sequences which derived from articles 6 to 14 of part two as applicable to delicts, since in most cases a crime also included a delict.

14. In conclusion, he urged the members of the Commission to reflect on all those questions and, if necessary, to help amend draft article 19, in particular, so as to make it clearer that the regime of special consequences of crimes had no dramatic, negative effect on the capacity to react to delicts in a timely fashion.

15. Mr. PAMBOU-TCHIVOUNDA said that the statements during the discussion that had taken place at the Commission's forty-sixth session on the sixth report on State responsibility had crystallized into two opposing views. The pessimist view, which denied that the division of an internationally wrongful act into the two categories of delicts and crimes had any relevance, had endeavoured to dissuade the Special Rapporteur from embarking on a special regime for State crimes. The optimist view, which he espoused, considered that the material differentiation of wrongdoing was a creation and an achievement of the Commission and that it was for the Commission to deal with it by means of a normative projection that would take account of the specific nature of State crimes. At the current session, the Commission had before it the Special Rapporteur's seventh report and, notwithstanding all the different views, should express its appreciation to its author. The report should be given a favourable reception despite the imperfections from which it suffered throughout. Some speakers had referred to those imperfections, but without sufficiently emphasizing the intrinsic difficulties of the topic, which were mainly of three kinds.

16. The first difficulty, which was methodological, arose out of the order adopted by the Commission itself for dealing with the consequences of an internationally wrongful act, considered from the standpoint of its dual—delictual and criminal—component. That order did not however correspond to that adopted for the wording of the definition of crimes and delicts in article 19 of part one<sup>4</sup> and, if anything, went in the opposite direction. The Commission had conceivably, for reasons of convenience and pragmatism, adopted an approach consistent with that of Descartes in the Discourse on Method, according to which a given subject was considered by proceeding from the simplest to the most complicated considerations. But it was conceivable to a certain extent only and common sense tended to recommend to the contrary. The adaptation of a pre-existing regime for crimes would certainly have made the Special Rapporteur's task easier, had that task consisted of the elaboration of a regime for delicts.

17. The second difficulty, which was technical, made the Commission, so far as the consequences of crimes were concerned, a prisoner of its legacy, namely, of part one of the draft articles,<sup>5</sup> which had in turn been affected by the legacy of the law of treaties. The methodological opening created by the generic term "internationally wrongful act" probably formed part of the progressive development movement that the Commission had

<sup>4</sup> See 2391st meeting, footnote 8.

<sup>5</sup> See 2394th meeting, footnote 4.

wished to stamp on the international law of State responsibility that was being codified. None the less, by making it multilateral, in keeping with that dual legacy, it had altered the fundamental bases of machinery which, in its spirit and essence, remained bipolar. That obviously created problems. In particular "the universalization of the status of injured State", as referred to in the seventh report, had politicized the matters.

18. The third difficulty was precisely of a political nature. The subject matter of paragraphs 2 and 3 of article 19 of part one, whether it was the essential obligation that was the subject of the breach or the result of such breach, was of a political nature. The interests that motivated the actors, gave rise to the reactions or determined the conduct were only the reflection of the political nature of State crime. State crimes were internationally wrongful acts of a political nature. It was inconceivable to him that, both before and after 1976, the Commission had had a different perception of the matter, for that was what explained the split that divided it as to the principle and relevance of a specific regime for State crimes. He could not accept that that split derived from the distinction between substantial consequences and instrumental consequences, which rather called to mind the very close relations between law and politics in international relations. Given those relations, how could a system of arbitration be devised and rebalancing machinery found that would restore law to its place without politics being undervalued or disregarded? That was the object of the task with which the Special Rapporteur had been entrusted.

19. The schema proposed by the Special Rapporteur was acceptable, even if it needed to be rewritten, improved or corrected by the Commission. He wished to make a contribution to the debate by formulating a number of comments relating, first, to the argumentation and, secondly, to elements of the proposed mechanism.

20. The argumentation which formed the substance of the seventh report related to both the normative and the institutional aspects—which of course were closely linked—of the consequences of international crimes. He would begin by commenting on a question that had given rise to a discussion for which the Special Rapporteur perhaps bore part of the responsibility, namely, the question of terminology. The Special Rapporteur had certainly wanted to impart a meaning to the concept of fault and of the wrongdoing State which recurred like a refrain in almost every paragraph of the seventh report. What were the reasons for that resurgence of the concept of fault, which some had seized on to make it the criterion for characterizing an act as a crime and, consequently, for distinguishing between the two categories of internationally wrongful acts covered by article 19 of part one? He could not agree with such an interpretation, for article 19 was clear. An internationally wrongful act was considered to be a generic category. A crime was an internationally wrongful act and so was a delict. What mattered in both cases was the breach of an international obligation. The intent supposedly underlying the breach was of little importance. Accordingly, a crime could not be characterized as such on the basis of the perpetrator's wrongful intent, for that intent was not known. The discussion on that point therefore appeared to be redundant.

21. Another perplexing aspect of the seventh report was its author's decision not to refer until a fairly late stage, under the heading of "The indispensable role of international institutions", to the list of crimes appearing in paragraph 3 of article 19 of part one. He wondered whether a recapitulation of that list placed much earlier on in the report, straight after the introduction, would not have helped the Special Rapporteur to shed light on the ambiguities of wording and substance contained in paragraphs 2 and 3 of article 19 or, at the least, on a doubt the Special Rapporteur had raised in the sixth report<sup>6</sup> that the question was very likely to arise whether the list ever had been and currently was the most satisfactory. In his opinion, that question was one of those that robbed the topic of scope and perspective and created the impression of going around in circles.

22. The reference to "rules of international law in force" in article 19, paragraph 3, was relevant to the characterization of crimes and to going further than the list, which, as the words "*inter alia*" clearly indicated, was not intended to be exhaustive. It was relevant because the identification of the rules in question—whether they originated in customary law or in treaty law or whether, for example, they related to the new law of the sea or the law governing international communications on the basis of case law (*Oscar Chinn case*,<sup>7</sup> *Corfu Channel case*<sup>8</sup>)—would reveal which among them set forth obligations that were essential to the protection of fundamental interests of the international community; and such an identification could perfectly well be made by the Commission, if not in plenary, then, at least in the Drafting Committee.

23. Moreover, the seventh report gave rise to some questions relating to certain specific modalities of the general obligation of restitution and the method consisting in transposing to the regime applicable to crimes all the elements of the regime applicable to delicts. Two factors were essential in that regard, namely, the object of the breach, or in other words the type of crime committed, and the preliminary determination of the beneficiary of reparation. The former of those two factors would reveal the limits of restitution in kind, or even of compensation, in the case of a crime, and the second would weigh fully in the justification of entitlement to act within the framework of a judicial body for the purposes of reparation. But did not the distinction between directly injured States and others which supposedly were only indirectly injured make the very concepts of international community and crime relative, and have the same effect on the basic elements of the definition of a crime in that questions of substance were going to arise, first, a priori at the level of the bodies entrusted with the characterization of a crime, and, secondly, a posteriori because of the specific implications of such a characterization. The principle of prior determination of the crime and of its attribution to a State was the keystone of the regime of crimes being elaborated, and the Special Rapporteur proposed not only the theory of that principle, but also a system for its technical application which, as

<sup>6</sup> See 2393rd meeting, footnote 3.

<sup>7</sup> *Judgment, 1934, P.C.I.J., Series A/B, No. 63, p. 65.*

<sup>8</sup> See 2381st meeting, footnote 9.

the Special Rapporteur conceded, could and should be amended and corrected by the Commission.

24. The assumption which formed the basis of the Special Rapporteur's reasoning and which the Commission ought to endorse was that, if the concept of crime constituted a legal category, it was logical that the determination of correspondence between *de facto* situations, or in other words the alleged crimes, and the definition of crimes in article 19 could and should be entrusted to a judicial rather than a political body. The required determination was, in fact, a legal one on the basis of an already existing standard, the definition contained in article 19. Within the framework of the United Nations system, the Special Rapporteur preferred recourse to ICJ rather than to the General Assembly or the Security Council. Several speakers had drawn attention to the shortcomings of ICJ, but they had done so in order to justify some alternative solution rather than to express a general and categorical opposition to that proposed by the Special Rapporteur. For his part, he had no preconceived ideas about the matter, but felt that there were three important points to be made. First, the Commission should beware of the risk of slipping from the universe of reparations into that of sanctions, from a system of "compensation" into one of "security". The possible overlapping of the jurisdictions of different bodies was connected with that risk. Secondly, the slowness of the Court's workings was not a convincing argument, in the sense that the judicial settlement of any dispute arising from the violation of a legally protected interest was likely to be slow rather than swift, as proved by the examples of Bosnia and Rwanda, or the *Corfu Channel* case, in which the ideas the Commission was exploring now had already been taking shape. Lastly, from the viewpoint of going further than the list in article 19, it might perhaps be of interest to envisage recourse to existing international courts, either at the regional level (for example, in the human rights area) or within the framework of specific regimes (in particular, that of the new law of the sea) establishing some *erga omnes* obligations—in other words, obligations whose breach constituted a crime within the meaning of article 19, paragraph 2.

25. As to the draft articles of part two proposed by the Special Rapporteur in his seventh report, draft article 15 did not seem to give rise to any particular problem. Article 16, on the other hand, and particularly its paragraph 2, made him wonder at what point the designation of the injured State was to take place and whether restitution in kind was conceivable in every case. The question was basically that of the scope of the jurisdiction of the body entrusted with the determination of the crime. In other words, did the attribution of a crime to a State include, in an implicit and incidental manner, the determination of the "circle of injured States"? If so, did such dualism apply to all crimes? In any event, it would be preferable to insert the words "where necessary" after the word "obtain" in paragraph 2 of draft article 16. Draft article 17 gave rise to two sets of problems, one of connection with other articles and the other of clarification. In its connection with draft article 16, it bore the stamp of uncertainty as to who had the right to resort to countermeasures. In particular, the Special Rapporteur might explain in the Drafting Committee the various

uses of the terms "every State", "every injured State" and "all States". Similarly, were interim measures requested by all States or only by certain particular States and on what basis? The right to resort to countermeasures also created a connection between draft articles 17 and 18. The implementation of the provisions of both articles was subject to the same condition of prior determination of the crime, which gave rise to the question whether the implementation of the obligations embodied in article 18 did not form part of resort to countermeasures. If not, was the implementation of those obligations left to the discretion of States or did it take place under the supervision of the international community? But, if so, who would be the arbiter? Lastly, draft article 19, which was the keystone of the edifice, and in particular its paragraphs 2, 3 and 4, could and should be altered, again for the sake of clarity. The Commission should, in any event, receive the seventh report favourably and, with the assistance of the Special Rapporteur—that open-minded and least doctrinaire of men—clarify all the elements that would enable him to draw up a well-ventilated and rationally acceptable text in the interests of the international community as a whole.

26. Mr. ROSENSTOCK, referring to the statement made by the Special Rapporteur at the beginning of the meeting, said he thought that the Commission was on the wrong track in wanting to build the second part of the draft on a text, that of article 19 of part one, that was full of infelicities if not absurdities, such as the definition of an international delict as any internationally wrongful act which was not an international crime in accordance with paragraph 2 of the same article, thus making it impossible to respond to a crime in the same way as to a delict. As to the "constitutional" problems raised by other speakers, everything would depend on what the Special Rapporteur meant to cut out of his proposals, but the problems in question were not confined to Articles 18 and 27 of the Charter of the United Nations; they also related to Articles 12, 24 and 39. The ballot proposed by the Special Rapporteur combined the negative aspects of both systems to create a potential monster. So far as the commission of jurists that was supposed to act as prosecutor was concerned, if that meant the General Assembly or the Security Council having to set up a subsidiary organ to conduct the prosecution of a State in ICJ, that was a highly inadvisable route to follow. Nothing in the Special Rapporteur's new proposals therefore cured the fatal problem of all his imaginative constructs, namely, that the compulsory jurisdiction of the Court would not be acceptable to States. He appreciated the Special Rapporteur's undeniable creativity, but thought that it reflected a desire to attain a castle in the sky and to put off the recognition that nothing remotely similar to the proposed system was going to work. The experience of the Council, all the way back to the case of Southern Rhodesia,<sup>9</sup> clearly showed that dealing with problems which involved threats to international peace and security did not need the imaginative construct of crimes of States. The real question continued to be that of the purpose of the proposed edifice: were there any acts which the international community might plausibly consider to be crimes of States and which did not represent threats to

<sup>9</sup> Security Council resolution 277 (1970) of 18 March 1970.

international peace and security? Obviously, such cases could only be peripheral ones that could be dealt with as *erga omnes* violations, combined with some refinements of the concepts relating to directly or indirectly injured States. The question that needed answering was why the Commission should construct the whole edifice for peripheral cases and, by so doing, jeopardize meeting the time-limits it had set itself for the first reading, especially as the text it would eventually produce would not be likely to contribute to the progress of international law or the promotion of international peace and security.

27. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Rosenstock's statement was out of order inasmuch as the Commission was in the process of considering the way in which he had acquitted himself of the task it had entrusted to him at the preceding session. He had worked very hard on the preparation of his report, which, like all reports, was certainly not perfect and needed to be improved by the Commission. That Mr. Rosenstock was against article 19 of part one was his own business, but he had no right to demand that the Commission should consider whether or not it should maintain article 19 or deal with the problem of the consequences of internationally wrongful acts characterized as crimes under that article.

28. Mr. MAHIOU said that there were differences of opinion within the Commission on the concept of crime and on article 19 of part one. From a logical point of view, it could be asked whether the Commission was right to deal with the consequences of crimes first and revert to article 19 afterwards, but the fact was that, at the present stage of its work, the Commission was in the process of considering those consequences. Therefore it must, without prejudging the reactions of States, acquaint them with the consequences it drew from crimes, leaving it to them to express their views on that subject and, consequently, on article 19. Since consensus seemed difficult to reach, the Commission might on completing the first reading, submit not a single proposal to the General Assembly and to States, but a proposal containing two alternatives or even two separate proposals, one based on the determination of the crime being made by States and the other on that determination being made by a mechanism which, in addition to determining the existence (or non-existence) of a crime, would decide on the lawfulness of the consequences to be drawn therefrom by States or any other institution.

29. Mr. HE thanked the Special Rapporteur for his erudite and elaborate report accompanied by recommendations reflecting his deep conviction about the course he believed the Commission should follow.

30. After due reflection he had to admit, with great reluctance, that despite the ingeniousness, boldness and imagination of the Special Rapporteur's ideas, approaches and reasoning, the envisaged system might be far from practicable. He feared that the gap between the ideal and the reality remained serious and great and that, for that reason, the Commission's work might lead nowhere because the resulting draft articles, even if they could be accepted by some States in the form of a convention, still could not affect the competence of United Nations organs as defined by the Charter.

31. The fundamental issue continued to be the use of the term "State crime" in the field of international law in a sense other than the meaning it had in internal law, such usage was bound to cause concern to most sectors of international public opinion.

32. It was widely accepted that States did not commit crimes, but individuals did. Under international law, the State was composed of certain basic elements, namely, territory, population and administrative organs. If a State were to be established as a subject of crime, the question might be asked whether the main elements constituting it should be considered as committing a crime. For territory or population in an integral sense, the answer was no. For juridical persons, including administrative organs, the question whether or not they could be considered as subjects of crime was disputable. That problem had been dealt with by States in a variety of ways. But, in any case, the State itself had been exempted from criminal responsibility, since it alone was entitled to punish and since it could not punish itself.

33. By extension, it was difficult to see who, in an international community of some 184 sovereign States on an equal footing with one another, all with the power to punish, could exercise such power over other sovereign States. True, the Charter of the United Nations endowed the Security Council with the power to maintain international peace, but it gave the Council no legal or criminal function with regard to States. ICJ was the only permanent judicial organ for the settlement of disputes, but its jurisdiction was founded on voluntary acceptance by States. That being so, it would be difficult to imagine how the United Nations machinery could operate in the way envisaged by the Special Rapporteur.

34. Reverting to the argument that only individuals, but not States could commit crimes, he said that, in a sense, the State could be considered as an instrument which individuals could use in order to commit crimes. Thus, criminal responsibility would fall on the individuals and the crimes committed would constitute crimes of individuals. Persons in the leadership of a State might use its territory, resources, people and administrative organs to engage in internationally wrongful acts for criminal purposes. Furthermore, as Mr. de Saram had pointed out (2394th meeting), to use the term "attribution" to mean that a State was liable to compensate for harm caused by its officials or agents was one thing, but to impose the vicious label of "criminal" on the entire population of a State because of the conduct of some of its leaders was another. That was not fair to the population of the offending State and could not be justified.

35. That was why it had been suggested that, if the main objective was deterrence, the best way of achieving that objective was to attribute criminal responsibility to the individuals from the offending State who had decided to commit the wrongful act. Imposing criminal responsibility on the State—an abstract entity—would dilute the deterrent effect on the individuals who were criminally responsible.

36. As to international practice, the Nürnberg and Tokyo Tribunals had tried and punished individuals as government leaders who had committed crimes against peace and humanity. The International Tribunal for the

former Yugoslavia<sup>10</sup> and the International Tribunal for Rwanda<sup>11</sup> had jurisdiction to try not State “crimes”, but crimes of aggression and genocide committed by individuals. Moreover, the draft statute for an international criminal court and the draft Code of Crimes against the Peace and Security of Mankind also applied to individuals. The proposal that “crimes” should be attributed to States therefore did not reflect contemporary State practice.

37. The concept of “crime” as provided for in article 19 of part one encroached on the field of primary rules and went beyond the Commission’s role, which should be to set forth the secondary obligations that would arise in the event of any breach of primary rules. Consequently, to persist in addressing the legal consequences of a questionable notion—State “crime”—would only prolong the debate and divert the Commission from the important task of elaborating a set of rules on State responsibility.

38. If the concept of “crime” were to be introduced into the draft articles on State responsibility, clear provision must be made for the judicial system that would determine that a crime had been committed. In that connection, the Special Rapporteur had proposed, in draft article 19 now before the Commission, that the main organs of the United Nations—the General Assembly, the Security Council and ICJ—should, in playing their respective roles, together take the important decision to implement the special provisions on the legal consequences of crimes. That proposal, which was bold and imaginative, seemed attractive. It should, however, be remembered that the Council and Assembly were political bodies whose mandates were defined in the Charter of the United Nations: the function of the Council in maintaining international peace and security was purely political and had nothing to do with legal judgements and the role of the Assembly was also political and limited to deliberations and recommendations. The suggestion that the Council or the Assembly should consider whether an “international crime” would justify the grave concern of the international community would mean that the Council or the Assembly would become involved in the legal field in that they would be enabled to exercise a *de facto* judicial function which should be exercised *ipso facto* by an international judicial body. The question whether such a proposal was in conformity with the Charter therefore merited further study. It was also a matter that concerned the interpretation of the Charter, which was outside the Commission’s mandate.

39. Reference to ICJ was a good idea, but, as Mr. Bowett had pointed out (2392nd meeting), the problem was that, as a rule, the Court took a long time, sometimes several years, before arriving at a decision. It was because of that problem that the Special Rapporteur had suggested the number of judges should be increased. That, however, would not speed up the work of the Court, but would involve an amendment to the Charter and to the Statute of the Court, which was outside the Commission’s field of competence.

40. At the preceding session, he had been among those who had advocated that the legal consequences of an internationally wrongful act should be addressed on the basis of the distinction, not necessarily between crimes and delicts, but between quantitatively less serious and more serious internationally wrongful acts. That might provide a way out of the Commission’s dilemma. The Special Rapporteur, however, insisted on dealing with the legal consequences of “State crimes” separately, thus placing the new draft articles on a questionable basis. In the circumstances, he would reserve his position on draft articles 15 to 20, as proposed in the seventh report, but he wished in passing to make a few comments in that connection.

41. The draft articles on State responsibility should be based on the principle of the sovereign equality of States and should exclude any unduly excessive demands that encroached on the rules and principles of international law relating to the protection of the sovereignty, independence and stability of the offending State. Yet such limitations had deliberately been omitted from draft article 16. That article also provided that every State was entitled to demand full reparation. Given that, in the case of “crime”, all States were injured States, did that mean all States had the right to demand full reparation regardless of the limited resources of the offending State? Should a distinction be drawn between injured States and States entitled to demand reparation, as had been done between directly injured States and indirectly injured States? The underlying logic of the article seemed questionable.

42. The provisions on restitution in kind, satisfaction and guarantees of non-repetition also raised certain difficulties.

43. It was important to strike a certain balance between the progressive development of international law and its codification. While the Commission should look beyond the stark realities, so as to promote the progressive development of international law, it should be wary of pursuing an ideal that was too far removed from reality lest the outcome of its work should prove unacceptable to States and, hence, futile. It was also necessary to ensure consistency between international law and State practice. The approach contemplated, whereby the system of international responsibility would be made into a system parallel or supplementary to the system under the Charter, seemed too ambitious to succeed. It would be better if, with a view to carrying out its mandate, the Commission confined itself to setting up a system of secondary obligations on State responsibility, which was already a difficult and complex task. On practical grounds, he would agree with the suggestion made by some delegations in the Sixth Committee, at the forty-ninth session of the General Assembly, that consideration of the question of the legal consequences of international crimes should be deferred until second reading.<sup>12</sup> Although that suggestion would leave an undesirable gap in the draft articles, it would provide a solution to the current dilemma.

<sup>10</sup> See 2379th meeting, footnote 5.

<sup>11</sup> *Ibid.*, footnote 11.

<sup>12</sup> See *Official Records of the General Assembly, Forty-ninth Session, Sixth Committee, 25th meeting, para. 4.*

44. Mr. ROSENSTOCK said that the Special Rapporteur was free to think as he saw fit of his suggestions, comments, questions or analyses, but he would appreciate it if he did not engage in *ad hominem* argumentation.

45. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had engaged not in an *ad hominem* argument but in an argument in reply to what he considered to be out of order proposals. Mr. Rosenstock was out of order in raising the question whether article 19 of part one, or any other article in the draft, should deal with crimes. At the present stage, the issue was to find solutions for the implementation of the consequences of crimes, and not to discuss whether article 19 of part one, as adopted on first reading, should stand.

46. The time argument was not valid. If the draft articles under consideration were sent back to the Drafting Committee with all the comments and proposals made in plenary in that connection, the Drafting Committee could start to consider them at the current, or next, session. He did not see why the Commission should come back all the time to the use of the word "crime", which had been adopted in article 19 of part one: it was not his invention and he did not insist on it. Nor did he intend to propose that a given consequence should or should not have a punitive character. He had simply indicated the supplementary or special consequences of crimes and ways and means of implementing them. It was up to the Commission to discuss those questions at the current and next sessions and at least to try to produce draft articles on the subject. The waste of time was caused by the improper attempts, by some members, to remove article 19 of part one beforehand.

47. Mr. SZEKELY said that he was grateful to the Special Rapporteur for his courage in placing the strengthening of the rule of law in international relations before the cold, calculating and selfish realism of the individual interests of States.

48. In his excellent seventh report, the Special Rapporteur mentioned two interdependent problems to which the distinction between an international delict and an international crime gave rise. The first problem concerned the rules governing the determination of the special or supplementary consequences of crimes as compared to the consequences of delicts, while the second concerned the institutional question of the appointment of the entity or entities that would determine and/or implement such special or supplementary consequences. As one who was resolutely in favour of the distinction between an international delict and an international crime, he was also in favour of the aggravation of the consequences of crimes as compared to the consequences of delicts. For the same reason, he was, moreover, in favour of the intervention of international institutions to determine who had committed an international crime and to implement the special or supplementary consequences of that crime so as to make it possible to prevent, or at least minimize, the possibilities of arbitrary action that were more likely if States, taken individually, had to do the same without any control.

49. Clearly, therefore, the Special Rapporteur had had to meet the enormous challenge of devising a credible scheme whereby the existence of a crime could be deter-

mined and its attribution decided in a legally objective manner.

50. He started to construct that scheme in draft article 15 of part two, in which he proposed the regime of supplementary substantive and instrumental consequences. His own view was that that regime should be in addition to the regime of the legal consequences entailed by a delict, "not "without prejudice" to it. In draft article 16, the Special Rapporteur introduced the first adjustment by aggravating the consequences of a delict in the case of crime: the State which committed a crime would not enjoy the benefit of the exceptions provided for in article 7, subparagraphs (c) and (d), which provided that restitution in kind was due provided, and to the extent, that it

would not involve [for the State which committed the wrongful act] a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation

or that it

would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.<sup>13</sup>

51. In the first case, he agreed the criterion should be that the wrongdoing State must, in so far as possible, re-establish a situation whose maintenance was essential for the international community even if that would mean a very heavy burden for it. In the second case, it would be reasonable, in his view, to provide that the restitution in kind imposed on the wrongdoing State would be confined to safeguarding the vital interests of its population. In that connection, he wondered whether it was possible for the State to suffer serious economic consequences without the vital interests of its population being endangered. In practice, it was probable that those vital interests would be seriously affected by the State crime and that it would be the population, always the weaker and more vulnerable party, who would pay for the crime or be punished for it, and not so directly the natural persons or groups of natural persons who ran the Government or took decisions. Similarly, because of the disproportionate burden restitution in kind represented by comparison to compensation, the exception to the limitations set forth in article 7, subparagraph (c), to which reference was made in article 16, could, in practice, affect the vital interests of the population more than those of officials who, through the acts they had committed under cover of the Government's prerogatives, had caused the State to commit an international crime. That was an added reason for aggravating the penalties laid down in the draft Code of Crimes against the Peace and Security of Mankind, particularly in the case of crimes committed by an official in the performance of his official duties. Even so, he did not see how States could be deterred from committing an international crime except by providing for extreme consequences. In the interest of balance, however, it would then be advisable to define the meaning and scope of the expression "vital needs of the population" so that restitution in kind did not result in a massive violation of the fundamental political, social and economic rights of the population—which was what article 14

<sup>13</sup> See 2391st meeting, footnote 9.



(Prohibited countermeasures)<sup>14</sup> was designed to prevent. Perhaps it should also be stipulated that the restitution must be materially feasible, as the Special Rapporteur pointed out in his report, and also morally tolerable, as the Special Rapporteur stated in his report in regard to "satisfaction". He had dwelt on that point because, in his view, the sacrifice of the vital needs of the population was far more to be feared in the case of a developing wrongdoing State than in that of a prosperous wrongdoing State, which had more resources for making reparation.

52. As to the exception concerning the safeguarding of political independence, he agreed with the Special Rapporteur's conclusion in his report, which was reflected in draft article 16, paragraphs 2 and 3, but not with the reasoning set forth in the report. Basically, he did not believe it was possible to say in particular that aggression was a wrongful act frequently perpetrated by dictators or otherwise despotic Governments, for contemporary history made it sufficiently clear that aggression was often, and perhaps even more often, also committed by industrialized democracies because they had a far greater chance of going unpunished because of their power and, above all, because, under the international legal system, there was no completed regime of international responsibility with defined consequences and international machinery to determine that the wrongful act had occurred and to apply the consequences it entailed, like the one the Special Rapporteur proposed.

53. The distinction the Special Rapporteur made between "political independence" and "political regime" seemed at first sight to be risky, to say the least. "Political regime" according to the meaning given to it in the report, seemed rather to be linked to, and to have an affinity with, the concept of "self-determination" in political matters; if that self-determination were affected, the inevitable result would also be an infringement of political independence. It would perhaps be better to link the concept of restitution in kind less to the "regime" and more to the group of persons who controlled it and who were covered, in the context of reparation through "satisfaction", by article 10, paragraph 2 (a),<sup>15</sup> and draft article 16, paragraph 3. Despite that dubious distinction, however, the concept of "political regime" and its consequences in the event of an international State crime were admirably well explained in the report. To his mind, there was nothing incongruous in the wrongdoing State being required to make restitution in kind in the event of an international crime even if that presupposed that the group of persons intellectually and materially responsible for the crime must be punished, chastised and, above all, removed from power (or from the political regime). Such a measure was certainly less extreme than depriving the wrongdoing State of the benefit of the rules and principles of international law concerning the protection of its sovereignty and freedom, to which reference was made at the end of draft article 16, paragraph 3, of and which would irreversibly undermine the reservation or safeguard set forth at the beginning of that paragraph, in other words, the preservation of its exist-

ence as a genuinely independent member of the international community.

54. If, as he trusted, a close connection was ultimately established between the regime of consequences laid down in article 19 of part one of the draft articles on State responsibility and the regime provided for in the draft Code of Crimes against the Peace and Security of Mankind, the persons covered would be more or less the same. Consequently, it was inconceivable that, under the terms of the draft Code, they would end up paying for their acts with loss of their liberty, while, under the draft on State responsibility, they could remain free and even continue to exercise power. That would be manifestly unacceptable and absurd.

55. As to the instrumental consequences, it was a positive step to provide that "all States" could resort to countermeasures, something which constituted a very important aggravation of the consequences of committing a crime and could act as a deterrent or bring pressure to bear on the wrongdoer. In that regard, draft articles 17 and 18 were not only particularly well structured, but showed that articles 11 to 13, concerning delicts, were along the right lines.

56. He also fully endorsed draft articles 19 and 20 and pointed out that it was inconceivable that the Commission should take nearly a quarter of a century to elaborate a draft convention on State responsibility without including an institutional system for the progressive development of international law like the one devised by the Special Rapporteur. Personally, he would prefer a judicial mechanism to a political mechanism. Furthermore, while the slowness of ICJ was to be deplored, that of a body like the General Assembly should not be underestimated, for it was still considering at its regular sessions items that had been on the agenda for more than 20 years. The procedure for establishing the existence/attribution of a crime was very important, since it could either weaken or strengthen international law.

57. Again, a system under which States were obliged to submit to a settlement mechanism would be nothing new. For several decades, States had agreed to such mechanisms, more particularly under the Hague Conventions and the Charter of the United Nations. Accordingly, it was not unreasonable to expect all States to agree to be judged by the same yardstick and so expect to impart some reality to the principle of the equality of States in law.

58. The mechanism proposed by the Special Rapporteur was in fact modest. Indeed, under a perfect legal system, that institutional scheme should be applied not only to crimes, but also to all international delicts; confining the application of the mechanism to crimes was already a concession to the sacrosanct sovereignty of States, a concept which States often invoked improperly in order to evade the consequences of their breaches of international law. The provisions of draft articles 19 and 20 seemed to be regarded by some members as removed from reality, but it should be borne in mind that, as far as the crucial question of State responsibility was concerned, being realistic meant bowing to the lack of political will on the part of some States which did not want legal obstacles that would in any way hinder their free-

<sup>14</sup> Ibid., footnote 11.

<sup>15</sup> Ibid., footnote 9.



dom to promote their interests, in disregard of the rights of others or the interests of the international community as a whole. The price of that realism was being paid by men and women, children and old people, victims of wars of aggression, colonial domination, slavery, genocide, apartheid and ecocide, because States did not want their acts to be judged by the competent international bodies, not only to avoid bearing the consequences, but also to remain free to carry on perpetrating their misdeeds. Realism should not turn the members of the Commission into their accomplices. It had been asserted that States did not commit crimes; unfortunately, every day millions of victims gave the lie to that assertion. Those considerations had to be borne in mind in answering the question raised by Mr. Rosenstock, namely, whether an arrangement such as the one proposed by the Special Rapporteur was necessary. For his own part, he was convinced that it was.

59. He would also like to make a few comments on the informal addendum to the seventh report. To begin with, the idea of an ad hoc commission of jurists appointed by a political body was quite disturbing, for it was difficult to believe that such a system would afford some degree of impartiality. He would prefer the other solution suggested in the informal addendum, which emphasized the judicial rather than the political aspect of the mechanism by setting up an ad hoc Chamber of judges to make the requisite finding. Nevertheless, if the judicial phase was assigned to an ad hoc commission of jurists appointed by a political body, the members of that Commission should at least be expected to act in keeping with the interests of the international community and not the particular interests of the States of which they were nationals.

60. One paragraph of the informal addendum was rather troubling in that it spoke of "third" States. As the Special Rapporteur himself admitted, such States should participate as principal parties at the side of the original applicants, since all States were in fact injured by the commission of an international crime.

61. Otherwise, he endorsed the conclusions the Special Rapporteur set out in the informal addendum to take account of diverging opinions which had been expressed in the course of the discussion. In particular, the proposals concerning the adoption of countermeasures even before a judicial determination of the existence of an internationally wrongful act were entirely acceptable.

62. Lastly, it was regrettable that the debate on the topic of State responsibility, which was of crucial importance to international law, gave rise to such sharp controversy, precisely in the year of the fiftieth anniversary of the United Nations, as if no lesson had been drawn from the past, as if the guarantees of respect for international law had been greater after the Second World War than they were at the present time, a time of other conflicts and of other serious breaches of international law. It was none the less to be hoped that the Commission, faithful to its task, would do everything to move ahead in its work on the topic under consideration, even moving into the progressive development of international law.

63. Mr. THIAM said that he wished to emphasize the generosity and humanism behind the Special Rapporteur's seventh report.

While a number of points in the report were open to dispute, by and large the cause did not lie with the Special Rapporteur, who was one of the most competent members to whom the Commission had entrusted the consideration of a particularly delicate topic, but with the Commission's particular method. The Commission was moving ahead in considering the draft articles when a number of concepts and terms were still not clearly defined. For example, the concept of crimes had been the subject of debate since the time of Mr. Ago. It was unfortunate and dangerous that the report and the draft articles used terms on which not everybody was agreed and the meaning of which was constantly being questioned. It was also regrettable that vague and ambiguous expressions should be used when a more straightforward formulation would be more readily understandable. In that regard, for example, under the terms of draft article 18, paragraph 1 (e), all States would

"fully implement the *aut dedere aut judicare* principle, with respect to any individuals accused of crimes against the peace and security of mankind the commission of which has brought about the international crime of the State or contributed thereto."

Would it not be better to speak simply of individuals whose crimes entailed the international responsibility of States?

64. The Commission was also considering part two of the draft when part one had not been endorsed by the international community and the very terminology used had not been accepted. Consequently, part two of the draft was built on quicksand. To avoid talking pointlessly and going around in circles, the Commission should have submitted part one of the draft to States after completing the first reading, obtained the comments of States on part one, considered part one on second reading and only then have taken up part two. The Commission should never lose sight of the fact that it was working for the international community and that, for example, when it was drafting articles on crimes, it must know whether the international community endorsed the meaning that it attached to that term. Moreover, the woolliness of certain words or concepts was a constant source of controversy.

65. In his opinion, the Commission also had a tendency to indulge excessively in theory, to the point where it sometimes lost the resulting conclusions from sight. For example, it had enunciated the principle whereby crimes had an *erga omnes* effect, while envisaging a convention on crimes. However, if crimes had an *erga omnes* effect, why would a convention between States be needed? He would be grateful to the Special Rapporteur for some clarification on that point.

66. Over and above problems of consistency and method, the Commission should also weigh up the effectiveness of the Special Rapporteur's proposals. For instance, the Special Rapporteur had considered that, if an allegation was to be regarded as sufficiently serious and well founded to require the attention of the international community, a political body—the General Assembly or the Security Council—should so decide. Such reasoning seemed acceptable, for the seriousness of an act was a

subjective notion and a political authority was needed to take a decision in that regard. Nevertheless, such a mechanism posed a problem in that the decision to refer a matter to ICJ, the judicial body competent to determine the responsibilities and assess the consequences of crimes, was left to a political body. Furthermore, the Assembly procedure would not prove very easy, since the Assembly, which took its decisions by a two-thirds majority, held a regular session only once a year. Convening a special session would require consulting all States and a certain majority would need to meet, something which was neither easy nor rapid. As far as the Council was concerned, things were still more complicated because account would have to be taken of the veto power of its permanent members. If the members directly concerned were to abstain in the voting, as proposed by the Special Rapporteur, the Charter of the United Nations would need to be amended. Indeed, all of the solutions proposed by the Special Rapporteur would entail amending the Charter, not with regard to the Charter's principles or purposes, but with regard to the procedures that it established.

67. In the field of State responsibility, which involved international peace and security and in which States could be very seriously wronged, it was essential for the procedures to allow prompt action. Yet the mechanisms proposed by the Special Rapporteur would be slow and complex and it was doubtful how effective they would be in responding to an emergency situation. The proposals contained in the informal addendum were not, at first glance, any more satisfactory than those contained in the report.

68. In the discharge of its mandate, which was to ensure the progressive development of international law, and to respond to the needs of the international community, the Commission should be in closer touch with reality and work more methodically, step by step. The progressive development of the law did not call for revolutionary solutions, even if they were generous solutions. While the Special Rapporteur was skilfully carrying out his difficult task, the members of the Commission were duty-bound to tell him of their concerns. It was his hope that the Commission would move back a little and work on the progressive development of international law in order to meet the needs of the international community.

69. Mr. PELLET said that he had already spoken on a part of the Special Rapporteur's report (2393rd meeting), a part which was perhaps the most spectacular and also certainly the most debatable in that it sought to subordinate the implementation of the consequences of the commission of a crime to a prior finding, in a wieldy and complicated arrangement. But, regardless of how spectacular it was, the procedural side of the report was not the most important; it was important only because, if the mechanism devised by the Special Rapporteur was adopted, the proposals for a response to heinous wrongful acts that were set out in draft articles 16 to 18 would be largely drained of substance. That would be a great pity, for they could be criticized on points of detail, but they were in the main entirely appropriate.

70. He had already indicated his complete agreement with draft article 15, which was very important in that it provided that the consequences of crimes added to, and did not replace, the consequences of delicts. Crimes and delicts were internationally wrongful acts and it was therefore natural that they should produce shared consequences. Similarly, since, under article 19 of part one, a crime was a serious breach of an international obligation of essential importance for the protection of fundamental interests of the international community, it was natural that the consequences of such a breach should be more radical and more "penalizing" than those of a mere delict. In that regard, he would point out to Mr. Thiam that, since the Commission had adopted part one of the draft, it was natural that it should continue under its impetus and that it would not now be natural for it to adopt an entirely different strategy.

71. He wished to engage only briefly in the discussion of the draft articles, for the discussion fell within the purview of the Drafting Committee, but he would none the less like to dwell at some length on two fundamental problems of a general nature which had been taken up by a number of members and were again discussed in the informal addendum. One pertained to the relationship between the draft and the system for the maintenance of international peace and security organized under the Charter of the United Nations and the other pertained to the definition of the injured State.

72. For lack of time, however, he would continue his statement at a later meeting.

73. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was appreciative of some of the comments by Mr. Thiam, but wondered what Mr. Thiam meant when he called for the Commission to move step by step. According to that suggestion, the Commission should have broken off its work for two years after adopting part one of the articles, on first reading, including article 19, in order to submit them to States and only thereafter deal with the consequences of the wrongful acts singled out as crimes under article 19. However, on the one hand, it was usual for States to comment on a draft only when the whole of the draft had been considered by the Commission and, on the other, it seemed obvious that States would not be in a position to discuss article 19 and part one of the draft properly without having a draft as a whole including of articles covering the consequences of crimes. In addition, it might well be asked why article 19 should have been, so to speak, suspended, whereas the rest of the articles of part one were being used by the Commission as the premise for the elaboration of parts two and three. Accordingly, he did not understand the reasons for Mr. Thiam's suggestion, but could not believe that it was simply a pretext.

74. Mr. THIAM said it seemed that he had not been properly understood. His remarks had been intended more particularly to highlight the fact that, if the General Assembly rejected the concept of State crimes and article 19, the whole edifice built by the Commission would collapse. The idea behind his suggestions had been to make sure that the international community endorsed the new foundations proposed by the Commission; if the

Commission did not do so, it would be continuing its work at its own risk.

*The meeting rose at 1 p.m.*

## 2396th MEETING

*Wednesday, 7 June 1995, at 10.10 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (continued) (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)**

[Agenda item 3]

### SEVENTH REPORT OF THE SPECIAL RAPporteur (continued)

1. Mr. YAMADA said that, with the submission by the Special Rapporteur of his scholarly seventh report (A/CN.4/469 and Add.1 and 2) containing draft articles 15 to 20 of part two, the Commission now had before it the complete structure of a draft convention on State responsibility. He had perused the whole set of draft articles several times, and could not help but entertain some fundamental doubts about the responsibility regime to be set up in the future convention. He recognized, however, that the Special Rapporteur's purpose was faithfully to abide by the past decisions of the Commission and the prevailing views of members. Hence his doubts related not to the Special Rapporteur's own proposals but to the decision of the Commission on the "structure of the draft" taken in 1975,<sup>2</sup> and, in particular, the decision that the purpose of part two of the draft would be to determine what consequences an internationally wrongful act of a State might have under international law in different hypothetical cases. It would first be necessary to establish in what cases a State which had committed an internationally wrongful act might be held to have incurred an obligation to make

reparation, and in what cases such a State should be considered as becoming liable to a penalty. He was concerned at that coexistence in part two of the two entirely different legal concepts of reparation and penalty.

2. He was not, at the present stage, questioning part one of the draft, which included article 19, on international crimes and delicts.<sup>3</sup> His doubts related to part two, and to the kind of responsibility regime the Commission should formulate for internationally wrongful acts. The problem might be similar in substance to the one Mr. de Saram had so eloquently explained (2394th meeting). In explaining his own thinking, he wished, albeit with some diffidence, to draw an analogy between international and national legal systems. Although such an analogy might not necessarily be valid, it could perhaps shed some light on the topic under consideration.

3. In the Japanese legal system, civil responsibility was totally different, distinct in quality, separate and independent from criminal responsibility. The regimes of civil and criminal responsibility were never mingled. When individual A failed to fulfil a contractual obligation entered into with individual B, civil responsibility alone was incurred. The State provided a set of rules governing civil responsibility and it was left entirely to parties A and B to solve the problem, either out of court or through recourse to judicial proceedings. No agency of the State, other than the judiciary, intervened in the case. That system of civil responsibility was the one which prevailed in the modern-day world: most States had now eliminated intervention by State agencies in matters of civil responsibility, and such Dickensian institutions as debtors' prisons were prohibited under article 11 of the International Covenant on Civil and Political Rights.

4. When individual A inflicted bodily injury on individual B, that act entailed civil responsibility for individual A *vis-à-vis* individual B and, at the same time, criminal responsibility for individual A *vis-à-vis* the State. The civil responsibility aspect of that wrongful act was dealt with in exactly the same way as in the case of a breach of contract. The civil proceedings were wholly independent of the criminal proceedings, and whether individual A was convicted or not was irrelevant. Concurrently, criminal proceedings might be held. The criminal responsibility aspect of that same wrongful act, the crime of bodily injury, was handled only by the State agencies responsible for suppressing crimes, such as the police and the prosecution department. Neither individual B, the direct victim, nor other individuals who might theoretically be regarded as victims if a crime was thought to be against the public interest, were involved.

5. In the draft articles of part two submitted by the Special Rapporteur in accordance with the Commission's decision of 1975, the civil responsibility and criminal responsibility of a wrongdoing State were lumped together under one regime, something that posed a problem. As he had said earlier, the analogy with a national regime might not be valid: the international community had not yet developed to a stage at which it could accommodate a criminal responsibility regime similar to

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> *Yearbook* . . . 1975, vol. II, pp. 55 *et seq.*

<sup>3</sup> See 2391st meeting, footnote 8.

a national regime. The Special Rapporteur clearly explained the situation in the seventh report, in which he stated that in the predominantly inorganic condition of the inter-State system, even the implementation of the consequences of internationally wrongful acts recognized as a crime by the international community as a whole seemed to remain in principle, under general international law, in the hands of States. He asked whether, in such circumstances where the actors were States and not the international community as a whole, a viable regime of criminal responsibility of States could be expected? He also asked whether the substantive and instrumental consequences currently envisaged in the draft articles of part two were effective punitive measures? He raised the question whether it would not be better to deal solely with the civil responsibility of States for all categories of internationally wrongful acts?

6. The Special Rapporteur was to be commended on his ingenious proposal for a two-phased procedure, in which the General Assembly or the Security Council would make a preliminary political evaluation and ICJ would make a decisive pronouncement on the existence/attribution of an international crime. That was one way to meet the requirement that an objective determination as to the existence/attribution of a crime should be a prerequisite for the implementation of any special regime. He also appreciated the Special Rapporteur's point that that procedure was likely to reduce the arbitrariness of the *omnes* injured State's or States' unilateral or collective reaction.

7. He asked how that scheme would function in reality. He had drawn up a comparative chart of the consequences of international delicts and international crimes. In the case of crimes, the injured State would be relieved of some restrictions on countermeasures as envisaged in article 17, paragraph 3. But that State must await the decision of the two-phased procedure before it could resort to countermeasures. The injured State could, admittedly, resort to the countermeasures stipulated in the case of an international delict. But what incentive did the injured State have to trigger that rather cumbersome procedure? It would not obtain a decision on the merits and a solution to the crime by resorting to that procedure. The Special Rapporteur pointed out that the wrongdoing State could also invoke that procedure. Indeed, by doing so, it might delay resort to countermeasures directed against it. Should the wrongdoing State be allowed to do that? Would it not conflict with the maxim *ex turpi causa non oritur actio* (no action arises out of a disgraceful matter)?

8. Draft article 19, paragraph 2, stated that the decision of the General Assembly and the Security Council on the matter should be made by a qualified majority. He, too, thought that it was the prerogative of those two organs to decide by the required majority in accordance with the provisions of the Charter of the United Nations. In the same article, the Special Rapporteur proposed an *actio popularis* system in bringing the matter before ICJ. It was the corollary to article 5, paragraph 3.<sup>4</sup> However, ICJ had been reluctant to accept an *actio popularis*. In its judgment in the *South West Africa* cases (*Ethiopia v.*

*South Africa; Liberia v. South Africa*), the Court had ruled that

the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute.<sup>5</sup>

9. The Special Rapporteur advocated a contentious procedure of ICJ rather than an advisory opinion with regard to the existence/attribution of a crime. He recognized the rationale of that argument, yet fully-fledged contentious proceedings between States were complicated and time-consuming. He said that what was sought from the Court was not a decision on the merits of the dispute and a final solution to the problem, but simply a decision on the existence/attribution of a crime. He asked whether it would not prejudice the authority of the Court to utilize the contentious procedure and to require it to stop short of a final judgment of the case. He also asked whether the Court was to be told to leave the matter in the hands of the parties until they brought the post-countermeasures dispute before it. He thought it might be more expedient to seek an advisory opinion of the Court. Such an advisory opinion could be made binding by placing a provision to that effect in the current draft. A precedent existed in article 37, paragraph 2, of the Constitution of the International Labour Organisation<sup>6</sup> as well as in article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations.

10. Mr. BARBOZA, referring first to the notion of "crimes" committed by States, said that the acts had to be called by some name. They were committed very often, they looked like crimes, they were crimes. Was it necessary to worry about the dignity of a State which engaged in such conduct? Of course, one must bear in mind the disadvantage of the fact that responsibility for such crimes in international law was a form of collective responsibility, and that innocent people would thus have to suffer the consequences of a State action, in circumstances such as an embargo. There was no way around it, but collective responsibility was a fact of international life, and to confine international action to punishing individuals for State crimes might not be sufficient to stop the consequences of such crimes. In any case, the draft articles contained important safeguards concerning protection of the vital needs of the wrongdoing State's population, the country's continued existence as an independent State, and its territorial integrity.

11. On the other hand, acceptance of the notion that there were international obligations which protected essential interests of the international community meant that conduct by States in breach of such obligations, however characterized, had to be attributed to States according to the same rules as applied to any other State conduct in part one of the draft. And that conduct would

<sup>5</sup> *Second Phase, Judgment, I.C.J. Reports, 1966, p. 47.*

<sup>6</sup> International Labour Office, *Constitution of the International Labour Organisation and Standing Order of the International Labour Conference* (Geneva, May 1989).

<sup>4</sup> See 2392nd meeting, footnote 13.

undoubtedly have to carry some aggravated consequences besides those attributed to wrongful acts.

12. After some reflection, the Special Rapporteur seemed finally to have accepted the original idea by the previous Special Rapporteur, Mr. Riphagen, that crimes had all the consequences of a delict plus some other consequences which the international community as a whole would impose on them. That also seemed logical. As a final general remark, he concluded by reaffirming that he was one of those who accepted the notion of an aggravated responsibility in cases of certain offences called "crimes".

13. As to the normative aspects of the seventh report, the Special Rapporteur had done a thorough job of analysing the substantive consequences of an international crime of State, by going through the substantive consequences of a delict—cessation, restitution in kind, compensation, satisfaction and guarantees of non-repetition—and making the necessary adjustments in the field of crimes. He had no important objections on that score. The report then went on to analyse the instrumental consequences. There was a fundamental difference between the precondition for lawful resort to countermeasures in the field of crimes and in the field of delicts: in the case of crimes, a pronouncement by one or more international organs was necessary, at least regarding the existence/attribution of a crime. Once that pronouncement had been obtained by the complainant State, there was nothing to oppose the adoption of countermeasures if an adequate response from the wrongdoing State was not forthcoming.

14. Regarding proportionality, apparently any *omnes* State might take countermeasures, even if the effects of the act on itself were solely the legal damage originating in the breach of an international obligation. It sufficed that the countermeasure was in proportion to the gravity of the international crime.

15. The other consequences of crimes as set out in draft article 18 were important in that they provided the basis for concerted action by States for certain purposes. They imposed obligations on every State party to the future convention to refrain from recognizing as legal or valid the situation created by the international crime, and to abstain from any act or omission which might assist the wrongdoing State in maintaining the said situation. States were also required to assist each other and coordinate their reactions in carrying out the two aforementioned obligations. Those countermeasures were imposed by any State party, not by the Court. He asked whether that meant that all other States had to follow suit and cooperate in whatever countermeasure was decided by any one State, as long as it was not a prohibited countermeasure.

16. The point was not just an academic one, for guarantees of non-repetition might be very onerous for the wrongdoing State, as was noted in the report, because the *omnes* injured States were entitled to address to the wrongdoing State demands of disarmament, demilitarization, dismantling of war industry, destruction of weapons, acceptance of observation teams, adoption of laws affording adequate protection for minorities and establishment of a form of government not incompatible with

fundamental freedoms, civil and political rights and self-determination. He asked who decided on those measures and whether there was an obligation on every State party to the future convention to assist the State taking the countermeasure, even if it deemed the countermeasure inadequate or excessive. He said that point was not very clear.

17. None the less, the part of the report on the normative aspect created a system of countermeasures of some weight, provided a sufficient number of States allowed themselves to be persuaded to join the convention on those terms. It was on institutional matters, that the report presented real difficulties. In that field, two different subjects should be distinguished: one pertaining to centralized reactions to a crime, usually known as sanctions; the other to decentralized reactions, namely, countermeasures. The draft articles proposed by the Special Rapporteur did not appear to introduce any innovations with regard to centralized sanctions. Draft article 20 very neatly separated measures under the draft articles from those the Security Council might take under the provisions of the Charter of the United Nations. Collective security, then, had nothing to do with the criminal responsibility of States in the draft, which was all to the good. It thus seemed that the system created in the report consisted of a number of decentralized countermeasures taken by States, triggered, except in the case of urgent measures, only by a decision of ICJ on the existence/attribution of a crime. Injured States also had access to the Court via a decision taken by the General Assembly or the Council by a qualified majority. The Special Rapporteur did not insist on the need for a qualified majority, to judge from the recently-circulated informal addendum to his report. Before the Court's decision, no countermeasures could be taken in regard to crimes, except for urgent, interim measures under draft article 17, paragraph 2. It was doubtful whether that system was likely to work in reality, unless the draft articles commanded exceptionally wide acceptance. He failed to see how, for instance, ICJ could be seized of a case where the wrongdoing State was not a party to the convention. Certainly, he was not aware that the Assembly had any legal power to seize the Court of a case in such circumstances. In view of the extreme reluctance of States to accept the compulsory jurisdiction of the Court, particularly with regard to articles of so vast a scope as those under consideration, making the system dependent on the acceptance of such compulsory jurisdiction might only add to the difficulties of the subject. It was a sad but realistic conclusion.

18. Mr. Pellet (2393rd meeting) had complained that the draft was too timid, that the articles proposed imposed too many conditions on the adoption of countermeasures, and that the Court's procedure was too slow to cope expeditiously with the consequences of a crime. In his informal addendum the Special Rapporteur had made some suggestions on ways of abbreviating the Court's procedure, such as the appointment of an ad hoc Chamber. If resort to the Court was to be retained in the draft articles, that was perhaps a good suggestion. The Special Rapporteur also pointed out that, in addition to the measures under draft article 18, paragraphs 1 (f) and 1 (g), interim measures could also be taken pending the Court's decision. But those measures might not be sufficient: it

might take some time for the effects of even a full range of countermeasures to make themselves felt. The initial problem thus remained.

19. Mr. Pellet apparently proposed that States should be given more freedom to take countermeasures, with an a posteriori legal revision. That was an interesting solution. It seemed that Mr. Pellet accepted either the Court or an arbitration procedure, perhaps along the lines of the one proposed in article 12 for ordinary countermeasures<sup>7</sup>. He would welcome some clarification in that regard. An arbitration procedure—a solution considered inappropriate by the Special Rapporteur—would deprive the process of the “Hue and Cry” effect<sup>8</sup> that would be provoked by the intervention of an international organization, but on the other hand, it would render the situation less dramatic, providing some consolation to those who did not accept the criminal responsibility of States. It was not a State, but a set of countermeasures, that should be subjected to legal revision.

20. At all events, if the first solution was deemed unsuitable, he would favour one along the lines suggested by Mr. Bowett (2392nd meeting), namely, the appointment by the General Assembly of a special prosecutor and of a commission of jurists to assist the Assembly in its pronouncement. The Commission was faced with a number of possibilities, among which it should be able to find an acceptable solution.

21. Finally, one paragraph of the Special Rapporteur’s informal addendum clarified the problem of the “differently injured States”, suggesting that those States were entitled to demand cessation/reparation and even to take countermeasures, but not for themselves or to their respective physical benefit, although incidentally, what was meant by the word “physical”? The Special Rapporteur might very well be correct: after all, in the case of a crime, the interests of the international community were at stake, as crimes were breaches of *erga omnes* obligations of fundamental interest to that community and *omnes* States acted as decentralized organs of that community. He suggested that the draft articles proposed in the seventh report should be placed before the Drafting Committee for examination.

22. Mr. VILLAGRÁN KRAMER said he would confine his comments to the institutional issues raised by the Special Rapporteur in connection with State responsibility for international crimes.

23. The road the Commission had been travelling in its study of wrongful acts was now branching off—on the one hand, into the byway of delicts, and on the other, into a path marked crimes. The road of wrongful acts had had only one exit: a place where States, either individually or as a group, were the victims of such acts. The situation was very clearly one of an *erga omnes* breach, a breach of commitments that affected the entire international community. If States were affected individually, the action was direct, as was the reaction; if States

were affected as a group, it was an *actio popularis*, as Mr. Yamada had just pointed out.

24. Now, on the path marked international crimes, the Special Rapporteur had set out a number of very clear signposts concerning the relevant institutional regime. In the case of acts entailing the right to take reprisals, a mechanism was suggested for dispute settlement based on consensus, or in other words, conciliation and arbitration, including mandatory third-party arbitration. The picture drawn of dispute settlement was attractive, audacious and juridically sound. It was grounded in ideas, not in institutions, and that was precisely why it was so useful.

25. The organs of the United Nations were evolving. The Security Council was taking on new functions in cases of breaches of the peace and was adopting significant measures such as the imposition of major sanctions. The Special Rapporteur had acknowledged that the United Nations as presently structured had limitations, but that new avenues for action by the Council had opened up, and they deserved to be explored.

26. The Special Rapporteur’s suggestion that the role of the General Assembly should likewise be explored was a valid one. Yet the General Assembly was empowered only to adopt recommendations, even in the case of crimes. It could, of course, “pillory” the wrongdoing State and the sanction of adverse publicity would then become one of its prerogatives. For Namibia, however, it had taken 27 years of public opprobrium before the tragic situation there had been resolved.

27. Another interesting option for the General Assembly would be that of requesting advisory opinions from ICJ on matters relating to a crime. If the Court found there was cause for a dispute among States, it would naturally refrain from ruling on the merits of the case. The advisory opinion mechanism was, of course, a political tool that could be borrowed by any Member State, but the Assembly, too, could make use of it. Indeed, by using it, the Assembly would be breaking new ground, effecting a de facto revision of the Charter of the United Nations and fostering a consensus in favour of an official revision of it. Requesting an opinion of the Court would, of course, imply accepting its jurisdiction. The Special Rapporteur made it abundantly clear in his report that the text on State responsibility would become a treaty to be signed and ratified by States. A State that ratified it would simultaneously be accepting the compulsory jurisdiction of the Court, and that might jeopardize the chances for broad ratification of the instrument.

28. A number of new developments had occurred in connection with the Security Council, owing to the new international climate created once the confrontations of the cold war had subsided. The Council’s functioning had become more efficient, as demonstrated by the sharp decline in the number of vetoes in recent years: the figures showed a radical reduction during the period 1988 to 1995, compared with 1975 to 1988. States that were not permanent members of the Council were gaining more and more responsibilities and a consensus configuration was emerging.

<sup>7</sup> For the text of article 12 of part two as adopted by the Drafting Committee at the forty-fifth session, see *Yearbook . . . 1993*, vol. I, 2318th meeting, para. 3.

<sup>8</sup> A. Zimmermann, *The League of Nations and the Rule of Law, 1918-1935* (London, Macmillan and Co., 1936), p. 451.



29. The Security Council had applied sanctions, very severe ones, against Iraq, not because Iraq had simply violated a norm of international law, but because its action could be characterized as a crime under international law. If the Council had adopted sanctions in what was essentially a breach of the peace, that meant there was room for it to exercise its competence in respect of international crimes. The sanctions imposed by the Council had involved compensation by Iraq to private citizens, not to States. The Council's action had simultaneously benefited individuals and punished a wrongdoing State.

30. In the whole range of options available, the best was probably recourse to the Security Council. Admittedly, it did pose a problem and it had been outlined by Mr. Bowett in 1994;<sup>9</sup> Mr. Jiménez de Aréchaga, too, had raised a similar point: there was nobody able to monitor the legality of actions taken by the Council.<sup>10</sup> Yet the expedient of requesting advisory opinions from ICJ had not yet been properly scrutinized.

31. The formulas offered by the Special Rapporteur for dispute settlement were different for crimes and for delicts. There might well be a reason for that disparity, yet it presented an obstacle to in-depth consideration of the dispute settlement scheme. Because the scheme was extremely sophisticated, it might prevent the Commission from finding a comprehensive solution for crimes and force it to lower its sights.

32. Mr. YANKOV said that the seventh report not only afforded an opportunity to pursue and perhaps complete the discussion on the concept of a "crime" committed by a State, but also offered further ideas in the form of new draft articles and proposals. It was a commendable intellectual effort to raise controversial questions and to try to offer some solutions. The informal addendum attested yet again to the Special Rapporteur's earnest efforts to provide common grounds for compromise.

33. The Commission's consideration of the legal consequences of internationally wrongful acts in general and of exceptionally grave breaches of international obligations in particular had focused on the concept of crime in international law and the definition contained in article 19 of part one.<sup>11</sup> The difficulties encountered in fleshing out that concept should not force the Commission to abandon its endeavour: it must make strenuous efforts to the bitter end in order to find a solution. Even if it deleted article 19 altogether, the problem of differentiating between ordinary delicts and serious breaches of international obligations would remain. He did not hold with the view that the only problem involved was one of terminology. Replacing the word "crime" by expressions such as "violation of extreme gravity", "internationally wrongful act of particular gravity" or "very serious international delict" would not solve the problem.

34. He agreed with the Special Rapporteur and some members that article 19 of part one in its present form gave rise to serious reservations and had to be reconsidered on second reading in the light of the Commission's work on parts two and three. The article's deficiencies, in both substance and form, had now become clearly evident. Mr. Rosenstock (2395th meeting) had detailed some of the reasons why the article did not measure up as a true legal definition of a crime as opposed to an ordinary delict.

35. During the Commission's review of article 19 of part one, a number of essential elements must be borne in mind. A crime was a breach involving the fundamental interests of the international community: it did not exist merely in the context of a bilateral relationship, but had broad international ramifications as well. Secondly, a crime was a breach that was exceptionally serious in both qualitative and quantitative terms. Finally, the international community had to recognize, on the basis of experience and practice, that a particular breach constituted a crime.

36. The concept of "crime" under international law had evolved, particularly during the Second World War, to crystallize in international public opinion as something which had political and moral, as well as legal, connotations. Therein lay the problem facing the Commission. He agreed with the Special Rapporteur that the regime to be proposed for crimes could not be seen as involving strict codification *de lege lata*. Particularly serious violations of international obligations such as aggression, genocide, human rights violations and serious war crimes had become generally recognized as "crimes" when they were committed, not only by individuals, but also by entities such as States. The higher degree of gravity was the inherent characteristic of such acts.

37. What kind of legal regime should be established for State responsibility? Was it absolutely necessary to retain the distinction between civil and criminal responsibility? Perhaps the time had come to move away from the standard approach based on municipal law. Protection of the marine environment was an area of concern that had prompted radical changes in traditional concepts of State sovereignty and State responsibility. Perhaps the golden age of legislation solely on the basis of customary law was now a thing of the past. The Commission was not a legislative body, but a group of legal experts whose function was to serve the international community by putting forward new proposals. It must take the actual and potential responses of States into account, but must not lose sight of its mission to provide new options for the solution of newly emerging legal phenomena.

38. As to the legal effects of internationally wrongful acts characterized as crimes, it was only natural to look into the "special" or "supplementary" consequences. The substantive consequences of ordinary delicts and those stemming from exceptionally serious violations of international obligations identified as crimes were similar in many instances and the remedies applied had many points in common, though it was necessary to explore the special consequences specific to crimes.

<sup>9</sup> See 2391st meeting, footnote 17.

<sup>10</sup> E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sorensen, ed. (London and Basingstoke, Macmillan Press Ltd., 1968).

<sup>11</sup> See 2391st meeting, footnote 8.



39. The problem of claimants derived from the notion of *erga omnes* breaches. The solution should perhaps be sought in a distinction between the substantive and the instrumental consequences of an *erga omnes* breach, irrespective of whether the breach was a delict or a crime. The informal addendum to the report pointed out the significance of that problem. Clearly, States that were directly or materially affected were different from other injured States. But the Commission was still at a very early stage of its examination of the issue. In his report, the Special Rapporteur made the interesting suggestion that the active and passive aspects of the responsibility relationship could be covered in draft article 15 of part two which would be the introductory provision of the special regime governing the substantive consequences of international crimes of States. While he agreed with that general proposition, he believed that the distinction between a directly or materially injured State and other injured States in connection with an *erga omnes* breach still had to be scrutinized.

40. Article 6 of part two (Cessation of wrongful conduct),<sup>12</sup> should apply both to delicts and to crimes, though in the case of a crime, the injured State should be able to request urgent action or support by the appropriate international institution, whether global or regional. The text of draft article 16, paragraph 1, therefore required further examination. Perhaps it would be possible to find additional elements by which grave breaches of international obligations could be more adequately identified.

41. As to restitution in kind, he understood the provisions proposed in article 7 of part two to apply to both delicts and "crimes". By referring to "every injured State" in paragraph 2, draft article 16 failed to draw a distinction between directly and indirectly injured States, something which was a shortcoming. On the other hand, it was right that the provision on compensation, set out in article 8, should apply to both delicts and crimes. Some differentiation between delicts and crimes should none the less be contemplated in connection with satisfaction and guarantees of non-repetition, namely, articles 10 and 10 *bis*, and further thought should generally be given to the considerations formulated in the relevant part of the seventh report.

42. On the question of instrumental consequences, or countermeasures, the distinction between delicts and crimes was undoubtedly of great significance. As rightly pointed out in the report, while only some kinds of delicts involved violations of *erga omnes* obligations, all crimes consisted of infringements of such obligations. Article 5 was based on that assumption.<sup>13</sup> However, as had already been pointed out in the present debate, the distinction between the directly injured State or States and other injured States was of paramount importance.

43. The dispute settlement procedure suggested by the Special Rapporteur needed closer scrutiny, especially in the matter of the possible involvement of the General Assembly or the Security Council. Despite the great political and moral value of the Assembly's recommenda-

tions, it was difficult to see how they could be incorporated in an institutionalized procedure. As for the Council, the question was whether its powers should not, in accordance with Articles 24 and 39 of the Charter of the United Nations, be confined to determining the existence of any threat to the peace, breach of the peace, or act of aggression, it being left to an international judicial body to decide on the legal consequences. In that connection, he would inform the Commission that the Drafting Committee had been engaged in working out specific provisions of the draft articles on dispute settlement and hoped that they would be completed at the present session.

44. In conclusion, the Commission should not lose sight of realities or ignore the question as to whether certain provisions were really ripe for adoption by States. It might take some years for the full impact of the Commission's work to be fully felt, but he firmly believed that the time would come when the rule of law would be applied far more broadly. The area of customary law as a background for strict codification should be explored as a move towards progressive development. He proposed that the draft articles should be transmitted to the Drafting Committee, possibly with a view to the elaboration of a revised text which could then be submitted to Governments, whose reactions needed to be known at every stage of the Commission's work.

45. Mr. KABATSI said that the Special Rapporteur's seventh report, like all the preceding ones, made a most positive and valuable contribution in a particularly thorny area of international law. The subject of State responsibility was complex enough in itself, but the concept of the so-called international crimes of States—and it should be noted that the Special Rapporteur himself resorted frequently to the expression "so-called"—was even more so.

46. There was no question that particularly serious international wrongful acts should be met by equally serious consequences. But would the application of such consequences be made easier by characterizing the wrongdoing State as a criminal State? After all, the State in question might itself be the prime victim of the so-called crime, particularly where acts of genocide or serious violations of human rights were concerned. Long after the wrongdoing State had suffered all the consequences of the breach, the label of "criminal State" would still haunt the country and its people. Such a situation was neither desirable nor just. It was very difficult to accept the notion of a crime being attributable to States as opposed to individuals, and he shared the views expressed to that effect by several speakers, especially Mr. He (2395th meeting) and Mr. de Saram (2394th meeting). The Special Rapporteur himself and other members of the Commission, for example Mr. Tomuschat, although in sympathy with the concept, had admitted to being not entirely happy with the term "crime". To use the term simply for want of a better one would be most unwise and the resulting confusion would inevitably entail grave and unjust consequences for the States concerned and their peoples.

47. For reasons of a mainly political nature, some States were increasingly being characterized as "rogue"

<sup>12</sup> Ibid., footnote 9.

<sup>13</sup> See 2392nd meeting, footnote 13.

States. It was not a trend the international legal order should encourage or endorse. States which had the means to do so would be more and more inclined to resort to interim measures, in other words to self-help, and the consequences of such arbitrariness could be horrendous. The danger was increased still further by the fact that, under the proposed regime, all States were to be considered injured States and would therefore be entitled to resort to interim measures, either directly or in the guise of assistance to the more directly affected State or States; and the suggestion was that countermeasures should be more readily applied to States branded as "criminal". Characterizing a State as "criminal" could be used as an excuse for taking countermeasures for quite other reasons.

48. The seventh report clearly showed that the Special Rapporteur himself was not happy with the attribution of the "criminal" label to States. For his own part, he considered it acceptable and indeed necessary that provision should be made for a legal regulatory regime for very serious violations, but he doubted whether "criminalizing" States would help that process and he would find it extremely difficult to accept any regime based on the concept of State crime.

49. Mr. LUKASHUK said that the debate had revealed significant differences on some of the provisions of the draft on State responsibility. The only solution would seem to lie in discussing the draft article by article, with a view to achieving the greatest possible measure of agreement.

50. The differences related basically to two points, that of the concept of State crimes and that of the mechanism for the implementation of State responsibility. With regard to the former point, the Commission had already adopted article 19 of part one,<sup>14</sup> which incorporated the concept of State crimes, and continually going back on past decisions was hardly advisable. That, however, was a formal argument. As for the substance of the question, he would refer to paragraph 9 of the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, which read, in part,

Due consideration should be given by Member States to making criminally responsible not only those persons who had acted on behalf of an institution, corporation or enterprise . . . but also the institution, corporation or enterprise itself.<sup>15</sup>

An aggressor State bore not only criminal responsibility but also serious political responsibility, and an element of punishment was undoubtedly also involved.

51. By recognizing the possibility of the criminal responsibility of State leaders, the Commission had surely taken a step far more threatening to potential criminals in positions of power than the recognition of the criminal responsibility of States. It was not by chance that some Governments had taken the view that the criminal responsibility of States was an acceptable concept, but that

the criminal responsibility of State leaders was not. The real difficulty, however, lay in the fact that the proposed provisions fell very far short of recognizing the criminal responsibility of States. Only the terms used were the same, simply because, as Mr. Yankov had convincingly shown, no other name could be found for the most serious breaches of the law.

52. No one would deny the need to listen carefully to the views of Governments. But that certainly did not mean the Commission must blindly follow the practice of States. The Commission was entrusted with encouraging the progressive development of international law, and each member was personally responsible for carrying out that task. If Governments failed to agree with the Commission's draft, the responsibility would be theirs, not the Commission's. It was the Commission's duty to work out and propose a draft which it honestly believed to be the best possible. The draft presented by the Special Rapporteur was indeed somewhat romantic in a number of particulars. Yet in the course of an article-by-article discussion it would undergo many changes, including some that would bring it more closely into line with the Charter of the United Nations. That did not mean that romanticism and idealism should be banished altogether from the Commission's work; on the contrary, they were essential to progress in all spheres.

53. Mr. ROBINSON said he paid tribute to Mr. Ago and his colleagues, who, some 20 years earlier, had charted a course for the international community in a manner which, perhaps, still represented the single most daring act of progressive development undertaken by the Commission. At that time, he had experienced a sense of powerful excitement mingled with some concern about the concepts and the political and jurisprudential underpinnings of article 19 of part one. He was still deeply moved by that article and captivated by the imagination and foresight that had inspired its formulation. The challenge before the Commission was, while remaining faithful to the spirit of article 19, to plot a course for its implementation that was grounded in reality and was fully alive to the social and political climate of the present day. The Special Rapporteur had clearly been appropriately inspired by that article and, with the exception of one instance where there was some over-reaching, the report also reflected a keen sensitivity to the real politics of the present-day world.

54. Nation States exhibited a degree of organization not to be found in the international community, which was generally characterized by a low level of organization. States had a persona and a personality, and there was nothing unreal in the notion that States had the capacity to commit crimes. Neither the acknowledgement of the existence of individual criminal responsibility nor the fact that the Commission had, in its work on the draft Code of Crimes against the Peace and Security of Mankind, adopted the approach of dealing with individual criminal responsibility, detracted from the validity of the concept of State responsibility for crimes.

55. He endorsed the Special Rapporteur's approach, which sought first to identify the normative, supplementary consequences of international crimes and then acknowledged that implementation of those consequences

<sup>14</sup> See 2391st meeting, footnote 8.

<sup>15</sup> *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, 26 August-6 September 1985 (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. B, annex.

required the intervention of some third-party system in order to avoid arbitrariness.

56. The report accepted the proposition laid down in article 5 of part two, namely, that all States were injured States and, as such, were entitled to obtain cessation and reparation from the State that committed the crime. It was true that that proposition was a logical consequence of the fact that only some kinds of delicts involved violations of *erga omnes* obligations, whereas all crimes consisted of infringements of such obligations. Nevertheless, the concept of *erga omnes*, as he understood it, did not mean that every State, no matter how remote from the crime in physical or legal terms, had the same entitlement as the State directly affected by the crime, nor did it mean that each and every State was entitled to reparation and cessation from the wrongdoing State. Otherwise, the result would be an unacceptable multiplicity of claims. Despite the Special Rapporteur's suggestion that every State should be entitled to demand cessation and reparation to the extent that it had been injured, his own view was that article 5 would have to be reconsidered so as to find an acceptable solution.

57. As to the special or supplementary consequences of international crimes of States, although the comparison the Special Rapporteur had made with delicts was useful from the standpoint of methodology, it would be better to devote discrete articles to such consequences. In many instances, the extraction of certain aspects of the provisions on delicts—for example, in regard to some of the exceptional cases in which there was no right to restitution and satisfaction—was confusing.

58. The Special Rapporteur had made the bold proposal that a State which claimed that an international crime had been committed could refer the matter to the General Assembly or the Security Council. If it was decided that the matter was such as to justify the grave concern of the international community, any Member State could then bring the case before ICJ. While he agreed in general with the Special Rapporteur's move towards third-party settlement, the proposed use of the Assembly and the Council was perhaps going too far. In the current global environment, there were good grounds, many of which had already been cited, for rejecting such a proposal, though it might become more acceptable in the context of a revision of the Charter of the United Nations. His concern, however, was that claims might be brought simultaneously before the Assembly and the Council—which could give rise to concurrent jurisdiction, it had been said, although that would be to ignore the confining features of Article 12 of the Charter. Again, he did not agree with the proposal by one member, that a commission of jurists should be appointed by the Assembly or the Council, for that would not overcome the political objections to the involvement of those two organs.

59. On the other hand, he fully concurred with the Special Rapporteur that an element of compulsion was inevitable. If arbitrariness was to be avoided, some binding machinery must be established to determine whether an international crime had been committed by a State prior and as a precondition to the implementation of the legal consequences of a crime.

60. His own suggestion would be to take from the Special Rapporteur's proposal the excellent idea of a court—in which connection he endorsed certain paragraphs of the report—to which aggrieved States could have direct access for the purpose of determining whether an international crime had been committed by a State. The jurisdiction of such a court would be compulsory in that any aggrieved State could unilaterally invoke its jurisdiction. Problems of cost, frequency of sessions and the screening of claims to avoid abuse of process could be resolved in the pragmatic manner which had characterized the Commission's work on the draft statute for an international criminal court. The court proposed by the Special Rapporteur would be preferable to ICJ, which was not a criminal court and whose procedures were not geared to criminal trials. Admittedly, the Statute of ICJ could be amended, but a special court would better achieve the desired objective.

61. He urged the Commission to follow the Special Rapporteur's lead in dealing with a very difficult area of the law, though that did not mean it was bound to accept all of his proposals.

62. The CHAIRMAN, speaking as a member of the Commission, said that the issues raised in the Special Rapporteur's seventh report were of fundamental importance for the reorganization of the world public order and called for detailed analysis. They were, however, too broad to be realistic and did not make for a readily comprehensible picture.

63. His own approach to the issues raised was conditioned by the practice of countermeasures and his recognition of their arbitrary and unjust nature. Too often, such measures legitimized power play and coercive measures rather than promoting the equity and justice essential for a new world order. The practice whereby the claimant State acquired the status of a judge in its own cause was particularly suspect. Consequently, a careful structuring of the restraints was essential in the interests of sovereign equality, territorial integrity, political independence and the regulation of international relations on the basis of international law, equity and justice.

64. In his energetic pursuit of those restraints, the Special Rapporteur had made a number of suggestions, which could only command admiration and support. None the less, it was important to guard against reopening the system under the Charter and not to allow States to take the law into their own hands and subject the international community to a virulent form of vigilantism, which would have grave consequences for the world public order. Many of the Special Rapporteur's suggestions and proposed draft articles did not provide a conclusive answer to the issues involved. Those issues included the concept of crime and whether it could be transported to the international plane; the distinctions to be drawn between delicts and crimes for the purpose of the consequences generated by the concept of differently injured States; the need to make the responses of the community proportional to the overall injury involved and the factors that should govern such responses; the need to ensure an objective determination of the alleged crime before any action was taken; the role of the General Assembly, the Security Council or any other interna-

tional forum in determining whether there was a *prime facie* case before a response was initiated by States; the difficulty of distinguishing a purely legal determination from a political assessment in the highly complex international society in which both intermingled; the role of interim measures and how they would differ from the ensuing consequences; and the respective roles of ICJ and of the political organs of the United Nations.

65. The basic difficulty for him lay not so much in what the report proposed in terms of the progressive development of the law or *de lege ferenda* or in the fact that some of the proposals would inevitably clash with, or even result in an unnecessary duplication of, the system under the Charter. Rather, it lay with the very concept of State crimes and the rigorously precise response system provided. In that regard, the Special Rapporteur's world was a brave new world of States, law-abiding and ready and willing to subordinate the element of sovereignty that allowed them a measure of freedom, as well as the equality to choose when and when not to act. It was that freedom which the Special Rapporteur's proposal sought to deny, particularly when it was a matter of responding to criminal acts that could affect their very survival and when, as so often proved to be the case, discretion was the better part of valour. But, while there was no consensus on the ground rules for determining violations, while the institutions for making such determinations had yet to be established, while the world order was still based on unequal strengths and uneven development and while equity and justice for millions of wretched human beings was ill-defined and elusive, the Special Rapporteur's brave new world order must for the immediate future remain beyond the realm of acceptability.

66. Modern systems of national law were based more on techniques of reform than on a purely punitive approach. Accordingly, on the basis of the concept that a crime once committed was a crime against the entire community, a prosecutor was given responsibility for the prosecution, which, however, took place only if he deemed it appropriate. Yet the Special Rapporteur did not recognize such an approach and resorted to the concept of differently-injured States, allowing such States a measure of freedom or the initiative to react to the "crime" in question. That could pose a severe threat to world peace and security, and could cause the proposed legal order to wilt under the pressure from differently motivated States—for when States acted, they did so mostly out of self-interest. Unfortunately, the Special Rapporteur's new proposal did not remedy the basic flaws in his earlier proposals. Furthermore, any proposal drafted in terms that were too rigorous was likely to be honoured more in the breach than in the observance and could thereby further undermine respect for the existing world order. The Special Rapporteur's proposed scheme, which required further examination, should therefore be completely recast.

67. Time was not on the Commission's side. If it wished to finalize the draft articles on State responsibility on first reading, it must not bite off more than it could chew. Rather, it should place before the world community of States the kind of menu that community was likely to find edible.

68. Like the subject of countermeasures, the treatment of "crimes" must await a world of greater political and economic integration, one where the participants were respected for their power not of coercion but of persuasion and where the national interest was in communion with the common interest.

69. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would be grateful for clarification on one point: was the Chairman suggesting that the work on countermeasures should be suspended?

70. The CHAIRMAN said he had simply wished to stress that the subject of "crimes" was as difficult and elusive as that of countermeasures. He was certainly not suggesting that the Commission should not proceed to deal with the latter. Both questions would require further examination.

*The meeting rose at 1.05 p.m.*

## 2397th MEETING

*Thursday, 8 June 1995, at 10.10 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (*continued*)** (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

### SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET said that, as he had indicated (2395th meeting), he would first discuss two general basic issues before commenting on draft articles 16 to 18. One basic issue was the relationship between the draft articles and the system for the maintenance of peace and security established under the Charter of the United Nations. The other concerned the definition of an injured State.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

2. Beginning with the second issue, he noted that, in his seventh report (A/CN.4/469 and Add.1 and 2), the Special Rapporteur had stated that in the case of crimes, all States are “injured States” under the definition formulated in article 5,<sup>2</sup> adding in a footnote, “notably in paragraph 3 of that article”. Although, in strictly legal terms, the statement was correct, since paragraph 3 of article 5 provided that, “if the internationally wrongful act constitutes an international crime”, the expression “injured State” means ... all other States”, that definition should, in his view, either be revised or a distinction should be made between different categories of injured States for the purpose of the application of articles 16 to 18 (or 19). On that point, he agreed with Mr. Tomuschat (2392nd meeting).

3. Two very different considerations were noteworthy in that regard. In the first place, a crime, by its very definition, affected the entire international community and, in that sense, all States had an interest in its cessation and, if necessary, its punishment. The Special Rapporteur drew conclusions from that definition which were, at first glance, entirely logical, such as the idea that any State could resort to countermeasures against the wrongdoing State or the idea that all States should help in responding to the crime. However, the overly rigid logic of that position was attenuated by other considerations.

4. It was clear that a crime did not affect all States in the same way. While some were directly affected and had their individual interests violated in fact and in law, others were affected only as members of the international community whose foundations were shaken by the very fact that the crime had occurred. That was, moreover, what the Commission had said in 1985 in its commentary to article 5, paragraph 3. Paragraph (26) of the commentary stated that, while it was clear from the very wording of article 19 of part one of the draft articles that, in the first instance, all States other than the author State were to be considered “injured States”, the Commission, at the outset, in provisionally adopting article 19, had recognized that the “legal consequences” of an international crime might require further elaboration and distinctions. Paragraph (27) of the commentary stated that, in particular, the question arose whether all other States, individually, were entitled to respond to an international crime in the same manner as if their individual rights had been infringed by the commission of the international crime; paragraph (28) stated that, obviously, paragraph 3 did not and could not prejudice the extent of the legal consequences which were attached to the commission of an international crime; and that that was a matter to be dealt with within the framework of the particular articles of part two of the draft dealing with international crimes. He recalled the fable *Les animaux malades de la peste* (The Animals and the Plague), in which La Fontaine recounted that all did not die of it, but all were affected, it was his view that, while all States were affected by a crime, they were affected in different ways and with greater or lesser intensity and that the Commission must make that distinction in its draft articles.

5. It was evident, for instance, that Kuwait, the victim of Iraqi aggression, was not *vis-à-vis* Iraq in the same situation as Liechtenstein or Australia. Yet, each of the three States was an “injured State” because the aggression had clearly constituted an international crime which had disrupted the entire international order. The same issue arose in relation to the application to ICJ made by Bosnia and Herzegovina against Yugoslavia. It seemed clear that, if Yugoslavia could be accused of the crime of genocide or of complicity in that crime, then all States were entitled to seize the Court or come to the defence of Bosnia and Herzegovina. It was, however, doubtful that New Zealand or France could obtain compensation in the same form as Bosnia and Herzegovina, whose nationals were the direct victims of the alleged genocide.

6. A clear distinction therefore had to be made between different categories of injured States, setting those which had been directly injured apart from those which had been injured solely in their capacity as members of the international community. Such a distinction would have major consequences especially with regard to compensation; it would be difficult to imagine, for example, that France would be entitled to monetary compensation for the murders, rapes or ill-treatment to which the Bosnian Muslims, Serbs and Croats had been subjected.

7. In other words, without contradicting the commentary to article 5 adopted by the Commission in 1985, its reasoning should be taken to its logical conclusion and a distinction should be drawn between the legal consequences arising from crimes which violated the individual rights of injured States and those arising from crimes which violated only the rights of States as members of the international community. The draft articles should accordingly be revised and clarified in that regard. That seemed also to be the Special Rapporteur’s intention according to the comments he had made on draft article 5 *bis*, in the informal addendum to his seventh report.

8. The second general problem concerned the relationship between the draft articles on State responsibility and the system for the maintenance of peace and security established under the Charter of the United Nations. Nearly every member of the Commission had commented on that issue and he himself agreed with what Mr. Yankov had said (2396th meeting). The comments he was about to make were not meant as a criticism of the Special Rapporteur’s seventh report, but were rather an attempt to work with him, on the basis of his report, on the particularly difficult issues that arose. The problem was that, while not every international crime necessarily threatened international peace and security, the crimes which came to mind most spontaneously did. That was true of aggression, to use once again the examples given in article 19, paragraph 3, of part one.<sup>3</sup> In contrast, the connection between maintaining international peace and security and, for instance, slavery or serious ocean pollution was less clear. A further complication was the very broad interpretation given by the General Assembly and the Security Council to the concept of a threat to peace, as amply illustrated in the report, in which the Special Rapporteur pointed out that policies of racial discrimination, certain forms of colonial domina-

<sup>2</sup> See 2392nd meeting, footnote 13.

<sup>3</sup> See 2391st meeting, footnote 8.

tion, massive violations of human rights and crimes against humanity had been described by the Assembly and the Council as threats to peace or even aggressive acts. To that list might also be added certain "humanitarian disaster" situations, such as those in Rwanda and Somalia.

9. Such developments could either be regretted or welcomed; he welcomed them. At the same time, he acknowledged that the tendency of the General Assembly and the Security Council to broaden the scope of the concept of a threat to peace made the Commission's task much more difficult. According to the key article of part two, article 4:

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

In 1983, the Commission had already pointed out that the provisions and procedures of the Charter would prevail over any future convention and might even prevent the implementation of the draft articles on State responsibility. According to paragraph (2) of the commentary to article 4:

In those particular circumstances, the provisions and procedures of the Charter of the United Nations apply and may result in measures deviating from the general provisions of part 2. In particular, the maintenance of international peace and security *may* require that counter-measures in response to a particular internationally wrongful act are not to be taken for the time being. In this connection, it is noted that, even under the Definition of Aggression, the Security Council is empowered to conclude "... that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."<sup>4</sup>

10. Virtually the entire body of law of responsibility for international crimes could be affected as a result of the broadening of the system for the maintenance of international peace and security. He did not disagree with what Mr. Rosenstock had said (2392nd meeting), however far he was from agreeing with his general views on international crimes. Mr. Rosenstock had said, in essence, that the Commission must ensure that the draft articles did not interfere with the emergence of a new system for the maintenance of international peace and security, whose foundations were taking shape and which could contribute to international control of the response to a crime—which he himself would call control of a heinous wrongful act.

11. It must be acknowledged that the new system was still in the early stages and often incoherent, that it was used in a partial manner and that, as the Special Rapporteur had noted in his report, the implementation of the consequences of internationally wrongful acts remained in principle, under general international law, in the hands of States.

12. Consequently, the draft articles must carefully avoid two dangers. First, the articles must not deal with crimes from the point of view that they, or some of them, threatened international peace and security; that was the concern not of the Commission, but of the Char-

ter of the United Nations and its progressive development. Secondly, the draft articles must not hamper the development of the new system for the maintenance of peace which was probably in the process of being created and prevent crimes which, for the moment, did not fall within the scope of the maintenance of the peace from subsequently being characterized as doing just that. Thus, while to his knowledge massive pollution of the air or the seas had thus far never been regarded as a threat to peace, it might be so regarded under certain circumstances. As a firm believer in a constructive interpretation of the Charter and one that was as "integrationist" as possible, that is to say promoting the integration of international society to the maximum, he sincerely hoped that the draft articles would not close the door on such a development. While article 4 of part two guaranteed against that, care must be taken to ensure that no element of the draft articles left the question in any doubt. In that connection and since two safeguards were better than one, draft article 17, paragraph 2, would add a useful safeguard if it could be interpreted as maintaining the possibility of applying sanctions within the framework of the system for the maintenance of international peace and security. There again, however, it was important to maintain the system rather than duplicate it and, on reflection, he wondered whether keeping paragraph 2 might not give rise to problems of compatibility with article 4.

13. Those two general comments on the definition of the injured State and on the relationship between the draft articles and United Nations system for the maintenance of international peace and security were less far apart than they might seem. To a certain, but increasingly greater extent, the reactions to a wrongful act by "injured States" whose individual rights had not been violated were governed by the Charter and, in so far as indirectly injured States were entitled to respond to a crime, it was, first and foremost, in their capacity as Member States of the United Nations. In particular, the draft articles ruled out any use of armed force unless it met the criteria provided for or implied in the Charter and, in particular, although not exclusively, in Chapter VII, including Article 51. As a result, the draft articles did not have to deal with that aspect of the matter, and that greatly restricted the possibilities of derogation under the legal regime for international crimes by comparison with that for delicts.

14. In that regard, one should qualify the fears expressed by the Special Rapporteur in his report, where he stated that considering the gravity of crimes and the severity of their special or supplementary consequences, very serious difficulties might arise from a universalization of the status "injured State". The Special Rapporteur also exaggerated the difficulties somewhat when he underscored the risks of arbitrariness and conflict that might result; in any event, he did not see how the Commission could consider the question of the use of armed force, which was solely a matter for the Charter of the United Nations. Two fundamental elements ought in any case to reduce those fears: first, not all injured States were alike and the same rights could not be recognized for all, secondly, in any event, there could be no question of derogating from the provisions of the Charter in the evolving interpretation given to them, particularly with

<sup>4</sup> Originally adopted as article 5, for the commentary see *Yearbook... 1983*, vol. II (Part Two), p. 43.



regard to the use of force. The impact of the special consequences of an international crime as opposed to a delict should therefore not be overrated. All those points constituted another reason for favouring a fundamental change in the spirit of draft article 19 of part two and for hoping that, if an international control must intervene, it would be not a priori, but a posteriori.

15. He did not think that the new proposals made by the Special Rapporteur in the informal addendum were likely to entirely calm the fears which he had expressed at an earlier meeting and which had not been solely the result of the slowness of the procedure proposed. Although the Special Rapporteur's explanations on the problem of the "constitutionality" of draft article 19, paragraphs 2 and 3 (section (b) of the informal addendum) reassured him, he was afraid that the proposals made on how to shorten the legal phase of the proposed procedure (section (a) of the informal addendum) posed other difficult problems of conformity with the Statute of ICJ. While those proposals might be paths worth exploring, in the current state of development of the international community, the system of the kind proposed in draft article 19 could in any case only be optional.

16. In the light of those general considerations, he would refer to the exact consequences of the commission of a crime as envisaged by the Special Rapporteur in draft articles 16 to 18. His remarks would be rather brief and general because it was up to the Drafting Committee to finalize the wording. Like the Special Rapporteur in his report, he would draw a distinction between substantive and instrumental consequences.

17. With regard to substantive consequences, the Special Rapporteur considered that there was no reason to change articles 6 to 8 of part two<sup>5</sup> on cessation and compensation or make them more stringent. He shared that view entirely about cessation, but was more sceptical about compensation and somewhat surprised that few members of the Commission had touched on that problem.

18. In the first place, he noted that compensation was a question on which it would appear essential to draw a distinction between the reparation owed to the directly injured State, whose individual rights had been infringed, and other injured States whose rights had been infringed only in so far as they were members of the international community. The State directly injured clearly had the right either to full reparation or, if *restitutio in integrum* was impossible, to receive to that end a sum of money as compensation for the material or moral damage sustained, either directly by it or by its nationals. But that was much more debatable for other injured States, which, by definition, had sustained only "juridical damage", if that expression made any sense. He therefore urged the Special Rapporteur to propose wording which took that necessary distinction into account and said that, if the Special Rapporteur so desired, he would be prepared to make one or more alternative proposals to ensure that States not directly injured could not demand a monetary reparation.

19. Secondly, he thought that the question of "punitive" or aggravated damages deserved to be closely studied, at least in the case of crimes. There had been cases in which punitive damages for violations of the law had been awarded by international courts, for example in the "*I'm alone*" case<sup>6</sup> and many other cases in which such damages had been demanded, especially given the particularly serious nature of the offence, that is to say of the crime. Reference could be made, for example, to the pleadings of the United States before ICJ in the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*<sup>7</sup> or the pleadings of Nicaragua in the last phase of the case concerning *Military and Paramilitary Activities in and against Nicaragua*.<sup>8</sup> Given the nature of the obligation breached by the State responsible for the crime and the reintroduction of the concept of fault that that designation implied, as the Special Rapporteur himself acknowledged, the idea of punitive damages would seem a priori to be a logical consequence of the very concept of crime. Although he was opposed to punitive damages in the case of simple delicts, he asked the Special Rapporteur to consider the concept in the case of crimes. Perhaps the Special Rapporteur thought that that was already covered by article 10 (Satisfaction), paragraph 2 (b) and 2 (c), of part two.<sup>9</sup> But for one thing, paragraph 2 (b) covered only "nominal damages", whereas, in the case of crime, it was necessary to go beyond what was symbolic and, for another, if article 10 did in fact cover that concept, it ought to be revised precisely in order to set aside punitive damages for cases of crimes, but to rule them out for cases of delicts. If he could allow himself in that context to reopen the discussion on the general provisions, he recalled that they had in fact been adopted subject to the results of the discussion on crimes.

20. As to the proposals on satisfaction and restitution in kind contained in the seventh report, he agreed in both cases with the general explanations given, as well as with the wording proposed for the corresponding paragraphs of article 16, at any rate in their general thrust.

21. The only point that might be considered, and the Special Rapporteur did consider it in his report, was whether there was an obligation to preserve the territorial integrity of the State. Some members argued the need to provide for a possibility of infringing territorial integrity, as, for example, in the case where genocide had been committed and the wrongdoing State had been severed of the part of the territory in which the population that had been the victim of that genocide had lived. That case might seem convincing, but he thought that there was reason to proceed more cautiously. The opposing argument advanced by other members, according to which an international court, and even ICJ, could not in any case rule on such an action, did not appear to be decisive because international law was not essentially a law of judges and what a court could do was not necessarily the sole objective of the draft. What was, however,

<sup>6</sup> See 2392nd meeting, footnote 8.

<sup>7</sup> *Order of 13 December 1989, I.C.J. Reports 1989, p. 132.*

<sup>8</sup> See 2381st meeting, footnote 9.

<sup>9</sup> See 2391st meeting, footnote 9.

<sup>5</sup> See 2391st meeting, footnote 9.



decisive was that, if the draft provided for the possibility of calling into question the territorial integrity of the State as part of the punishment of the crime, that would constitute interference in the United Nations system for the maintenance of international peace and security. It was inconceivable that the severance of territory or even an infringement of territorial integrity, regardless of the form it might take, could emanate from anything other than the provisions and procedures of the Charter, with which the Commission could not concern itself. Consequently, any infringement of the territorial integrity of a State could take place only by derogating from the provisions of the draft articles and because the Security Council and, perhaps, the General Assembly had found that a severance of territory was necessary to maintain international peace and security. He was therefore firmly in favour of retaining the principle of the "non-infringement" of territorial integrity, even in cases of crime, in article 16, paragraphs 2 and 3. The result would be that the infringement of the territorial integrity of a State could be decided only by the United Nations organs in the framework of their constitutional powers.

22. The same considerations somewhat limited the originality of the "instrumental measures" that might be taken against the State that was the author of a crime as compared to measures that were acceptable in cases of delicts.

23. With regard to that aspect of the debate, however, he would stay at the level of generalities for two reasons. The first reason, of a general nature, was that the provisions on countermeasures—the main, if not the only, "instrumental" consequences of internationally wrongful acts—had still not been definitively adopted by the Commission or even by the Drafting Committee, regardless of what some might think. Hence the difficulty in defining precisely how countermeasures taken in response to a crime could and must differ from those that were admissible in the case of delicts. The second reason, of a personal nature, had to do with the heated controversy at earlier sessions between himself and the Special Rapporteur on the subject of countermeasures, which he thought must be very narrowly restricted and controlled. At the time, he had believed that the general provisions of draft articles 11 to 14 did not sufficiently limit their application. The reason for his hostility to the draft proposed at the time and to that of the articles currently under consideration in the Drafting Committee had been—and continued to be—the fact that those provisions made no distinction between responses to delicts and responses to crimes. But whereas they appeared to be suitable, or almost so, for crimes, they were much too open, permissive and lax for countermeasures in response to simple delicts. That explained why he fully endorsed what the Special Rapporteur stated in his report in which he expressed his hope that the formulation of article 11 could be reviewed and he entertained serious doubts as to the appropriateness of article 13.<sup>10</sup> It was indispensable to reopen the question of countermeasures so as to strike an acceptable balance not only between the various views expressed in the Commission over the past four years on the question, but also between the re-

gime of countermeasures in cases of crimes and that applicable in cases of delicts.

24. He was also prepared to accept the spirit of article 7 of part three proposed in the seventh report, but he preferred wording modelled on article 66 of the Vienna Convention on the Law of Treaties, which would replace both draft article 19 of part two and article 7 of part three.

25. With regard to the other consequences of crimes, he agreed with the general philosophical outlook reflected in the report, but had some doubts about certain aspects of the wording of draft article 18, primarily for two reasons. First, certain provisions of that article failed to distinguish between the rights of the State whose individual rights had been injured by the crime and the rights of other States. Secondly, the wording in certain parts of the article had more to do with the rules on the maintenance of international peace and security than with the law of international responsibility in the strict sense, to which the Commission must confine itself. For example, concerning paragraph 1 (*f*), if the constituent instruments of the competent international organizations, that is to say essentially and almost exclusively the Charter of the United Nations, gave those organizations decision-making capacity, there was no point in repeating it. As to the statement that States should comply with the recommendations of international organizations, that would be to have a particular conception of the term "recommendation" and would also draw the Commission into the field of the maintenance of international peace and security. In sum, the wording of that article would need to be closely examined by the Drafting Committee.

26. The last matter of concern to him involved the relationship, which was obviously both close and complex, between international crimes as such and crimes against the peace and security of mankind. Certain crimes, such as aggression and genocide, came under both categories. Not all international crimes were automatically crimes against the peace and security of mankind and, in that respect, the "pruning" which the Commission had apparently decided to undertake in the framework of the second reading of the draft Code of Crimes against the Peace and Security of Mankind would help highlight that distinction. It was perfectly clear and widely accepted that an intervention or a threat of aggression were not crimes against the peace and security of mankind, whereas it could very easily be argued that they were international crimes within the meaning of article 19 of part one of the draft on State responsibility. On the other hand, all crimes against the peace and security of mankind were international crimes, crimes under international law, which had specific consequences, in particular on one point: the individuals who had committed crimes against the peace and security of mankind were directly punishable. That was the main purpose of that concept.

27. Consequently, for example, article 10, paragraph 2 (*d*), of part two was inadequate when the international crime also constituted a crime against the peace and security of mankind. It provided that, "in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials

<sup>10</sup> Ibid., footnote 11.

or private parties”, satisfaction might take the form of “disciplinary action against, or punishment of, those responsible”. But, when speaking of crimes, for one thing punishment was a necessity and an obligation and, for another, it could be inflicted not only by the State in question, but also internationally. He therefore thought that something must be said about the difference between the two categories of crimes. Without referring in detail to the legal regime of crimes against the peace and security of mankind which was the subject of part one of the draft Code, it would be reasonable and even essential to indicate in a special provision of the draft articles on State responsibility that

“the provisions of the present draft [or of the present convention] shall not prejudice any question which might arise because of the responsibility incurred in the case of the commission of a crime against the peace and security of mankind.”

However, the clarification included in draft article 18, paragraph 1 (*e*), was useful, provided that its wording was revised.

28. In closing, he said that, while he was certainly not in agreement with everything in the seventh report, its overall thrust seemed quite appropriate, apart from the *a priori* mechanism envisaged in draft article 19, precisely because it was *a priori*. Consequently, he was in favour of referring draft articles 15 to 18 to the Drafting Committee. Draft article 19 should also be referred to the Drafting Committee on the understanding that, if no satisfactory solution was found, it could be discarded, even if it meant strengthening draft article 7 of part three. Consideration in the Drafting Committee should lead to fundamental changes in the spirit of draft article 19, without ruling out definitively the eventuality of its deletion. It should also be the opportunity to review articles 11 to 13 and perhaps certain aspects of articles 6 to 10 so as to balance the entire draft with regard to countermeasures and draw a clearer distinction than was currently the case in articles 11, 12, 13 and draft article 17 between measures in response to a crime and measures in response to a simple delict.

29. Mr. EIRIKSSON said that he would confine himself to confirming his general views on the question of State crimes and reacting to one aspect of the Special Rapporteur’s excellent draft articles, namely, draft article 19 and related proposals appearing in the informal addendum.

30. First, he wished to confirm that he had no difficulty, in principle, with accepting the concept of State crimes. Secondly, he did not mind calling such crimes “crimes”. Thirdly, he congratulated the Special Rapporteur on the high quality of his report, which responded to the Commission’s desire to have before it a complete set of draft articles on the consequences of retaining article 19 of part one<sup>11</sup> in the text. Fourthly, he did not mind, at least at the stage of first reading, going along what some called radical paths, even if, in his heart of hearts, he was aware that States were eventually unlikely to follow. However, it would be for them to make their posi-

tion known at some later stage. Fifthly, as to the need to go along such radical paths, he recalled having expressed earlier, in the context of the draft Code of Crimes against the Peace and Security of Mankind, his dissatisfaction with the way the Security Council was discharging its obligations as envisaged in the Charter of the United Nations. In any event, it was not appropriate for the Council to take on a role more suitable for judicial organs. Sixthly, with regard to the link between judicial settlement and countermeasures, he based himself on the text of article 12 of part two adopted by the Drafting Committee<sup>12</sup> and did not believe it realistic to propose that recourse to third-party dispute settlement should be a precondition for the adoption of countermeasures. Seventhly, he believed that ICJ was the appropriate dispute settlement body in the context of the draft articles, particularly in the case of State crimes, but would also support an arbitration mechanism. Lastly, having heard the views expressed during the debate, he would be inclined to support direct referral by States parties to the dispute settlement mechanism decided on and did not believe that the Commission should propose an intermediary role for the Assembly, the Council or some new quasi-judicial body.

31. Mr. ROSENSTOCK said that he was in agreement with much of what had been said by Mr. Pellet, but did not agree that the Drafting Committee had not completed its work on the articles of part two. Of course, the Drafting Committee might have to take another look at a number of points if the Commission decided to go into the question of “State crimes”.

32. What he wanted to do, basically, was to put a question to the Special Rapporteur in the hope that the latter would shed a little light on that question in his final summing up. There was undeniably a split among the membership of the Commission as to whether to make a qualitative distinction between wrongful acts. Among those members who supported such a distinction, some were wedded to the term “crime”, while others preferred such terms as “especially serious acts” or “exceptionally grave acts”. Some saw the need for institutional consequences, while others did not. The institutional scheme contained in the Special Rapporteur’s seventh report and in the informal addendum had been objected to by some members as being contrary to Articles of the Charter of the United Nations and variously unworkable. Other suggestions had been made and problems had been pointed out with regard to those suggestions.

33. Mr. Pellet, apparently, would build on part three, more or less in the form currently contemplated, and would not create any new institutional structures. Some members had objected to that approach as well.

34. Given that level of disagreement, the prospects for early progress were not very encouraging. It would, however, be helpful if the Special Rapporteur, in summing up the debate, could indicate whether he believed there were actions likely to be widely accepted as crimes, although they did not constitute a breach of the peace as that concept had been interpreted within the

<sup>11</sup> *Ibid.*, footnote 8.

<sup>12</sup> See 2396th meeting, footnote 7.

context of South Africa, Rhodesia, Yugoslavia, Iraq, Somalia and Rwanda. Were States actually prepared to regard as crimes or specially serious wrongful acts those that did not involve a threat to peace and security? He frankly doubted that, for example, acts of pollution would be so recognized. If there was not a world order imperative to deal with the problems raised by the question of crimes, the question ought to be asked whether the Commission should delay its work on State responsibility by pursuing so difficult and troublesome a goal which was, furthermore, a source of disagreement.

35. Only if it was sure that there really was a world order imperative, as opposed to the mere prospect of intellectual satisfaction to be obtained, should the Commission soldier on to find some way of bridging the very substantial gaps that existed. But if the world order imperative was not so great and bearing in mind the questions which had been, could be and would be dealt with in the context of threats against peace and security, the Commission ought perhaps to get on with the task of dealing with the topic of State responsibility as normally and generally understood, unless the Special Rapporteur in his summing up could provide some specific examples to show the need for that cumbersome addition.

36. Mr. THIAM recalled that the question of differences and resemblances between the topic of State responsibility and that of the draft Code of Crimes against the Peace and Security of Mankind had arisen at the very outset of the latter topic's consideration. Now that the Special Rapporteur on State responsibility was embarking on the consideration of the question of crimes, a very clear-cut distinction had to be drawn between the two topics. The draft Code was, *ratione materiae*, far more limited in scope because even if all crimes against the peace and security of mankind were international crimes, not all international crimes were crimes against the peace and security of mankind. Still more important was the distinction resulting from the fact that the topic of the draft Code covered only the criminal responsibility of individuals, whereas the topic entrusted to the Special Rapporteur on State responsibility dealt with the international responsibility of the State. In any case, he had always refused to deal with the criminal responsibility of the State because he thought that a State could not be criminally responsible. Only individuals could be so responsible, even if the fact that those individuals were sometimes leaders of States could lead to confusion between the two areas. It was the Commission's custom to grant the requests of special rapporteurs who wanted their draft articles to be referred to the Drafting Committee and he saw no reason for departing from that tradition, but special instructions should be given to the Drafting Committee, which was sometimes asked to decide on questions of substance that had not been settled in plenary. In his view, the Commission was unlikely to go very far in the direction chosen by the Special Rapporteur because there was basic disagreement as to whether the State was only a fiction. For his part, he would continue to believe in the responsibility of individuals who abused their powers for a purpose contrary to international law, particularly in committing crimes against the peace and security of mankind.

37. Mr. de SARAM said that he wished to raise four points of a technical nature which the Special Rapporteur might perhaps clarify at some time. The first question was how the constitutional arrangements that would be put in place if the concept of State crimes was implemented would lie side by side with the institutional arrangements in the Charter of the United Nations relating to the Security Council and the General Assembly. In his view, the institutional arrangements provided for in the Charter had to be preserved under any circumstances. If, within the context of a "crime", a countermeasure was taken by a State against another State, would that constitute a threat to peace which could then trigger an intervention by the Council? The second question was what would happen if only some States became parties to the convention that might be adopted on the subject. He asked whether the system that would be put in place would itself represent a potential threat to peace. Thirdly, if such a system were established, would it not be necessary to make it very clear that amendments to the Charter would have to be made or at least considered? Lastly, given the fact that the Charter contained not only institutional arrangements relating to the Council and the Assembly, but also such fundamental principles of contemporary international law as domestic jurisdiction, territorial integrity and political independence, he asked whether an amendment of those provisions would also become necessary. In the system that might be put in place, circumstances could arise where action contrary to those fundamental principles proved necessary.

38. Mr. VILLAGRÁN KRAMER welcomed the clarifications which the debate had provided on the distinction between the topic of State responsibility and that of the draft Code of Crimes against the Peace and Security of Mankind. In his view, the Commission should be very clear about the task to be performed by the Drafting Committee. The Drafting Committee should proceed on the basis of three working hypotheses. The first was that crimes under the draft Code were not necessarily those that would be characterized as international crimes by the Commission. The second was that it was not the international responsibility of States resulting from crimes for which individuals bore criminal responsibility that determined the international responsibility of States from the viewpoint of international crimes. The third, which was a consequence of the second, was that the international responsibility of States arising from acts or omissions characterized as international crimes did not require those crimes to be identified and listed by the Commission. It would be enough to establish criteria and parameters for taking decisions on a case-by-case basis.

39. Mr. ROBINSON wondered, first, whether, given the imperative constitutional role of the Security Council in connection with the maintenance of international peace and security, there was anything left for the Commission to consider in connection with the topic under discussion and, secondly, whether there was any State conduct properly to be considered, given the tendency of the Security Council to be very liberal in characterizing acts as constituting a threat to the peace. On the first of those two points, he felt instinctively that the answer should not be negative. There were many international instruments which in the past had had to concern them-

selves with regimes more or less parallel with that of the Council and they had all taken the precaution of elaborating formulations which preserved the Council's competence. He saw no reason why that approach should not produce the same results in the present case.

40. As to the second point, although he had not studied the matter in the detail it deserved, he was inclined to believe that there were crimes which could properly form the subject-matter of the instrument in the process of elaboration and which did not constitute crimes against the peace and security of mankind or threats to international peace and security. In saying that, he did not mean only pollution. It was true that the Security Council tended rather liberally to invoke threats to international peace and security and he thought that, in many instances, it had overstepped its competence, its characterizations being, furthermore, unilateral, discretionary and not challengeable by any other organ. But was it not precisely for bodies such as the Commission to tackle controversial issues? His feeling was that there was a significant area left for consideration by the Commission in relation to the particular matter on which the Special Rapporteur had reported. The idea of studying that aspect was, in any event, a useful one.

41. Mr. ROSENSTOCK explained that his point had not been to ask whether there were any matters which the Commission might study, but, rather, whether there were matters in the consideration of which it was imperative for the Commission to embroil itself and which might stand in the way of the reasonably timely conclusion of its primary task relating to State responsibility in general.

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/459,<sup>13</sup> A/CN.4/464/Add.2, sect. E, A/CN.4/468,<sup>14</sup> A/CN.4/471,<sup>15</sup> A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)**

[Agenda item 5]

**TENTH AND ELEVENTH REPORTS OF THE  
SPECIAL RAPPORTEUR**

42. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission approved the composition of the working group on the identification of dangerous activities under the topic, the establishment of which had already been decided at the 2393rd meeting, and which would be composed of the following members: Mr. Barboza (Chairman), Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Lukashuk, Mr. Rosenstock, Mr. Szekely and Mr. Yamada, it being understood that the working group was open-ended and that other members wishing to participate in its work would be welcome.

*It was so decided.*

<sup>13</sup> See *Yearbook* . . . 1994, vol. II (Part One).

<sup>14</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>15</sup> *Ibid.*

43. Mr. BARBOZA (Special Rapporteur), introducing his eleventh report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/468), explained that the report dealt with the role of the issue of harm in the draft articles. Harm was a concept at the heart of the topic of no-fault liability; in that area, there was no such thing as liability without harm, harm being the condition *sine qua non* of any reparation that might be due. And harm to the environment was, in turn, at the heart of the concept of harm, at least so far as the draft articles were concerned. While it was true that the Commission had discussed the concept of harm in general, it had not sufficiently developed that of harm to the environment, which had special characteristics and deserved separate consideration.

44. Taking certain liability conventions already in force as his model, he proposed to incorporate the definition of harm in article 2 of the draft (Use of terms). The definition would consist of three subparagraphs, the first two reflecting the traditional concept of harm (loss of life, personal injury or impairment of the health or physical integrity of persons; damage to property or loss of earnings) and the last dealing with harm to the environment. The latter appeared to differ from traditional harm in some important respects. It was also distinct from harm caused to persons or to their property through harm to the environment, which, in law, was not differentiated from traditional harm: a case in point might be, for example, harm suffered, in the form of loss of earnings, by a hotel owner who lost customers because of pollution of the water of the river which flowed near his hotel or harm suffered by persons as a result of drinking polluted water or inhaling harmful fumes.

45. He asked about the harm caused to things, independently from that suffered by the persons concerned and the harm caused to the global commons which had no visible link with direct injuries caused to persons or things. He said that two questions, in particular, required attention. One question was who was the party injured by environmental damage and the other was what did that damage consist of.

46. As to the first of those considerations, damage was harm caused to someone, thus it was always damage to someone, to a person or to a human group and its heritage; it did not seem possible to accept the concept of damage occurring in a vacuum. That was what accounted for the difficulties experienced by lawyers in understanding what was meant by environmental damage *per se*—damage which appeared to be unrelated to harm caused to persons or to their heritage—as if the adverse effect on the environment were sufficient to constitute an injury in law, whether or not there were any natural or juridical persons who might be harmed by it. If the extremist position adopted by certain ecologists and environmental law specialists boiled down to that, if they really considered environmental protection as an end in itself and believed that species and natural resources should be respected for their so-called “intrinsic” value—a value independent from the worth attached to them by human beings—then dangerous confusion could indeed result.

47. Looked at closely, harm to the environment was not differentiated in any way from harm to the person or property of a juridical person, in whose favour there arose a right to reparation: the person was compensated because the change in the environment produced by a certain conduct had harmed him, since he had lost one or more of the values provided to him by that environment. In brief, what was called harm to the environment *per se* was a change in the environment which caused people loss, inconvenience or distress, and it was that injury to people which the law protected against in the form of compensation. It was possible that harm to the environment *per se* could injure a collective subject, such as a community, which in any case would be represented by the State or by other public bodies, according to the circumstances.

48. The second matter was to determine who was injured by ecological harm, since the environment did not belong to anyone in particular, but to the world in general or to the community. The United States Congress had adopted three laws on harm to the environment, the Comprehensive Environmental Response, Compensation and Liability Act of 1980,<sup>16</sup> the Clean Water Act of 1977<sup>17</sup> and the Oil Pollution Act of 1990,<sup>18</sup> by which it had empowered government agencies with management jurisdiction over national resources to act as trustees to assess and recover damages; the public trust was defined broadly to encompass "natural resources" belonging to, managed by, held in trust by, appertaining to or otherwise controlled by Federal, state or local governments or Indian tribes. Thus, in his view, under international law, a State whose environment was damaged was also the party most likely to have the right to take legal action to obtain compensation, and that right might also be granted to non-governmental welfare organizations.

49. The report also dealt with the issue of reparation and discussed the differences between reparation for harm caused by a wrongful act and reparation for harm which had occurred *sine delicto*, the situation on which the draft articles were primarily based. In the first case, the *Chorzów* rule<sup>19</sup> would apply: reparation must wipe out all the consequences of the wrongful act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Since it set forth the consequences of violation of a primary rule, the *Chorzów* rule was clearly a secondary rule. Nevertheless, its content had been shaped by international custom, which the Commission was, moreover, endeavouring to codify and progressively develop within the framework of State responsibility.

50. In the case of liability *sine delicto*, on the other hand, the damage was produced by an act which was not prohibited by law. Therefore, the compensation was ascribed to the operation of the primary rule: it was not a

reparation imposed by the secondary rule as a consequence of the violation of a primary obligation, but rather a payment imposed by the primary rule itself. Reparation in that case was therefore a secondary obligation and not reparation *stricto sensu*: it was a payment imposed, for example, on the operator as a prior condition which must be met if the activity was to be considered lawful; in other words, the activity would be lawful only if the operator was prepared to repair any possible damage that might be incurred. As a result, compensation did not necessarily have to meet all the criteria of the *restitutio in integrum* imposed by international custom for responsibility for a wrongful act. While, under general international law, there was apparently no clear international custom with respect to the content, form and degrees of payment corresponding to the damage in liability *sine delicto*, there were some indications that it did not necessarily follow the same lines as the *Chorzów* rule. *Restitutio in integrum* was not being as rigorously respected in that field as in that of wrongful acts, as illustrated by the existence of thresholds below which the harmful effects did not meet the criterion of reparable damage, as well as the imposition, in legislation and international practice, of ceilings on compensation. Both the upper and lower limitations, which were imposed for practical reasons, created a category of non-recoverable harmful effects.

51. The *Chorzów* rule, however, obviously served as a guideline, although not a strict benchmark, in the field of liability *sine delicto* as well, because of the reasonableness and justice it embodied. It was true that there were differences between the circumstances of any damage produced by wrongful conduct and the harm produced by legal conduct, and that those might well be treated differently from a legal standpoint; however, that distinction was drawn mainly for practical reasons, such as, in the case of the ceiling, to fix an upper limit on the amount insured or, in the case of the lower threshold, to acknowledge the fact that all human beings today were both polluters and victims of pollution. It was evident, however, that the law must seek reparation, as far as possible, for all damages. In that connection, it was noteworthy that, in the conventions on nuclear material and oil pollution, an attempt had been made to go beyond the ceiling by establishing funds to help approach full restitution in circumstances where compensation might reach extremely high amounts.

52. In the case of reparation, the method generally selected was restoration, or re-establishment of the damaged or destroyed resources. That was a reasonable approach, since what was most important in that situation was to return to the *status quo ante*; in principle, ecological values prevailed over economic values to such an extent that, unlike what happened in other fields, some domestic laws specified that the compensation which might be granted to the injured parties in certain cases should be used for ecological purposes as well. The cost of restoration or replacement of elements of the environment provided a good measure of the value of the loss. That usually varied when the costs, especially of restoration, were unreasonable in relation to the usefulness of the damaged resources, which confirmed the idea that the predominance of ecological purposes was overruled only by the unreasonableness of the costs.

<sup>16</sup> *Comprehensive Environmental Response, Compensation and Liability Act 1980*, United States Code, 1994 edition, vol. 23, title 42, chap. 103, sects. 9601 *et seq.*

<sup>17</sup> *Clean Water Act of 1977*, *ibid.*, vol. 17, title 33, chap. 26, sects. 1321 *et seq.*

<sup>18</sup> *Oil Pollution Act of 1990*, *ibid.*, chap. 40, sects. 2701 *et seq.*

<sup>19</sup> *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

53. Restoration or replacement was thus the best form of reparation for damage to the environment. Identical restoration might be impossible, however, in which case most modern trends allowed for the introduction of equivalent elements. Article 2, paragraph 8, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which had been drafted by the Council of Europe and was perhaps the most detailed in that field, defined “measures of reinstatement” as

any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment.

The idea of introducing equivalent components was therefore accepted in international practice.

54. The conventions generally stopped there, that is to say with compensation for measures of restoration or replacement which had actually been taken or would be taken; in the latter case, compensation was used to pay for them. What happened in the cases where restoration was impossible or when the costs of restoration were unreasonably high? In his eighth report, he had cited a statement by Rest in 1991, in reference to the *Exxon Valdez* case, although the circumstances might have changed since that time:

As in this case it was impossible to clean up the oil-polluted seabed of the Gulf of Alaska because of the factual situation, the Exxon Corporation . . . saved the clean-up costs. This seems to be unjust. According to the Guidelines, the polluter could perhaps be obliged to grant *equivalent compensation*, for instance, by replacing fish or by establishing a nature park.<sup>20</sup>

Draft article 24, paragraph 1, covered that situation, providing that

if it is impossible to restore these conditions in full [that is to say the *status quo ante*], agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.<sup>21</sup>

55. All the liability conventions also included in the definition of harm the costs of preventive measures and any damage or loss caused by those measures, which might be more serious. They referred to preventive measures taken after an incident to minimize or prevent its effects; those measures were defined in all the conventions as reasonable measures taken by any person following the occurrence of an incident to prevent or minimize the damage.

56. The report also dealt with the difficult question of assessment of harm to the environment. Restoration did not present serious problems of assessment: it was a matter of determining at what point the cost became unreasonable in relation to the usefulness of the restoration. But what happened in cases when restoration was impossible or only partially feasible? The damage must then be assessed according to other criteria, such as determination of the extent to which the public had been deprived of services formerly provided by the damaged environment and estimation of the monetary value of those ser-

vices. In the United States, the laws already mentioned included abstract theoretical models for quantifying the loss; however, they were extremely elaborate and complex.

57. In view of the difficulties of the alternative assessment methods, it was easy to understand the trend in international practice to limit reparation of environmental damage to the payment of costs of restoration, the replacement of damaged or destroyed resources or the introduction of equivalent resources where the court deemed that to be reasonable. The quantification of costs using methods employed in the United States hardly seemed appropriate for a draft that aspired to become a global convention, with courts that were part of different cultures having such disparate attitudes towards the environment. However, if restoration or replacement of resources could not be partially or fully accomplished and real harm to the environment had occurred, it did not seem reasonable for the damage to be totally uncompensated. The court should perhaps have some leeway to make an equitable assessment of the damage in terms of a sum of money, which would be used for ecological purposes in the damaged region, perhaps in consultation with the State of origin or with public welfare bodies, without having to resort to complicated alternative methods such as those used by some national courts. After all, the courts granted compensation for moral damage, which was as difficult to assess as environmental harm. He asked how anguish and suffering could be measured or why the courts should not have the same freedom in assessing damage to the environment.

58. He had referred in his report to the possibility of incorporating a definition of environment into the draft articles, since there was currently no universally accepted concept of environment: elements considered to be part of the environment in some conventions were not so considered in others. The definition of environment would thus determine the extent of the harm to the environment; and the broader the definition, the greater would be the protection afforded to the object thus defined, and vice versa. Such a definition did not necessarily have to be scientific and, thus far, the definitions that had been tried had simply enunciated the various elements they considered to be part of the environment. According to the “Green Paper on Remedying Environmental Damage” of the Commission of the European Communities:

Regarding the definition of “environment”, some argue that only plant and animal life and other naturally occurring objects, as well as their interrelationships, should be included. Others would include objects of human origin, if important to a people’s cultural heritage.<sup>22</sup>

A restricted concept of environment limited harm to the environment exclusively to natural resources, such as air, soil, water, fauna and flora, and their interactions. A broader concept covered landscape and what were usually called “environmental values” of usefulness or pleasure produced by the environment. Thus, such concepts encompassed “service values” and “non-service

<sup>20</sup> *Yearbook . . . 1992*, vol. II (Part One), p. 59, document A/CN.4/443, appendix, para. 10.

<sup>21</sup> For the text of article 24, see *Yearbook . . . 1990*, vol. II (Part Two), p. 101, footnote 354.

<sup>22</sup> Commission of the European Communities, “Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green paper on remedying environmental damage”, document COM(93) 47 final (Brussels, 14 May 1993), p. 10, sect. 2.1.7.



values''; for instance, the former would include a fish stock that would permit a service such as commercial or recreational fishing, while the latter would include the aesthetic aspects of the landscape, to which populations attached value and the loss of which could cause them displeasure, annoyance or distress. It was difficult to put a value on those if they were harmed. Lastly, the broadest definition also embraced property forming part of the cultural heritage.

59. Those were, in summary, the questions raised in his eleventh report and on which he would appreciate the first impressions of the members of the Commission.

60. In terms of translation, he suggested that the Spanish word *daño* should be translated into English as "damage" rather than as "injury", which, according to common law experts, meant damage produced by a wrongful act.

61. Mr. ROSENSTOCK, referring to the Special Rapporteur's last point, said that the words "harm", "injury" and "damage" had all been used in the topic under consideration and, for practical purposes, a somewhat artificial distinction between the words "harm" and "injury" had been established or tried a few years earlier. He would appreciate clarifications on that point.

62. Mr. BARBOZA (Special Rapporteur) said that it had been decided that in English, "harm" would be more appropriate than "injury", but that "damage" could also be used. The problem arose because some authors made a distinction between "harm" and "damage", the former referring to the actual deleterious effects and the latter referring to the legal consequences of those effects. While he saw no problem in using the word "harm" for the moment, he was suggesting the word "damage" and, with all due respect to the common law experts, it was his view that the two words could be used interchangeably.

*The meeting rose at 12.50 p.m.*

## 2398th MEETING

*Friday, 9 June 1995, at 10.25 a.m.*

*Chairman:* Mr. Guillaume PAMBOU-TCHIVOUNDA  
later: Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vilagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (continued)** (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

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

1. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, at the previous meeting, he had asked for the floor to answer two of the questions that had been addressed during that meeting. They concerned the issue of "if" or "whether" and the issue of "when".

2. With regard to the first issue, he would remind members that in 1976 article 19 of part one of the draft had been adopted,<sup>2</sup> that in 1985 and 1986 the proposals of the previous Special Rapporteur, Mr. Riphagen, had been referred to the Drafting Committee<sup>3</sup> and that at the forty-sixth session of the Commission he had himself been entrusted with the task of dealing with the consequences of crimes within the framework of parts two and three of the draft. That being so, he was unable to see how the Commission could now shelve the matter of the special consequences of internationally wrongful acts singled out as crimes in article 19 of part one.

3. It had been said, and rightly so, that there were difficulties. In particular, as had been mentioned at the previous meeting, there were difficulties with regard to the institutional aspect, due to the problems of coexistence between, on the one hand, the law of State responsibility in the part that dealt with crimes in particular, and on the other, the existing system of collective security. There were other difficulties too, such as the multiplicity of differently or equally injured States. But, apart from the fact that some difficulties—for example, those relating to a plurality of injured States—also existed for delicts, was it conceivable that a group of lawyers such as the members of the Commission could abdicate their duty to try to reach a reasonable solution whatever the difficulties? In addition to his own proposals—and he was ready to consider any possible improvements to them—there were the suggestions made by Mr. Pellet (2393rd meeting) and Mr. Mahiou (2395th meeting). There were the preferences expressed by a number of speakers for a purely political solution, while other preferences had been expressed for a purely judicial solution. Mr. Eiriksson (2397th meeting) had also delivered a telegraphic message to that effect. Moreover, he had also seen an informal draft prepared by a member of the Commission which offered a combination of the "political" and the "judicial" roles of international institutions that was different from the one he had proposed.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> See 2391st meeting, footnote 8.

<sup>3</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. For the text of draft articles 1 to 5 of part three and the annex thereto as proposed by the previous Special Rapporteur, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 35-36, footnote 86. Those provisions were referred to the Drafting Committee at the thirty-eighth session.



4. In his view, all such avenues must be explored in depth and to the necessary extent, and there was no excuse to avoid dealing with the matter properly. It would be very odd if the Commission decided to abandon an issue which was attracting so much interest in international legal literature all over the world and which pertained to problems that arose so frequently in contemporary international society. He had cited a considerable part of that literature in the footnotes to his seventh report (A/CN.4/469 and Add.1 and 2), which included a reference to a very thought-provoking article by Mr. Bowett.<sup>4</sup> In his article, Mr. Bowett had not failed to touch upon article 4, a matter which he had dealt with repeatedly, and was dealt with again in a footnote to his seventh report and to which Mr. Pellet had referred (2397th meeting) his very interesting statement. It would take a long time for the Commission to recover the image of a body seriously dedicated to the progressive development of international law if it surrendered so easily before even trying to find a solution or even a set of alternative solutions for submission to the Sixth Committee of the General Assembly.

5. As to the time element—the second issue he wished to address—he had recently provided the Planning Group with a simple outline of the work that remained to be done on State responsibility. The Drafting Committee had done good work at the present session and part three was close to completion. All that remained to be done—without either minimizing or exaggerating the task—was, first, the section of part two relating to so-called crimes and, secondly, adjustments of the formulation of articles that had already been worked out and were strictly necessary to harmonize the whole of part two, including, of course, the completion of article 5 *bis* on which, as he had recognized in his informal addendum to his seventh report, something more would have to be done than in the past. The very serious problem of revision of article 4 should of course be tackled in connection with mere delicts as well as crimes.

6. For the Commission's effort on first reading to be completed, all that was needed, as he had pointed out in the Planning Group, was a sufficient degree of concentration on State responsibility on the part of the 1996 Drafting Committee. That suggestion had met with the approval of the Planning Group and in particular of Mr. Barboza, Mr. Pellet and perhaps, indirectly, the other two Special Rapporteurs, Mr. Thiam and Mr. Mikulka. In short, his feeling was that much more time and effort should be devoted to State responsibility than had been the case in the past. Despite his endeavours to obtain more time for his topic, he was bound to say that the Commission had not been very generous in that respect. It must remember, however, that it had decided to conclude the first reading of the draft on State responsibility by the end of 1996. If that was well remembered and acted upon at the next session, then there was no reason for undue concern.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/459,<sup>5</sup> A/CN.4/464/Add.2, sect. E, A/CN.4/468,<sup>6</sup> A/CN.4/471,<sup>7</sup> A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)

[Agenda item 5]

TENTH AND ELEVENTH REPORTS OF THE  
SPECIAL RAPPORTEUR (*continued*)

7. Mr. VILLAGRÁN KRAMER said that the Special Rapporteur's tenth report (A/CN.4/459) and eleventh report (A/CN.4/468), which contained a wealth of doctrinal material and precise information on both regional and international practice, made a significant contribution to the work of the Commission and merited its recognition.

8. The Special Rapporteur drew attention, in his eleventh report, to three areas of the topic that deserved particular attention: the environment *per se*, harm to the environment, and the reparation and assessment of such harm. In that connection, it was important to bear in mind the need for consistency in the approach to the articles on the topic before the Commission, to the articles on the topic of State responsibility, and to the articles on the law of the non-navigational uses of international watercourses. That was particularly true in the case of international watercourses, as had in fact been noted by the General Assembly in 1994, since the draft articles on that topic identified the criterion of significant harm and provided for the international responsibility for such harm to be attributed to the wrongdoing State. The work on the present topic should be consistent with the subject of international watercourses, because in both cases the harm involved was transboundary harm. The Special Rapporteur had also submitted an outline for new articles which, though the system of using letters rather than numbers to refer to them was somewhat confusing, would provide a firm basis for the Commission's efforts.

9. The Special Rapporteur was proposing that the chapter on prevention should be completed with a draft article and that the Commission should then take up other chapters dealing with the substance, namely liability, and with the procedural aspects of the subject. The common denominator in that connection was to be found in the Special Rapporteur's proposed additions to article 2, in regard to response measures, and the meaning of "operator" and "harm and its effects". Prevention, of course, led to the concept of negligence, which in turn led to the concept of due diligence. That meant the Commission was entering the area of fault which was characteristic not of international liability but rather of strict liability. None the less, in the matter of prevention, there was bound to be an element of fault. It also had to be recognized that harm, or damage, was a component of international liability for injurious consequences arising out of acts not prohibited by international law. That was

<sup>5</sup> See *Yearbook* . . . 1994, vol. II (Part One).

<sup>6</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>7</sup> *Ibid.*

<sup>4</sup> See 2391st meeting, footnote 17.

not just a personal view but a self-evident fact which called for reflection.

10. The question also arose whether the theory of risk and strict liability lay at the core of international liability for acts not prohibited by international law or whether that area of the law encroached on the topic of State responsibility. In that connection, he had been surprised to note that the Special Rapporteur had referred, in his tenth report, to "civil liability"; he had himself always been taught that the international liability of the State was neither civil nor criminal but was simply international.

11. The Special Rapporteur had, however, been right in saying that it was not possible to consider the liability of the State without considering its relationship with civil liability, one that also helped to pinpoint the concept of what could be termed ancillary, or residual, liability. In that connection, the Special Rapporteur had endeavoured to separate a group of acts that were attributable to the State and thus generated its strict liability from other situations in which residual liability could be incurred. One question which constantly came to mind was whether strict liability could give rise to residual liability: after all, if liability was strict, it could not be shared. Again, it had to be recognized that, in the new field of the topic into which the Commission was moving, the liability not only of States but also of individuals would be at issue.

12. By introducing the concept of operator into the articles, the Special Rapporteur had opened the door to private operators, in other words, to natural persons. Consequently, a relationship would arise between the State and the operator in terms not only of prevention but also of exploitation. Having regard to the presence in that regard of risk capital, responding to private interests, the State would have to decide whether or not its liability would be shared in the event of transboundary harm caused by acts that were not prohibited by international law and involved an imminent and major risk.

13. The Special Rapporteur tended to favour the formula of residual liability and, in alternative A of article 21, proposed in his tenth report, provided for such liability where harm occurred but would not have done so had the State of origin fulfilled its obligations of prevention. In such cases, liability would be limited to that portion of the compensation which could not be satisfied by applying the provisions on civil liability. The Special Rapporteur had, however, also proposed an alternative B under which the State would incur no liability whatsoever. Of the alternatives, he preferred the first. The Special Rapporteur went on to propose a last article to conclude the chapter on prevention, which again was somewhat confusingly identified by the letter X. In effect, it stated that the liability of the State of origin for a breach of or non-compliance with its obligation of prevention would be the same as in the case of a wrongful act. Hence, there was no strict liability in the field of prevention.

14. As for the relationship between international liability and civil liability, the Special Rapporteur had rightly distinguished four major areas: the role of the operator; the role of risk capital; the international mechanism for

risk insurance and financing; and the liability of the operator.

15. Although the specific definitions to be incorporated in article 2 provided a common denominator, a fundamental drafting problem remained, namely whether the draft articles should be divided into two separate chapters, one concerning the rules of liability *per se* (substantive law), and the other concerning procedure (adjectival law). It might well simplify matters to make that division.

16. Perhaps the most important aspect for him was the premise that an operator could have international liability and that the relationship of the State was with the operator. That was a useful premise, because it recognized the existence of the effect of the presence of risk capital in the international field and thus it was no longer the State *per se* that was solely liable for acts or omissions causing transboundary harm, but also individuals. In confronting that new reality, in other words, that risk capital assumed liability but also offered options to cope with it, the Commission could not ignore the situation of the developing countries. The industrial powers were those most actively involved in the production and distribution of goods and services, and they were the powers that would generate an accumulation of activities with a risk of causing significant transboundary harm. Each of their legal systems was able to deal with internal harm, but not with transboundary harm; yet their capacity was so large that the State could spread liability, by proposing that the operator should assume 90 per cent of the liability, itself assuming the remaining 10 per cent of the liability, or vice versa. It could assist in circumstances where insurance did not cover the total liability. But a developing country did not have the resources to do that, so, tragically, it must accept risk capital and its only opportunity would be to use the prevention mechanism, relevant legislation and prior authorization. If significant transboundary harm did occur subsequently, it would have no way of meeting the liability other than from its national budget. Insurance thus had an important role to play in the case of the developing countries and if the State, too, had a subsidiary role, it could take out additional insurance.

17. The basic premise was appropriate: it was the insurance mechanism to cover the risk of significant transboundary harm that enabled the Commission to submit a proper set of articles to the General Assembly. Under the capitalist system, it was the only one to offer developing countries that option. It thus allowed the Commission to move on with more confidence than before.

18. The Special Rapporteur proposed two alternatives in regard to the liability of the operator and it was obvious that the first formula would command the widest support. With regard to procedures and article E (Competent court), contained in the tenth report, the question arose of the appropriate way to tackle the problem of harm internationally. Many States established a rule of connection whereby the competent court was the court at the place where the harm occurred. In the United States of America, a rule applied that courts could be seized of cases involving damage occurring outside its territory under the non-convenience forum model. Nevertheless, a

whole system of law tied the court/damage relationship to the place at which the damage occurred. However, the Special Rapporteur was right not to confine the competence of the court to the State of origin alone, but to allow some leeway to seek options, including the court of the affected State, of the State of origin, and of the domicile of the operator. Yet those three connective factors with regard to the competence of the courts could not all be ranked equally, and some hierarchical order must be established between them, for a judge stood in need of guidelines.

19. As for article F (Domestic remedies), proposed in the tenth report, local remedies obviously existed in many countries, but the Special Rapporteur was rightly proposing that States should be obliged to provide affected persons with legal remedies that allowed for prompt and adequate compensation. In the case of article G (Application of national law), a court or legislator would have difficulties in distinguishing between substance and procedure unless the Commission provided it with some indicators. It should be made clear when national law was to be applied in the area of substance, and when it was to be applied in the area of procedure. In the legal system to which he was accustomed, the area of substance tended to be much wider, encompassing many aspects of form.

20. With regard to article H, it was essential to note that the Special Rapporteur referred to the causal link between the incident and the harm. Probable harm was a highly controversial notion, but one that the judge would have to assess. In other words, if strict liability were to come into play, the causal link between the incident and the probable harm would determine an effect that must be taken into account. Regarding article I (Enforceability of the judgement), the Special Rapporteur adopted the logical solution of stating the rule, namely, that judgements were enforceable. However, the exceptions to that rule enumerated in subparagraphs (a) to (d) of paragraph 1 were truly worthy of examination. It was not easy to take the existing model of private international law as justification for not enforcing a foreign judgement, for example, on the grounds that the judgement was contrary to the rules of public policy. Indeed, the Special Rapporteur was breaking new ground and providing pointers as to why a foreign judgement in a matter of damages might not be enforceable. That question was tied in with article J (Exemptions). Some four or five major areas had been established in which responsibility could not be imputed to a State, for instance, in the event of a state of necessity. In the case of strict liability, however, the situation changed drastically. In his view, it was a substantive issue, because article J made it clear that there was an aspect of liability that fell within the area of wrongful acts, and another area, of exemptions for other acts. The Commission must establish some criteria in that regard, and he would be grateful if the Special Rapporteur would clarify the question. The Special Rapporteur had also found it convenient to have recourse to a limitation period of three years. The exact length of that period was not a highly contentious issue and the one proposed was logical and appropriate.

21. In conclusion, in thinking of two notorious industrial accidents of recent years, one of which had taken

place in India and the other in the former Soviet Union, he could not help but wonder what would have happened if those accidents had occurred closer to the borders with other States. That concern had caused him to view the present topic from a different perspective. He therefore commended the Special Rapporteur for introducing the human factor into his consideration of harm to the environment and transboundary harm. He hoped that the Commission could make an effort to submit a complete text on the topic to the General Assembly in the coming year. Strict liability was no longer viewed by States with the alarm that it had once provoked.

*Mr. Sreenivasa Rao took the Chair.*

22. Mr. YAMADA said that the Special Rapporteur's tenth and eleventh reports were well researched and full of innovative ideas and would contribute significantly to the Commission's work of drafting articles on activities containing a risk of causing transboundary harm. In his tenth report, the Special Rapporteur dealt with the outstanding issue in the field of prevention, namely, prevention *ex post facto*. Previous speakers had opposed the inclusion of prevention *ex post facto* in the chapter on prevention proper, and had advocated placing such a provision in the chapter on reparation. However, he agreed with the Special Rapporteur's view that it should be considered as a question of prevention proper. The concept of "response measures" as discussed by the Special Rapporteur was now found in several agreements, and his proposal represented progressive development of law on that subject. Placing heavier and wider obligations of prevention on States and operators engaging in activities that entailed a risk of causing transboundary harm would certainly have the effect of reducing the likelihood of such harm occurring. Such an addition would deal conclusively with the question of prevention.

23. As to the question of liability, not until the concept of harm had been worked out would he be in a position to make a meaningful contribution. Nevertheless, the Special Rapporteur's in-depth study of the attribution of liability was very illuminating. He endorsed the approach whereby remedial measures other than monetary compensation should not be considered for the time being. There was the question of State liability for wrongful acts when a State failed to fulfil its obligations of prevention, and the Commission must consider the implications of that issue in relation to the convention on State responsibility on which it was currently working.

24. He welcomed the eleventh report, in which the Special Rapporteur focused on the question of the environment, which was most relevant to the present topic. The Commission's work must reflect the recent international trend, which was rapidly gaining pace, towards preserving the natural world. In principle, he endorsed the Special Rapporteur's views on the evaluation and restoration of damaged natural resources. He said he wished to comment on the new text proposed for the definition of "harm". It went beyond the ordinary meaning of a definition, and he wondered whether it might be placed in another part, on regulation of the conduct of the State or operator.

25. He said that also with respect to the new text proposed, in particular the text concerning entitlement to remedial action for harm to the environment, the Special Rapporteur recognized the right of action by the State or the bodies which it designated under its domestic laws. In the course of his explanations, he had referred to non-governmental welfare organizations in the report and to the competence of certain public authorities as "the bodies" designated by the State. However, it was not clear why the bodies designated by the State were entitled to have recourse to the right of action. That might lead to random proceedings. He did not see the need to authorize them as the competent authorities within the State, because the State itself was able to use the right of action without relying on "the bodies". In addition, the State of origin could not waive its privilege against claims presented by "a body" not the State. He hoped that that question would be clarified by the Special Rapporteur.

26. Mr. YANKOV said that the Special Rapporteur's eleventh report offered a number of valuable new elements for the Commission's consideration of an unexplored area of liability.

27. As to the definition of the environment, he was not convinced of the wisdom of excluding the human factor. Beginning with the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>8</sup> the human factor had been present in a great many instruments. As an example, one need only cite article 1, paragraph 4, of the United Nations Convention on the Law of the Sea. That Convention, while being very much oriented towards protection of the marine environment in its global dimensions, also set out a number of general concepts that could be applied to the topic under consideration.

28. Certain paragraphs of the report reflected the opinion that, since human life was protected by law in a number of domains, it should not be covered by instruments on the environment. When work had first begun on instruments for environmental protection several decades ago, the title used had been "protection of the human environment". Man had thus been placed at the very centre of the issue from the outset. It therefore seemed questionable that man should now be entirely excluded from consideration in an instrument on liability for environmental damage. Perhaps the Special Rapporteur should reconsider his stance, unless he could provide more arguments than those set out in the report in favour of his restricted concept of the environment.

29. In the report, the distinction between harm and damage seemed to be blurred, nor was the distinction made very clear in the proposed text for the definition of harm. He sensed the Special Rapporteur's reluctance to make a clear-cut distinction, as the words "harm" and "damage" were used interchangeably. Admittedly, that was the case in no less authoritative an instrument than the United Nations Convention on the Law of the Sea. The words "harm" and "harmful" were used only in

article 1, paragraph 1 (4), and article 206. Everywhere else the term "damage" was used: in articles 194 and 195 setting out general principles on prevention, article 232, on liability of States arising from enforcement measures, article 235, on responsibility and liability, and article 263, concerning compensation for damage caused by marine scientific research. Nevertheless, perhaps the Special Rapporteur could use the present session to clear up the ambiguities connected with his use of the words "damage" and "harm".

30. Mr. de SARAM said the comments just made by Mr. Yankov were extremely interesting and he requested the secretariat to provide copies of the articles cited from the United Nations Convention on the Law of the Sea.

31. Since the topic of liability raised fundamental issues on which there was a wide divergence of opinion, and since the time the Commission had available to discuss it was very limited, it would be preferable for members to confine their remarks to comments on the eleventh report, leaving substantive comments on the topic for a later session.

32. The CHAIRMAN said the secretariat would circulate copies of the articles referred to by Mr. Yankov. As for the subjects to be covered in the debate, he preferred to remain flexible and pointed out that the working group on the topic would also be looking into that question.

33. Mr. BARBOZA (Special Rapporteur) thanked members who had already expressed their opinions, to which he would obviously give careful consideration. Responding to the comments made by Mr. de Saram, he recalled that the Commission had decided to devote its discussion of the topic in plenary to the major issues on which progress on the whole topic was dependent. The entire regime for liability was contingent upon the choice of activities that would be covered. The scope of the future convention must be carefully delimited before the topic could be explored to the full. He therefore welcomed the suggestion that discussions in plenary should be confined to preliminary comments aimed at helping him better define his topic. A fully-fledged debate, while desirable, should be reserved for a later stage.

34. With reference to the remarks by Mr. Villagrán Kramer, because the Sixth Committee had insisted on the need for provisions on prevention, it had been necessary to contemplate violations of rules on prevention, and thus, to deal with the consequences of such violations. That inexorably raised the problem of responsibility for wrongful acts. After much debate, it had been decided to incorporate a certain amount of such subject-matter, even though the topic had originally been envisaged as focusing on the consequences of acts not prohibited by international law. Despite the obvious convergence with the topic of State responsibility, his report made absolutely no incursions into the terrain that concerned the Special Rapporteur on State responsibility, Mr. Arangio-Ruiz. His own work involved the formulation of primary rules, the violation of which gave rise to the very consequences proposed by Mr. Arangio-Ruiz. Side by side with State responsibility, there was necessarily a liability *sine delicto* which, under many modern conventions, was being assigned to what was now being

<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.

defined more and more frequently as the “operator”. Yet at times the two coincided, and that was one of the problems with the subject-matter dealt with in his tenth report. In fact, the report outlined many cases in which treaties had reconciled the liability of the State and of the operator.

35. The points raised by Mr. Yankov were important. Environmental harm and the definition of the environment were evolving issues, and he hoped the Commission would bend its collective efforts towards resolving some aspects of those issues. He agreed that the human factor was important, but he truly did not think it entered into the definition of the environment. A human being could be affected by environmental harm, but was not actually part of the environment.

### Closure of the International Law Seminar

36. The CHAIRMAN said that, over the past three weeks, a new enthusiasm had marked the Commission's meetings as members had been able to share their concerns with the energetic participants in the International Law Seminar. The freshness of their outlook and the academic atmosphere that accompanied them had encouraged members of the Commission to look to the future and to recover the idealism of their youth. He commended the participants on the results of their work on subjects that the Commission itself had been grappling with. He wished them every success in their future endeavours and was sure international law would be safe in their hands.

37. Mr. SCHMIDT (Director of the Seminar) said that the participants had taken an avid interest in the Seminar and that the recommendations that had emerged from their study groups were remarkably detailed. He hoped the wealth of information they had consumed would not be difficult to digest. Trusting that they would leave Geneva with the sense that their time there had been well spent, he wished them success in their future posts—whether in teaching or in government service. Some day, perhaps, one or more of the participants would be seen again in the Commission's meeting room—in a different capacity.

38. Mr. TOMUSCHAT said that, as a former participant in the International Law Seminar, he was especially honoured to have headed the study group on consequences of international crimes. The results of the work done by that team, and by its fellow, the study group on unilateral acts under international law, were truly remarkable. The participants, he hoped, had gained a deeper insight into the issues facing the Commission, and the fact that they themselves had been unable to reach agreement on some points mirrored the Commission's own quandaries. The participants had worked hard and it was his hope that their memories of the past three weeks would always be agreeable.

39. Mr. PANNATIER said that he had the gratifying task of thanking the Commission on behalf of the participants in the International Law Seminar. In the past three weeks they had been able to delve into the world of the Commission and had enjoyed privileged access to its

members. Those contacts had enriched each participant; one of the many gains of the Seminar was also the bonds of friendship that had been forged. All the members of the Commission had given freely of their time and the Director of the Seminar had made excellent arrangements for the organization of the programme. He wished to express thanks to the Governments which, in a time of growing budgetary constraints, had made contributions to facilitate the holding of the Seminar, and to extend to the Commission best wishes for success in its work from the participants in the Seminar, who would not forget what they had learned.

*The Chairman presented participants with certificates attesting to their participation in the thirty-first session of the International Law Seminar.*

### Other business (A/CN.4/L.518)

[Agenda item 11]

40. Mr. TOMUSCHAT, noting that a heated debate was going on in France over the pernicious effects on health of the asbestos used in building construction, asked whether any investigation had been made of whether that product was present in the structure of the Palais des Nations.

41. Ms. DAUCHY (Secretary to the Commission) said some offices had been renovated in 1991 and any asbestos present had been removed, but the secretariat would make further inquiries into the matter.

*The meeting rose at 12.10 p.m.*

## 2399th MEETING

*Tuesday, 13 June 1995, at 10.05 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.*

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/459,<sup>1</sup> A/CN.4/464/Add.2, sect. E, A/CN.4/468,<sup>2</sup> A/CN.4/471<sup>3</sup>, A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)

[Agenda item 5]

TENTH AND ELEVENTH REPORTS OF THE  
SPECIAL RAPPORTEUR (concluded)

1. Mr. ROBINSON said that the question of international liability for injurious consequences arising out of acts not prohibited by international law presented particularly difficult issues for developing countries. Since developing countries did not have the technology to carry out such acts and were more likely to be affected by them, they would generally favour a regime of strict controls, but, as engaging in those acts was an imperative for development, they must perhaps agree to a somewhat less strict regime. Likewise in favour of a strict regime of controls were developing countries located near other countries, whether slightly developed, almost developed or fully developed, in which activities of that nature took place and which felt directly threatened by them, as well as island States whose economy was primarily dependent on tourism and for which the integrity of the natural environment was of the utmost importance.

2. As to the developed countries, it might seem obvious that, since they generally engaged in such activities, they would favour a liberal regime. But it must be borne in mind that some of those countries were less developed than others and therefore engaged in such activities to a lesser degree and might therefore prefer a stricter regime. It was thus clear that the dichotomy established between developed and developing countries for the purpose of discussing the topic under consideration was relevant only as a generalization and might be misleading. Ultimately, the Commission must find a solution on the basis of State practice, an examination of relevant international conventions and proposals which developed international law. The Special Rapporteur was to be commended for an approach which reflected a judicious combination of codification and progressive development of international law in the area.

3. Turning to the actual concept of the environment, his preference was for as broad a concept as would allow a reasonable assessment and quantification of harm to the environment. The Special Rapporteur pointed out in his eleventh report (A/CN.4/468) that the *Chorzów* rule of *restitutio in integrum* was strictly applicable to breaches of what were called primary rules and that it was not being as rigorously respected in this field as in that of wrongful acts.<sup>4</sup> He believed, however, that the *Chorzów* rule must serve as an indicator of the degree to which reparation must be made for damage to the envi-

ronment. Subject to treaty obligations, reparation should seek as far as possible to restore the *status quo ante*.

4. With regard to the text proposed by the Special Rapporteur in his report, he was surprised to find references in subparagraph (c) (i), (ii) and (iii) to "cost" and "compensation" in the definition of harm to the environment, which were not so much components of harm as factors to be taken into consideration in assessing harm. It would be more sensible to introduce subparagraph (c) (i), (ii) and (iii) by a phrase such as: "in assessing reparation for harm to the environment, due account may be taken of". In order to stress the relevance of the *Chorzów* rule in that regard, he would make the text proposed in subparagraph (c) (i) even more explicit by adding the words "*the status quo ante*" after the word "restore". It was, moreover, not altogether clear whether the words "where reasonable" captured the circumstances in which the equivalent of resources not restored or replaced might be introduced into the environment. Concerning subparagraph (c) (ii), he understood "preventive measures" to include not only the *ex post*, but also the *ex ante*, measures referred to earlier in the report. Lastly, the text of subparagraph (c) (iii) was not stringent enough and he proposed that it should be replaced by the following wording:

"reasonable compensation in cases where the measures indicated in subparagraph (c) (i) were impossible or insufficient to achieve a situation acceptably close to the *status quo ante*".

The instrument envisaged should not provide that such compensation should be used to improve the environment of the affected region. No doubt in most cases, the compensation would be so used, but that was a matter for the affected State to decide. Whereas the illustrative list in subparagraph (c) (i), (ii) and (iii) ought to be exhaustive, he supported the non-exhaustive listing of items constituting the environment and understood that the omission of a reference to "cultural heritage" in the list proceeded on the basis that damage to such property was covered by subparagraph (b) on damage to property.

5. Lastly, he noted that, according to the proposed text, the affected State or the bodies which it designates under its domestic law shall have the right of action for reparation of environmental damage. He wondered whether that meant that an individual whose interest had been damaged would not be able to institute proceedings, what would happen if neither the State nor the designated agency made a claim for reparation whereas individuals felt that there was a just claim, whether individuals had no *locus standi* to make a claim and whether harm to the environment was a matter in which there were only State or para-State interests.

6. Mr. de SARAM noted with interest that the eleventh report contained an excellent statement on the questions that might be raised by the definition of "harm". It would be useful if the various texts containing such a definition were made available to the working group so that their wording could be compared.

7. It seemed to him that the Commission should focus its attention on the definition of the word "harm" and avoid spending time on other questions that could be

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

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

<sup>4</sup> See 2397th meeting, footnote 19.



considered at a later stage, including the necessity that the harm for which a particular claim for compensation was made should not be a remote, but a reasonably direct, consequence of the activity in the State of origin; the standards to be utilized in determining the amount of compensation payable in particular cases; and who would be entitled to submit claims. The prospects of catastrophic harm and thus of high claims also gave rise to great difficulties and it would probably be necessary in certain cases to conclude special arrangements. However, the Commission should, at least in principle, stick to the basic idea that the primary purpose of compensation was to restore the situation that had existed prior to the harm. For that reason, he did not quite agree with the point made by the Special Rapporteur in his report that there was a distinction to be drawn between reparation in the case of a breach of a primary international obligation and compensation pursuant to a primary international obligation.

8. The definition of harm must be reasonably comprehensive without being overburdened with detail. In a preliminary stage, it ought to cover the following elements: loss of life, personal injury or other impairment of health within the affected State, loss of or damage to property within the affected State, impairment of the natural resources of the affected State and impairment of the natural, human or cultural environment of the affected State.

9. There was another matter which, although not of direct relevance to the question of the definition of harm, was of general importance to the current topic: what the current basis was for the obligation to compensate where an activity not prohibited by international law in one State caused physical harm in another State and, regardless of the current state of the law on the matter, what ought to be the basis for the obligation to compensate in such cases. Where the obligation to compensate was set out clearly in a treaty, there should be no legal difficulty in determining the basis for the obligation. Difficulties arose where there was no such treaty, particularly as there was a paucity of guidance in the form of authoritative judicial or arbitral decisions. In such cases, it was difficult to determine which law was applicable. But from the point of view of the progressive development of the law that was needed if only for humanitarian considerations, he was of the view that it should not be impossible to find a basis for an obligation to compensate, at least in cases of very hazardous activities, a field in which, at any rate in many national systems of law, the obligation to compensate no longer entailed the requirement for the claimant who had been harmed to prove that there had been a failure to take all precautions at the source to prevent the harm from taking place. There was the view that, in many cases, the solution might be claims for compensation at the level of private international law, but he doubted whether that was possible if the countries concerned were both geographically distant and had different national legal systems. Logistical difficulties were also inevitable in litigating abroad.

10. Consequently, there was a need to consider elaborating rules applicable between States under public international law, but individual claimants should not, of course, be deprived of the opportunity to institute pro-

ceedings under private international law if they so desired. It would be a good idea to consider the question further at a later date, perhaps initially in the working group.

11. Mr. YANKOV drew the Commission's attention to two points. The first had to do with the place of the human being in the constituent elements of the concept of environment. Notwithstanding the explanations given in the eleventh report, particularly those which raised the question of human health, he continued to think that the definition of the concept of environment must contain a reference to human beings. He noted in that regard that article 2, paragraph 1 (b), of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment spoke of the significant risk for man that those activities posed and he suggested that the Special Rapporteur should pursue his consideration of that aspect of the question in the light of the debate and review the restrictive approach reflected in the report.

12. His second point concerned the use in English of the terms "damage" and "harm". He noted that, in most conventions on the environment, the word "damage" was used, but that the draft articles on the law of the non-navigational uses of international watercourses employed the term "harm". Although he had no particular preference for one term or the other, he thought that the Commission should also discuss that question.

13. Mr. VILLAGRÁN KRAMER said he thought that using the definition of harm to the environment proposed by the Special Rapporteur in his eleventh report would be convenient. The question still remained whether the definition should appear in article 2 or be placed at the beginning of a chapter entitled "Harm". It would be up to the Drafting Committee to take that decision. In his view, it was also very important that the Commission should reach agreement on the criteria to be applied in order to exclude certain acts or omissions from the concept of harm to the environment. Some interesting suggestions in that respect were made by the Special Rapporteur in the report.

14. He recalled, however, that the highly developed and less developed countries held widely differing views on the concept of the environment, as had become very clear at the United Nations Conference on Environment and Development. The standards advocated by both sides were equally valid. The developing countries said that the developed countries had made ample use of their resources in order to achieve their development and that they now wanted to prevent other countries from following their example. Yet certain activities were absolutely essential to a country's development and it was therefore necessary to take account of certain economic factors and to establish reference indices which would make it possible to exclude from the concept of harm certain elements connected with the various stages of a country's development. He personally was in favour of establishing strict standards, but he thought it useful to recall that point, not to the Special Rapporteur, who himself came from a developing country, but to the other members of the Commission.

15. With regard to prevention, the arguments advanced by the Special Rapporteur on the subject of *ex ante* pre-



vention and *ex post* measures assumed particular importance in the case of harm to the environment and the Commission should give favourable consideration to the latter type of measures as far as the environment was concerned. As for reparation, it was clear that, in the event of harm to the environment, *restitutio in integrum* was extremely difficult and complicated. The "Green Paper on Remedying Environmental Damage"<sup>5</sup> said some interesting things in that connection, but, there again, it was a matter of countries that were very highly developed and he was not sure that the standards advocated could be accepted by developing countries. That did not mean that it was necessary to provide two types of rules, one set applicable to the industrialized countries and the other to developing ones, but what certainly needed doing was to study the developing countries' suggestions in order to arrive at a reasonable common denominator.

16. Mr. ROBINSON, taking up the point raised by Mr. Yankov, said that, in his view, the concept of harm should include injury to human health. The inclusion of human beings or human health in the concept of the environment would help to provide that concept with an anchorage and a concrete basis which would otherwise be lacking, for human beings were really at the centre of the environment.

17. If he had understood correctly, the Special Rapporteur thought that the point was covered by subparagraph (a) of the definition of "harm" which he gave in the proposed text contained in his eleventh report. According to that paragraph, "harm" could, in particular, mean "loss of life, personal injury or impairment of the health or physical integrity of persons".

18. The problem arose, however, whether the inclusion of human beings or human health in the concept of the environment would not open the way to, as it were, a double claim for reparation. The Commission could easily circumvent that difficulty by including a provision in the text expressly precluding such a possibility. That approach should, in his opinion, be given further consideration.

19. Mr. KABATSI requested the Special Rapporteur to clarify the position under the envisaged arrangement of a State whose environment was adversely affected by a legitimate change in the use of the national resources of a neighbouring State, warranted, for example, by economic considerations. In the case of a riparian watercourse State that might decide to utilize land in the vicinity of the watercourse for agricultural purposes, which might have adverse effects on the rainfall situation in the neighbouring State and thus damage its forests or make lands in that State unsuitable for growing crops or keeping animals, he wondered what the rights of the injured State would be.

20. The CHAIRMAN, speaking as a member of the Commission, said that the information supplied by the Special Rapporteur and his judiciously formulated proposals had helped the Commission to see its way a little

more clearly in one of the most interesting, but also most elusive areas it was called on to study.

21. Nevertheless, the issues to be resolved remained exceptionally complex and abstract because international liability for injurious consequences arising out of acts not prohibited by international law could be envisaged at several levels. In the simplest case, where an activity, through a causal link, led to harm, which the Commission had agreed to describe as "significant" because of the need to establish a threshold, the problem of liability was reasonably easy to solve because there already existed a set of generally accepted principles applicable in that area.

22. A change of level occurred, however, when the activities in question were ultra-hazardous. That type of activity had been at the centre of concern in recent years and a number of legal principles and rules had already been formulated in that respect since such activities could be of fundamental importance to the development of a particular community or of the international community as a whole and they were now accessible to practically all States. As such activities were recognized as being socially beneficial, steps had to be taken to absorb the loss if any damage were to result.

23. It was to those developments that had brought into being the system of "civil liability", for example in the nuclear energy sphere, where the operator's liability had been instituted, within certain limits determined by the availability of insurance. Drawing inspiration from that approach, the Special Rapporteur had gone so far as to envisage, in his tenth report (A/CN.4/459), an insurance system funded by the State that would by virtue of subsidiary State liability, be additional to the reparation offered by the operator by way of his own civil liability. Thus far, the problem was still reasonably simple because the standards in question were more or less universally accepted by all societies engaged in "ultra-hazardous" activities that could, despite the best care, cause harm.

24. By their very nature, however, ultra-hazardous activities could entail extraordinary harm which could never be made good. In that context, the concepts of *restitutio in integrum* or of return to the *status quo ante* lost all meaning inasmuch as the harm could be irreversible. The calculated risk people accepted when they engaged in an activity which, under normal circumstances, produced a tolerable level of pollution could over a period of time assume an unacceptable or significant level of harm, because of the accumulated impact of the pollution involved. Moreover, that type of harm was not always rapidly assessable or traceable to a specific source or entity. In the case, for example, of deforestation or of effluent discharges into an ecosystem, which could at some point assume dimensions of significant harm, it was difficult to determine who was responsible and what type of liability would apply.

25. That was the field in which efforts should be made to undertake more global action by trying to draw up universally acceptable standards, to disseminate the relevant information widely and to help States regulate, legislate and otherwise provide the necessary mecha-

<sup>5</sup> Ibid., footnote 22.

nisms for monitoring the application of standards once they had been adopted and incorporated in their laws.

26. At another general level, the old quarrel which saw the developed countries favouring a "liberal" liability regime, while the developing countries wanted a stricter one, seemed to him outdated. Concern with environmental protection was today common to all countries, whatever the differences between them or stages of their economic growth.

27. The question was, rather, one of knowing what to do and what not to do in the case of a particular activity and what types of rules could be established and then to bring the message home, providing assistance to countries, if necessary, so as to give them the material means of implementing the principles adopted. Once certain standards and parameters had been defined, it would be possible to consider ways and means of promoting their adoption by all States. The Commission was well placed to help in formulating such principles and eventually connecting them up to a liability system, even if it might not be in a position to do so very quickly given the time available to it and the level of consensus reached so far.

28. The Special Rapporteur could play an extremely useful role in that regard by summing up what had been achieved over the past two years and specifying what principles could already be identified and what problems would have to be reviewed or what imponderables must still be reckoned with. For such imponderables did exist: in order to be convinced of that, it was enough to read draft articles 13 and 14 provisionally adopted by the Commission at the forty-sixth session.<sup>6</sup> What, for example, was the scope of the obligation of "due diligence" imposed on the State? And when the Commission stated that "pending authorization [which would or would not be granted to the operator in respect of an activity involving a risk of significant transboundary harm], the State may permit the continuation of the activity in question "at its own risk", what was the real scope of that provision? Those were concepts that needed to be carefully analysed and weighed further before further progress could be made.

29. Mr. BARBOZA (Special Rapporteur) said that, at the conclusion of the preliminary debate on his tenth and eleventh reports, he would simply sketch out a few replies to comments by previous speakers.

30. To Mr. Yankov and Mr. Robinson, who had by implication reproached him with having, as it were, overlooked the human dimension in his analysis of the topic, he would recall that, when introducing his eleventh report (2397th meeting), he had spoken out against any tendency to dissociate the human being from the environment. He had also duly made it clear in the report itself that harm to the environment was always harm to someone and he would not wish to give the impression of ignoring humanist concerns, which, on the contrary, he believed to be fundamental.

31. The human environment and the human being were nevertheless two different subjects. Since the hu-

man being was already in itself protected by law, the protection of the environment was the heart of the matter in the present context and that was why he had developed that aspect in particular.

32. He had also listened with interest to the comments made by Mr. Kabatsi and Mr. Sreenivasa Rao, but the former had given a complicated example that he would need to have in front of him in order to make valid comments on it.

33. In conclusion, he said that the draft which he was proposing and which, at the present stage, dealt essentially with matters of prevention and liability was a modest one that did not in any way set out to remedy all of mankind's ills.

*The meeting rose at 11.15 a.m.*

## 2400th MEETING

*Wednesday, 14 June 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Tomuschat, Mr. Vilagrán Kramer.

### The law and practice relating to reservations to treaties (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>1</sup> A/CN.4/L.516)

[Agenda item 6]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited Mr. Pellet, the Special Rapporteur, to introduce his first report on the topic of the law and practice relating to reservations to treaties (A/CN.4/470).

2. Mr. PELLET (Special Rapporteur) said that the question of reservations to treaties was not *terra incognita* for the Commission, which had already studied it on four occasions, first at its third session in 1951 in connection with the topic of the law of treaties and, later, within the framework of the work which had led to the adoption of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Con-

<sup>6</sup> For the text, see *Yearbook . . . 1994*, vol. II (Part Two), para. 380.

<sup>1</sup> Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

vention”), the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the “1978 Vienna Convention”), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the “1986 Vienna Convention”). He felt greatly honoured to be the successor of Special Rapporteurs as prestigious as James Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, Sir Humphrey Waldock, Sir Francis Vallat, and also Paul Reuter, whom he called to mind with particular emotion.

3. As all his illustrious predecessors had pointed out, the question of reservations to treaties was probably one of the most difficult in the whole of public international law. In the first place, there was the technical difficulty of having to reconcile two imperatives: first, the need to maintain, if not all, then at least the essential elements of the treaty message. The second was the need to facilitate as far as possible accession to multilateral treaties of general interest. Then came a difficulty of a political nature, for the presence of political motives behind what appeared to be technical debate could not be denied. However, with the completion of political decolonization and, more particularly, with the end of the cold war, the problem could now probably be approached in a more serene manner. It was one of the reasons why, he thought, the right time had come to engage in a dispassionate examination that would help to clarify the issues involved. Lastly, there was also a doctrinal difficulty: writers on the topic had adopted extremely clear-cut positions, particularly on one of the topic’s key problems, that of the “validity” of reservations, a term—criticized by some—which could be interpreted as covering two separate questions, that of the permissibility of a reservation and that of its opposability. The doctrinal differences in that area, which were so marked as to make it possible to speak of a “school of permissibility” as against a “school of opposability”, were discussed in his report.

4. More recently, controversy had been revived by the adoption by international human rights bodies, in particular the Human Rights Committee, the European Commission of Human Rights, the European Court of Human Rights and the Inter-American Commission of Human Rights of a bold new stand on the special problems of reservations to human rights treaties. Those developments, which had been welcomed by some States but had met with strong criticism on the part of others, added to the complexity of the topic to such a point that the question arose whether a uniform legal regime governing reservations to treaties was necessary or possible.

5. Those introductory remarks were intended to show how honoured and, at the same time, how daunted he felt by the task assigned to him, especially in view of the moral undertaking given by the Commission to the General Assembly to complete the task within not more than five years.

6. In embarking upon the task with all due humility he had found it necessary to devote a good deal of time and effort to the study of previous writings and discussions on the topic. As a result, the preparation of the first report had taken longer than expected and he asked the

members of the Commission to excuse the delay. In that connection, he particularly thanked the Secretary of the Commission and her staff for their most efficient cooperation and also thanked the translators who had moved heaven and earth to produce an English version in time.

7. Coming to the topic, as he did, in a state of almost virgin ignorance, he was entirely free from any preconceived opinion and any desire to impose his own point of view. If the tone of the first report was found to be somewhat tentative—in contrast to a perhaps more emphatic style in his contributions in other contexts—it was not because he believed that a special rapporteur had to be neutral in relation to his topic (although he must certainly submit to the majority view if it went against him). It was simply that his mind was not yet fully made up. In preparing the report, he had read or reread a great deal and, as he had indicated in the report, it had been his intention to annex a bibliography, albeit not an exhaustive one. Unfortunately, that had not proved possible at the present stage, in view of the volume of pertinent works, but a bibliography would be appended to his next report. The only important correction of substance to the report was that the words “and as States which have accepted the reservation are not bound to the reserving State” should be inserted after the words “reserving State” in subparagraph (iv) of paragraph 36.

8. Turning again to the question of the doctrinal controversies surrounding the topic, he referred in particular to the stimulating article by Mr. Bowett, which set out the views of the “school of permissibility”,<sup>2</sup> and to the work of Mr. Ruda which represented those of the “school of opposability”.<sup>3</sup> The arguments on both sides appeared a priori to be equally convincing, and he thought it would be premature to attempt to choose between them at the present stage; indeed, making such a choice at all might eventually prove unnecessary. He had none the less considered it essential, in the light of the directives given by the General Assembly in resolution 48/31, to include in his first report—the preliminary nature of which he wished again to emphasize—a recapitulation of the different positions held.

9. The report comprised three chapters: chapter I dealing with the Commission’s previous work on reservations, chapter II containing a brief inventory of the problems of the topic, and chapter III discussing the possible scope and form of the Commission’s future work on the topic. Chapter I was designed to refresh the memory of members about the essential stages in the topic’s long history, starting in 1950 with the report by the Special Rapporteur, Mr. James L. Brierly,<sup>4</sup> and ending with the adoption of the 1986 Vienna Convention. The most important stages in that process had been the advisory opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>5</sup> the

<sup>2</sup> D. W. Bowett, “Reservations to non-restricted multilateral treaties”, *British Year Book of International Law*, 1976-1977, vol. 48 (Oxford, Clarendon Press, 1978), pp. 67 *et seq.*, in particular p. 88.

<sup>3</sup> J. M. Ruda, “Reservations to Treaties”, *Collected Courses of the Hague Academy of International Law*, 1975-III (Leiden, Sijthoff, 1977), vol. 146, pp. 95-218.

<sup>4</sup> *Yearbook . . . 1950*, vol. II, p. 222, document A/CN.4/23.

<sup>5</sup> *I.C.J. Reports 1951*, p. 15.

first report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur,<sup>6</sup> which had led to the Commission's adoption of a flexible system; the adoption of article 2, paragraph 1 (*d*), and articles 19 to 23 of the 1969 Vienna Convention; the adoption of article 20 of the 1978 Vienna Convention; and, lastly, the adoption of the relevant articles of the 1986 Vienna Convention, which essentially reproduced the corresponding passages of the 1969 Vienna Convention.

10. In his report, he had tried to indicate the lessons he had drawn from those milestone events. First, the work had been difficult and a balance had had to be struck between widely differing doctrinal and political opinions. Secondly, solutions had been arrived at, in many cases, only at the cost of deliberate ambiguities. Thirdly, there had been a clear development in favour of an increasingly strong assertion of the right of States to formulate reservations to the detriment of the right of other contracting States to oppose such reservations, even if the right of other contracting States to oppose, on an individual basis, the entry into force of the treaty between themselves and the reserving State was maintained. Fourthly, the 1978 Vienna Convention, by express referral to it, and the 1986 Vienna Convention, virtually by reproducing it, had had the effect of strengthening the system established by the 1969 Vienna Convention, one which, given its many ambiguities and gaps, after all, was hardly "systematic".

11. Chapter II of the report had been more difficult to prepare. In drafting it, he had proceeded, on the one hand, on the basis of such information as he had concerning the relevant practice and, on the other hand, on the mass of doctrinal material to which he had already referred. An empirical method of that kind was undoubtedly far from ideal, and he hoped that the debate on the topic would be rich in useful criticism, and advice. Without presuming in any way to dictate any course of action to the Commission, he hoped that members would assist him in that manner rather than embark directly upon discussing the substance of the problem. The clarifications or guidelines he was seeking related to three areas.

12. First, it was quite possible that his brief inventory of the problems identified had not been set out correctly in every detail and he would be happy to receive any suggestions in that respect. Secondly, and more importantly, it was very likely that some points which might be important had escaped him altogether, because information available to him about State practice was incomplete and was difficult to obtain. The practice of the Secretary-General of the United Nations as depositary was relatively easy to ascertain, although the most recent systematic study dated back to 1964, and perhaps the Secretariat might be able to update it. It would certainly be extremely useful. Information, some full and some incomplete, had been supplied by seven international organizations of the United Nations system as well as by the Council of Europe and OAS. It was his intention to conduct a more systematic survey of the practice of international organizations both as depositaries and possibly as parties to treaties. The situation was less satisfactory so far as State practice was concerned, where he

had been obliged to rely on doctrinal studies as well as on a small number of inter-State documents, the most interesting being without doubt the report of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, meeting in Strasbourg on 21 and 22 March 1995, mentioned in the report. In the light of the forthcoming debate, he would, before the end of the present session, prepare a questionnaire on the topic to be sent out to States. In addition to any replies to the questionnaire, it would be very helpful if members of the Committee, and especially those from the countries whose practice was not wellknown, would communicate to him any information available to them about the practices in their own or in other countries relating to the topic under consideration. In that way, it would be possible to avoid speaking exclusively about the practice—readily accessible—of the few countries that "broadcast" their practice. Lastly, he hoped that the debate would help him to bring some order into the set of problems concerning the ambiguities and of the gaps in existing conventions which he had tried to pinpoint and which were set out in the report. The report contained a long list of questions which seemed to pose problems, and to make progress it would be necessary to establish a hierarchy among those questions according to their degrees of importance and the order in which they were to be taken up. He looked forward to any suggestions in that respect.

13. His only personal preference would be for a debate focusing on the practical rather than the theoretical aspects of the topic, although, of course, the two were not mutually exclusive. For example, in the quarrel between the schools of permissibility and of opposability, the adherents of permissibility considered that a reservation contrary to the object and purpose of the treaty was in itself void, irrespective of the reactions of the co-contracting States. Conversely, the adherents of the opposability school, more marked by relativism, thought that the only test consisted of the objections of the other States. The importance of the practical consequences of those conflicting positions was self-evident; one need only refer to the Channel Islands case.<sup>7</sup> For example, if the "permissibilists" were right, the nullity of a reservation incompatible with the object and purpose of the treaty could be invoked before an international or even a national tribunal even if the State claiming the nullity of the reservation had not itself made any objection to it, whereas, if the "opposabilists" were right, a State could not avail itself of a reservation contrary to the object and purpose of the treaty even if the other contracting parties had accepted it.

14. Among other questions of a particularly thorny nature that came to mind, the first was the effect of an impermissible reservation. Did it entail nullity of the expression of consent of the reserving State to be bound, or only nullity concerning the reservation itself? There again the case-law of international human rights protection bodies showed that the answers to those questions

<sup>6</sup> *Yearbook* . . . 1962, vol. II, p. 27, document A/CN.4/144.

<sup>7</sup> *Delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decisions of 30 June 1977 and 14 March 1978, United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp.130 and 339.

had considerable practical effects. In that connection, he referred to the *Belilos* case,<sup>8</sup> which had posed a number of practical problems for the Swiss Government.

15. Another difficult question was that of objections to reservations. In formulating an objection, should a State be guided by the principle of the reservation's compatibility with the object and purpose of the treaty, or could it exercise discretion in the matter? There too, one encountered the conflict between permissibility and opposability. Above all, what were the effects of an objection to a reservation if, as article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions permitted, the State objecting to the reservation had not opposed the entry into force of the treaty between itself and the reserving State?

16. Another group of difficult questions concerned interpretative declarations. How could such declarations be distinguished from reservations in the strict sense of the term and in the case of genuine interpretative declarations what were their legal effects? The effect of reservations and objections on the entry into force of the treaty was not always clear. The 1978 Vienna Convention was silent as to the fate of objections to reservations in the event of State succession. Did the successor State "inherit" objections formulated by the predecessor State? Could it formulate new objections itself? The replies provided by practice were, it seemed, always uncertain, even though, as a matter of simple logic, it should be possible to arrive fairly easily at a satisfactory system.

17. An absolutely fundamental point was whether there were areas in which the existing regime of reservations and objections to reservations was not satisfactory. He had in mind in particular the human rights treaties where the main consensual element that permeated the whole regime laid down under articles 19 to 23 of the 1969 Vienna Convention, was challenged not only by certain writers but also by international bodies concerned with the protection of human rights. That dispute had been reopened with some force in 1994 with general comment No. 24 of the Human Rights Committee.<sup>9</sup> If the system provided for under the 1969 Vienna Convention was not satisfactory, in what way should it be modified or should it be abandoned in the case of human rights treaties? But regardless of the question of the constituent instruments of international organizations or provisions codifying customary rules there were perhaps other areas—for instance, disarmament treaties—which had to be recognized as special cases.

18. Lastly—though the list was not restrictive—it would be appropriate at some stage in the work on the topic to raise the question of "rival" techniques of reservations, whereby States parties to the same treaty could modify their respective obligations by means of additional protocols, bilateral arrangements, or optional

declarations concerning the application of a particular provision.

19. He had not attempted to provide answers to the longer list of such questions in his first report and did not think that that should be a concern during the coming debate. The main thing was to identify all the problems properly. That was his sole ambition for the present session.

20. At the present stage, it was important not to put the cart before the horse. His idea for a preliminary study had been prompted by a desire to get the feel of the subject before dealing with it in depth. The need for such a study also seemed to be dictated by General Assembly resolution 48/31, paragraph 7 of which stipulated that the "final form to be given to the work on" the topic "shall be decided after a preliminary study is presented to the General Assembly". The same clause also applied to the topic of State succession and its impact on the nationality of natural and legal persons, but the Special Rapporteur for that topic, Mr. Mikulka, had not interpreted it in exactly the same way as he had. Mr. Mikulka considered that a working group was necessary to carry out the study. While he himself saw no drawback in appointing a working group on the law and practice relating to reservations to treaties—though it was perhaps a little late in the session to do so—he certainly did not regard it as indispensable. In keeping with the practice of the Commission, the preliminary study could be the outcome simply of his current report and the positions taken by the Commission.

21. He had not expressed any personal opinions, at least for the time being, on the content of chapters I and II, which were objective and simply intended to provide the Commission with certain information. Chapter III, on the other hand, dealt with the scope and form of the future work of the Commission, and it was important for the Commission to take a clear stand in that connection, if possible at the current session.

22. Again while he had no particular views on the form of the future work, in the matter of its scope, he could not fail to repeat that, in the case of the topic of the law and practice relating to reservations to treaties, the Commission was not a pioneer. It was not travelling through an unexplored jungle or sailing over uncharted seas. Admittedly, there were obstacles along the way, but the path was clearly marked out. Much had been written not only by scholars but by the Commission itself. Three conventions had been adopted and despite—or perhaps because of—their ambiguities, they had proved their worth. A second look at those conventions should perhaps therefore be taken before calling into question the work of the Commission's predecessors, to which States were, on the whole, attached. That was apparent from the statements made by most of the speakers in the Sixth Committee on the inclusion of the topic in the Commission's agenda and, more recently, at the Committee of Legal Advisers on Public International Law of the Council of Europe as also at the meetings of OAS. The Commission must not lose its bearings. It would be regrettable if, in reflecting once again on the question of reservations, it should cause doubt to be cast on the soundness of the existing rules without having

<sup>8</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *Judgment of 29 April 1988* (Registry of the Court, Council of Europe, Strasbourg, 1989).

<sup>9</sup> General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, adopted by the Human Rights Committee on 2 November 1994 (CCPR/C/21/Rev.1/Add.6).

something better to propose. He was not certain, for his own part, that it did, at any rate for the time being.

23. His firm conviction was that what had been achieved must be preserved, regardless of any ambiguities or gaps. After all, the rules on reservations set forth in the above-mentioned Vienna Conventions operated fairly well. The potential abuses had not occurred and, even if States did not always respect the rules, they at least regarded them as a useful guide, so much so that it seemed, in principle at least, that they had now acquired customary force. The Commission's task was to codify and progressively develop the existing law, not to destroy it. He, for one, would be most concerned to be the architect of anything that would result in a weakening of the positive law in that area. It was therefore his fervent hope that the Commission would not start to question what had been achieved but that it would instead seek to determine such new rules as might be necessary to complement the rules in the 1969, 1978 and 1986 Vienna Conventions, without throwing out the old ones, which, in his view, were certainly not obsolete.

24. There was another, and decisive, reason for taking that approach. If the Commission were to adopt norms that were incompatible with articles 19 to 23 of the 1969 and 1986 Vienna Conventions or even with article 20 of the 1978 Vienna Convention, States which had ratified, or would in the future ratify, those Conventions would be placed in an extremely delicate position: some of them would have accepted the existing rules and would be bound by them; others would be bound by the new rules that would be incompatible with the rules already adopted; and yet others could even be bound by both, depending on their partners. If recourse were had to a legal fiction, of course, it would be possible to circumvent that kind of situation, as was exemplified, almost caricatured, by the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.<sup>10</sup> In the case of reservations, where there was no need for such an upheaval in the law, the Commission would be on the wrong track if it set out along such a path. Also, it would not be acting in accordance with its mission.

25. In short, he would suggest that the existing articles of the 1969, 1978 and 1986 Vienna Conventions should be treated, in principle, as sacrosanct unless, during the course of the work on the topic, they proved to be wholly impracticable, which he did not think would be the case. The one point, therefore which he would make very firmly was that the Commission should not call into question something that already existed and did not, after all, work too badly. That did not mean of course that there was nothing left to do. Where possible and desirable, ambiguities should be removed, but not necessarily altogether, for complete clarity was not always a virtue in international law. An attempt must also be made to fill any gaps, if only to avoid any anarchical developments. Those were the only two objectives that the Commission should set for itself—and hence for its Special Rapporteur.

26. That led to the question of the form to be given to the results of the Commission's work. Once again, his position was fairly neutral though he very much hoped that the Commission would provide him with firm guidelines, if possible at the present session. If the objectives he had outlined were accepted, numerous possibilities were open to the Commission, including the treaty approach, which could itself take two different forms. One possibility would be to draft a convention on reservations that would reproduce in their entirety the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions subject only to clarification and completion where necessary. The mere fact of repeating the existing rules would preclude any likelihood of incompatibility, and it would not prevent the Commission from following the tried and tested method of submitting draft articles together with commentaries. The other possibility would be to adopt one or three draft protocols that would supplement, but not conflict with, the existing 1969, 1978 and 1986 Conventions. Again, in accordance with the Commission's usual practice, draft articles could be presented by the Special Rapporteur for review and then for improvement in the Drafting Committee.

27. There were also other possibilities, apart from treaties, which had great advantages; they would, however, require the Commission to change its usual methods of work. In that connection, he had endeavoured to show, in his report, that the Commission had great freedom in that respect. Indeed, General Assembly resolution 48/31 actually seemed to encourage the Commission to adopt an original approach to some extent. It would certainly be doing so if it decided, as he had proposed in his 1993 outline,<sup>11</sup> to draw up a guide to the practice of States and international organizations in the matter of reservations. Such a guide could take the form of an article-by-article commentary to the provisions on reservations in the three Vienna Conventions, prepared in the light of developments since 1969 and designed to preserve what had been achieved, along with necessary clarifications and additions.

28. It would also be useful, irrespective of the main solution decided on, if the Commission could propose model clauses into which negotiators could delve for the purposes of a particular treaty. It would make for flexibility and would be of great use to the Commission's "clients", namely, States. It should not be forgotten that the treaty rules on reservations were and would remain merely residual. In the treaties they concluded, States could always derogate from those rules. It would be particularly useful to show that numerous possibilities were available and that, depending on the type of treaty and the subject-matter, some were more suitable than others.

29. Model clauses had two advantages. First, the Commission must take care, when clarifying and completing the legal regime of reservations, not to freeze that regime. By proposing a variety of clauses of derogation, it would counterbalance the general trend towards more precision by providing for more flexibility. Secondly, there were at the present time fairly strong centrifugal

<sup>10</sup> General Assembly resolution 48/263, annex.

<sup>11</sup> "Outlines prepared by members of the Commission on selected topics of international law", *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/454.



tensions which were reflected in the challenge to existing rules in certain areas. That was particularly true of human rights. There was no certainty that the problems which arose concerning the human rights conventions could be resolved simply by interpreting the existing rules. Model clauses for human rights treaties would therefore probably provide a viable solution for the future. It was important in particular to base the work on treaty practice. While it would be difficult, if not impossible, to draw up an exhaustive list of all the clauses relating to reservations set forth in the existing multilateral conventions, a catalogue of such clauses could perhaps be made on the basis of a sufficiently representative sample of the various areas covered by treaties such as those on human rights, disarmament, international trade and so on. The drafting of model clauses would thus be a useful complement to the Commission's basic task.

30. As to that basic work, he had no marked preference between the various possibilities although he would welcome the Commission's clear instructions on how to proceed, as a matter of urgency. In particular he would ask it not to defer a decision in the matter. It would be difficult for him to submit a report at the forty-eighth session of the Commission if he did not know whether he had to prepare draft articles, a guide to practice, model clauses, extended commentaries, a draft protocol or protocols, or a combination of all of them.

31. One last problem, not of vital importance but none the less bothersome, concerned the title of the topic. "The law and practice relating to reservations to treaties" was not very satisfactory and had a rather academic ring to it. In particular, it gave the impression that the law and the practice were distinct and could be detached from each other. Nothing could be further from the truth. He therefore proposed a more neutral, and probably more accurate, title such as "Reservations to treaties".

32. His report was long and fairly technical. For the benefit of any members who might have found it particularly heavy going, he would draw attention in particular to chapter I, which gave the historical background to the topic, and to chapter II, which endeavoured to explain why so many problems continued to arise despite the conventions already adopted. He awaited with interest the reactions of members of the Commission.

33. On the other hand, the essence of what should be discussed at the present session was contained in chapter III. He sought urgent assistance and orientation from the Commission on the following questions: (a) Did the Commission agree to change the title of the topic to "Reservations to treaties"? (b) Did it agree not to challenge the rules contained in article 2, paragraph 1 (d) and articles 19 to 23 of the 1969 and 1986 Vienna Conventions and article 20 of the 1978 Vienna Convention and to consider them sacrosanct and to clarify and complete them only as necessary? (c) Should the result of the Commission's work take the form of a draft convention, a draft protocol(s), a guide to practice, a systematic commentary or something else? There again he was open-minded, but hoped that the Commission would arrive at a joint decision on that matter; and (d) Was the Commission in favour of drafting model clauses that could be

proposed to States for incorporation in future multilateral conventions in keeping with the field in which those conventions would be concluded?

34. He would also be grateful for comments or criticism from the members of the Commission on the problem area discussed in chapter II. But there would be time to pursue that further at a later date, whereas the replies to his four questions, or in any case the latter three, were absolutely indispensable for the continuation of the work on the topic. He hoped that the debate would help him identify the replies to those questions, which would be the substance of the preliminary study that would constitute the chapter of the Commission's report on the topic.

35. The CHAIRMAN said that the question of the form the articles should take was usually asked towards the end of the work. A discussion at the present time might prejudice many of the issues involved. Perhaps it would be appropriate for the Commission to restrict itself to a preliminary view. Moreover, he was not sure that members alone could decide; States might need to respond as well.

36. Mr. BOWETT said that he had always supported the inclusion of the topic on the agenda, for there was a great deal of uncertainty in State practice, and the Commission might therefore be helpful in that area.

37. As to the form, he was sceptical about the desirability of a new convention and agreed with the Special Rapporteur that the Commission should work on the basis of the system under the 1969, 1978 and 1986 Vienna Conventions and not attempt to discard it. Whether the Commission produced a protocol was an open question. His initial preference was for a guide, as the Special Rapporteur had suggested. But a decision now on the form would probably not prejudice the outcome, because if work proceeded even on the basis that it was a guide, by formulating rules or articles and commentary to explain why such rules or articles had been adopted, it was a simple matter to convert the guide into a draft protocol or draft convention. That would be a form entirely appropriate to such work.

38. He liked the idea of including model clauses—they would be extremely helpful and not at all inconsistent with a comprehensive guide to the practice of reservations. He had considerable doubts, however, as to the utility of consulting State practice. Few States, if any, and he included his own country, really understood the way in which the system under the Vienna Conventions worked. There was no point in being guided by State practice, which itself needed guidance. It was like having the blind lead the blind. Hence, he would not be too impressed by discrepancies in State practice. He was more inclined to take the system under the Vienna Conventions and see what it should logically dictate. He had no objection at all to the change of title proposed by the Special Rapporteur.

39. Mr. LUKASHUK, confining himself to preliminary remarks, said he congratulated the Special Rapporteur on his excellent report, which was a good foundation for further work. He had only one point to make at the present time: the report contained an excellent analysis of the facts, but was silent as to the reasons behind



the various events and decisions discussed. For example, why had such renowned legal experts as Brierly, Lauterpacht and Fitzmaurice suffered defeat with their positions, whereas Waldock had immediately prevailed? Any answer to that question must be sought beyond the boundaries of law. The Special Rapporteur had rightly pointed out in his oral presentation that the problem of reservations often contained a political element. That required a further explanation, one which had not been forthcoming in the report. What was needed was an analysis of the position of States in the context of the overall world situation.

40. The problems of international law could not be resolved without bearing in mind what was happening in the world. In the discussion on international liability for injurious consequences arising out of acts not prohibited by international law, it had been stressed how important it was for the Commission to bear in mind the current and future requirements of the international community. Having personally participated in the preparatory work of the Vienna Conventions, he had been struck by the important role played by the Soviet Union in introducing changes in the texts of reservations. In the cold war context of the time, the Soviet Union had been concerned that an agreement might be imposed upon it. Today, the situation had changed, and that needed to be taken into consideration.

41. It was indeed a good idea to compile literature on the practice in relation to reservations, but there was no need to hurry to produce the bibliography promised by the Special Rapporteur. He agreed with the Chairman that it was difficult to imagine at the present time the form that the results of the Commission's work would take.

42. In his opinion, the Commission should discuss the problem of soft law, an area that had taken on growing importance. Perhaps the focus could be on soft law, thereby making it another of the Commission's fields of endeavour in regard to international law and international practice.

43. It seemed to be agreed that there was no need to contest the Vienna Conventions. In any event, he was convinced that the report of the Special Rapporteur was a firm foundation for further study of the problem of reservations in the international community today.

44. Mr. PAMBOU-TCHIVOUNDA, confining himself to preliminary comments, thanked the Special Rapporteur for his exhaustive and interesting report, one in which a great deal of time had obviously been invested. It was also particularly gratifying to see that, for the first time, a Special Rapporteur had taken the trouble to translate into French those passages of his report that he had cited in the original English.

45. The Special Rapporteur was right to refer to the political difficulties associated with the topic. In his view, it was important to bear in mind considerations of political expediency. Telephone calls exchanged between Heads of State or Ministers had an enormous impact on the final decisions regarding the form of reservations. A second consideration was the time factor. The Special Rapporteur had referred to the ambiguity be-

tween "interpretative declarations" and reservations which under positive law were nothing more than declarations. The three Vienna Conventions were silent about the time at which an interpretative declaration could be made, and it might be useful to attempt to draw a clearer distinction between those two categories. He agreed with the Special Rapporteur that the Commission must remain within the spirit of the Vienna Conventions.

46. He questioned whether the General Assembly, whose delegates were not necessarily experts, would understand the preliminary study in its present form. The Special Rapporteur should revise his position on the results to be sent to the General Assembly, so that they could be rendered in a more accessible form.

47. He experienced some hesitation about simplifying the title of the topic. It might then be argued that there was, for instance, also a need for a treaty on signatures or a treaty on ratification, both of them areas which likewise posed problems.

*The meeting rose at 11.50 a.m.*

## 2401st MEETING

*Friday, 16 June 1995, at 10.10 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present: Mr. Bowett, Mr. de Saram, Mr. Elaraby, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer.*

### **The law and practice relating to reservations to treaties (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>1</sup> A/CN.4/L.516)**

[Agenda item 6]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)**

1. Mr. ROSENSTOCK said that the Special Rapporteur's excellent work was precisely tuned to what was needed at the current stage of the consideration of the topic. The first report (A/CN.4/470) provided the background to the question, gave a review of the problems posed and made a number of suggestions as to how the

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

Commission might deal with those problems. Although the current regime of reservations, including complete gaps in its coverage, had not at first appeared to have resulted in a large number of inter-State disputes, the theoretical and practical problems that had arisen were very complex and numerous. The Special Rapporteur had wisely advised against engaging in a discussion of the substance of the issues at the present time. In any event, he was inclined to question whether there was any justification for devoting much time to problems relating to reservations to bilateral treaties or to the "succession" aspect of the topic (Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention")), for which a few general principles might meet the basic needs once some order had been established with regard to reservations relating to the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"). In any case, it was to be hoped that, as the Commission's work on the topic progressed, the problems and gaps would diminish and there would be less temptation for bodies such as the Human Rights Committee to overreach in response to what would prove to be less of a vacuum than it seemed.

2. Concerning the options available to the Commission to grapple with those problems and gaps, he fully shared the Special Rapporteur's analysis that there was no reason to reopen the texts that had emerged from the second session of the United Nations Conference on the Law of Treaties<sup>2</sup> and in particular to rewrite articles 2 and 19 to 23 of the 1969 Vienna Convention. He agreed that the Commission should simply try to fill the gaps and remove ambiguities while retaining the versatility and flexibility of the key articles of the 1969 and 1978 Vienna Conventions and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention"). The drafting of protocols or of a "consolidated" set of articles in a separate instrument might turn out to be as risky as going back to the drawing board, a temptation that should be resisted not only by the Special Rapporteur, but also by the Commission as a whole and by the Sixth Committee, as well as in Government comments, if only because of the hazards of a codification conference. He was therefore in favour of either guidelines with attendant commentary and model clauses, with the Commission still retaining the option of shifting to a bolder approach involving draft treaty articles, or a draft instrument if it turned out that such a change was necessary and prudent. Lastly, the Commission and the Sixth Committee should not waste any time agonizing over the title of the topic. If the Special Rapporteur's reservations about the current title were serious, the Commission should decide right away whether it should be changed.

3. Mr. TOMUSCHAT said that the report under consideration was a model of clarity and detail that boded well for future reports on the topic. The Special Rapporteur gave a good description of the state of the question

in all its complexity and had a definite view—and rightly so—on only one specific issue: that the Commission should refrain from inventing the world anew. The decisive turning-point in the development of the law of reservations had been the advisory opinion of ICJ on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>3</sup> which the Commission had eventually endorsed after much hesitation, and there was no reason to dismantle the legal edifice built upon that foundation. But the gaps and cracks must be filled, not by a formal legal instrument, but by an expository guide, together with a number of model clauses. At the current preliminary stage of work on the topic, four points could be made on: the nature of a reservation; problems associated with interpretative declarations; reservations to bilateral treaties and institutional aspects of control over reservations.

4. Concerning the first point, the drafters of the term "reservation" in article 2, paragraph 1 (d), of the 1969 Vienna Convention had exercised great care, but an important element was missing from their definition, namely, that, by virtue of a reservation, a State party could only reduce the scope of its obligations towards other States parties and under no circumstances unilaterally increase rights not set forth in the treaty. That could be illustrated by two examples. If a treaty providing for certain joint activities of a group of States laid down a scale of assessment for expenditure relating to those activities, a State party could very well declare that it did not agree to the share assigned to it. The intention would certainly be to reduce the scope of the obligations set forth in the treaty and it would thus be a real reservation, regardless of whether such a reservation was permissible and accepted by the other States parties. On the other hand, a State could not claim a greater voting power than that foreseen by the treaty for the administration of joint activities. Another example: if freedom of movement as defined in a treaty of economic union encompassed the right to acquire homes for vacation purposes, a State wishing to prevent its coastal regions from being bought up by its rich neighbours might attempt at an appropriate time to enter a reservation to that effect. On the other hand, if the right in question was not covered by the treaty's regime on freedom of movement, the rich neighbouring State could not formulate a reservation granting its citizens the right to buy property for any purpose whatsoever in the territory of the other States parties. In sum, as confirmed by a study of relevant practice, States made use of reservations in order to evade or avert certain burdensome obligations, but rarely to arrogate new rights or more extensive rights than those provided for by the treaty concerned.

5. With regard to the second point, it was not always easy to draw a distinction between reservations and interpretative declarations, but, in general, a reservation specified the scope of the declaration accepting the treaty's obligations, whereas interpretative declarations did not affect that scope, which was determined by the sole content of the treaty, and their only purpose was to influence the process of treaty interpretation without committing other States parties. Reservations made use

<sup>2</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6).

<sup>3</sup> See 2400th meeting, footnote 5.

of a State's sovereign treaty-making power, which might conflict with the will of the community that had agreed on the text of the instrument in question. However, there were quite a number of borderline cases. The Commission might therefore establish, if not a clear and distinct rule, at least a presumption that States were bound by their public statements and that there was no need to inquire at all costs into their unspoken intentions. That approach would also be useful in situations in which a treaty prohibited reservations. One would then assume that the declarations in no way affected the scope and meaning of the instrument of ratification, which were exclusively determined by the treaty itself.

6. Matters appeared clearer with regard to the third point: there could be no reservations to bilateral treaties. In a bilateral relationship, either the two parties agreed on the actual scope of their mutual obligations and rights or they did not.

7. Lastly, as to the question of the permissibility of reservations and means of control in that regard, it ought to be relatively easy to ascertain whether an attempt was being made to evade a clear-cut prohibition on reservations contained in the instrument in question, such as in the United Nations Convention on the Law of the Sea or the Marrakesh Agreement Establishing the World Trade Organization.<sup>4</sup> On the other hand, it was much more difficult to assess whether a reservation was incompatible with the object and purpose of a treaty because, in such cases, there would need to be agreement on what constituted the "core" provisions of the treaty, those without which a treaty would lose its essential thrust. In any event, with regard to the preservation of the integrity of international treaties, it did not seem that the system set up by the 1969 Vienna Convention had stood the test of time. Apparently, States considered that it was not of any concern to them, so much so that hardly any reservation had ever given rise to more than eight objections. The solution certainly did not lie in the creation of a new institutional mechanism, but in seeking to strengthen the controlling function of the treaty's depositary. It should certainly not be demanded of the depositary to reject instruments of ratification containing a reservation clause that he considered incompatible with the object and purpose of the treaty, but he might draw the attention of other States parties to reservations that he regarded as "questionable" in that regard. In any event, the depositary could be asked not to accept any instrument of ratification containing reservations prohibited by the treaty in question.

8. Mr. BOWETT said that he was not certain about the absolute validity of two points made by Mr. Tomuschat. First of all, it was not clear that a reservation could only reduce the obligations, and never increase the rights, of its author. In the 1977 arbitration between the United Kingdom of Great Britain and Northern Ireland and France with regard to the Channel Islands,<sup>5</sup> France had entered a reservation to article 6 of the 1958 Convention on the Continental Shelf to the effect that those islands were covered by the special circumstances exception in

the said article 6. In the view of the United Kingdom, it had been an interpretative declaration, but the arbitral tribunal had ruled that it had been a reservation. That reservation, by allowing France not to apply the median line, but another boundary line based on the special circumstances, had in fact increased the rights of its author.

9. Likewise, it seemed to be something of a simplification to say that the problems of the permissibility of reservations really only arose in terms of incompatibility with the object and purpose of the treaty, matters being clearer for the prohibition of reservations. Treaties permitted reservations for some of their articles and not for others, hence the possibility—and the actual practice—of reservations which were formally attached to an article for which they were allowed, but which were worded in such a way that their substance related to an article for which reservations were prohibited. Thus, difficulties were not confined solely to the problem area of incompatibility.

10. The CHAIRMAN asked Mr. Tomuschat to comment on the following example: if as was often the case, a treaty codified rights derived from rules of customary international law and, in so doing, reduced somewhat the rights that certain States parties had enjoyed in the past, would a reservation with which one of those States sought to preserve those previous rights be regarded as "increasing" rights in respect of the treaty and perhaps be considered impermissible?

11. Mr. TOMUSCHAT said that, in the example cited by the Chairman, the problem had to do not with the rights and obligations derived from a treaty, but with the situation with regard to customary law. In principle, the conclusion of a treaty had no effect on rights and obligations under customary law. States could decide to "modernize" and to make a clean sweep of past law, but, in the case of the rules of diplomatic relations, for example, the Vienna Convention on Diplomatic Relations contained in its very preamble a clause on reservations stipulating that the rights, and even the practice, predating its entry into force were not affected. The examples given by Mr. Bowett all related to situations in which it was difficult to draw a distinction. There was, however, no reason not to be clear in the case of prohibited reservations. If a State that ratified the United Nations Convention on the Law of the Sea declared that the Convention had no effect on its rights under its Constitution or internal law, that declaration must be considered invalid, and a judge did not need to examine whether it was a reservation. By accepting a treaty that prohibited reservations, a State accepted the treaty in its entirety, regardless of what it stated elsewhere. The Commission might, if the Special Rapporteur so agreed, suggest that such rigour should be the rule.

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

[Agenda item 2]

12. The CHAIRMAN said that informal consultations would be held on the draft Code of Crimes against the

<sup>4</sup> GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (Sales No. GATT/1994-4), pp. 5 *et seq.*

<sup>5</sup> See 2400th meeting, footnote 7.

\* Resumed from the 2393rd meeting.

Peace and Security of Mankind, followed by a meeting of the Drafting Committee on the same subject.

*The meeting rose at 10.45 a.m.*

## 2402nd MEETING

*Tuesday, 20 June 1995, at 10.10 a.m.*

**Chairman:** Mr. Pemmaraju Sreenivasa RAO

**Present:** Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer.

### **The law and practice relating to reservations to treaties (continued) (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>1</sup> A/CN.4/L.516)**

[Agenda item 6]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. RAZAFINDRALAMBO said the Special Rapporteur's first report on the law and practice relating to reservations to treaties (A/CN.4/470) was a model of logic and precision. The Special Rapporteur had stressed that, for the time being, it was his intention to provide an essentially descriptive and neutral review of the topic. In drafting his first report, he had, fortunately, not kept strictly within those self-imposed limits. In particular, he had expressed a preference for preserving the treaty rules adopted in the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention") and confirmed in the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention"). In respect of the final form of the work on the topic, he was in favour of elaborating draft protocols to existing conventions.

2. Aware that the report had been distributed somewhat late and that members did not always have easy access to previous summary records on the topic, the Special Rapporteur had taken pains to cite in full extracts from reports of earlier Special Rapporteurs on the topic and

the relevant provisions from the 1969, 1978 and 1986 Vienna Conventions. In addition, rather than use extensive footnotes, he had incorporated in the body of the report doctrinal views and the appropriate passages from the yearbooks of the Commission. Thus, for the moment, there was no need to annex a complete bibliography to the report, but it would be useful for the Secretariat to update the study of the practice of the Secretary-General in respect of reservations to multilateral conventions.

3. It was widely acknowledged that the question of reservations to treaties was complex and controversial. Accordingly, he was in favour of establishing a working group at the Commission's next session. In that way, the Special Rapporteur would be able to complete his work on the topic within the prescribed time-limit and it would ensure that the Commission respected the five-year deadline for submitting draft articles.

4. The Special Rapporteur had provided a lucid discussion on the validity of reservations, citing in his first report Mr. Bowett's concerns in that regard. Personally, he shared the Special Rapporteur's view that the expression "validity of reservations" was neutral and comprehensive enough to encompass both the "permissibility" and the "opposability" of a reservation. At the same time, he agreed with Mr. Bowett that a reservation prohibited by a treaty or contrary to the treaty's object and purpose, even if it was accepted by all the other parties, should be considered impermissible and, under such circumstances, the question of the opposability of the particular reservation could not be raised. That approach was more consistent with the terms of article 19 of the 1969 Vienna Convention.

5. The Commission should not, however, spend its time trying to resolve the doctrinal differences between "permissibility" and "opposability" schools. An additional ambiguity arose from the confusion between "permissibility" (*permissibilité*) and what was termed in French *licéité*. The former corresponded to the "exercise" of the reservation, whereas the latter seemed to relate more to the actual "existence" of the reservation. The distinction between the two was very subtle and merited further study.

6. The most difficult problems lay in the case of a vague and general reservation or one which was contrary to the object and purpose of a treaty. The 1969 and 1986 Vienna Conventions contained no indications with regard to the meaning or scope of the expression "object and purpose of the treaty". The working group might usefully concentrate on that matter. It might also consider the legal consequences of the impermissibility of a reservation, as enumerated in the report. Such consequences could only be elucidated in the light of the practice of States and international organizations. Information on the practice of international organizations was probably relatively scarce, and could even be difficult to find. For instance, to his knowledge there was only one case in which a reservation had been formulated to the Constitution of the International Labour Organisation. It had occurred in 1953, at the time of the request by the former Soviet Union for readmission to ILO. Under article 1, paragraph 3, of the Constitution of the International Labour Organisation, the Director-General regis-

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

tered the formal acceptance by the requesting State of the obligations arising from the Constitution. In the case in point, the Director-General had notified the Soviet Union that its acceptance of the obligations did not permit of any reservations. As a result, the requesting State had formulated a new request, not accompanied by any reservations. That example helped to answer the question of what, in the practice of international organizations constituted the competent authority to determine the permissibility of a reservation to a constituent instrument.

7. The report presented a clear overview of the regime for objections to reservations, in particular the rules applicable in the case of impermissible reservations. In fact, the study of objections was warranted only within the framework of the "opposability" doctrine. That was, moreover, the approach used by the Special Rapporteur in his report. The answers to the questions raised therein would depend on the information provided by Governments and international organizations on their legislation and practice.

8. One of the most interesting parts of the report dealt with gaps in the provisions relating to reservations in the 1969 Vienna Convention and the 1986 Vienna Convention. In that connection, States tended to resort to "interpretative declarations" for two purposes: to try to amend a treaty at the time of ratification or to bypass the prohibition on reservations to a treaty whereby they expressed their consent to be bound. In the first instance, arbitration bodies and other tribunals had held that "interpretative declarations" must be taken to be reservations if they were consistent with the definition in the conventions concerned. Declarations accompanying accession to a convention, ratification of which could not be accompanied by reservations, as in the case of ILO conventions, were exemplified in the "considerations" or "understandings" found in ILO practice. For example, at the time of its ratification of ILO Convention No. 147, concerning minimum standards in merchant ships, the United States had elaborated "understandings" with regard to certain clauses of the Convention. The Director-General of the International Labour Office had not deemed those "understandings" to be contrary to the Convention, reasoning that some "understandings" accurately reflected the meaning of the Convention while others did not directly affect the terms of the Convention.

9. The ILO approach could help clarify the question of whether reservations and objections could be made to human rights instruments. While ILO conventions were designed to defend the material and moral interests of individuals, some of them, such as Conventions No. 29, concerning forced or compulsory labour, and 105, concerning the abolition of forced labour, and Conventions No. 87, concerning freedom of association and protection of the right to organize, and 111, concerning discrimination in respect of employment and occupation, were among the most significant of human rights instruments. In principle, ILO conventions could admit of no reservations, since any reservation would be considered incompatible with their object and purpose. Nevertheless, some ILO instruments, known as "promotional" conventions, contained flexible clauses designed to fa-

cilitate ratification by all member States regardless of their level of economic and social development. He believed that each State was free to make an "interpretative declaration" at the time of its ratification of an international labour convention. The Director-General would then assess the meaning and scope of the declaration, according to three criteria: the terms of the convention, the *travaux préparatoires* and the practice of the ILO monitoring bodies, more especially the Committee of Experts on the Application of Conventions and Recommendations. If the declaration did not meet those criteria, the ratification would be rejected. In short, the "interpretative declaration" was considered equivalent to a reservation which was incompatible with the object and purpose of the convention. In the light of ILO practice, the Commission might be able to find, with regard to human rights instruments, a mechanism which corresponded to that of the Human Rights Committee on general comment No. 24 which prohibited reservations to human rights treaties.<sup>2</sup>

10. Like the Special Rapporteur, he was in favour of preserving the treaty rules which had been adopted between 1969 and 1986. With regard to the final shape of the work, he endorsed the Commission's traditional practice of making that decision at the final stage. The Special Rapporteur would no doubt appreciate more precise indications in that regard, for the content of the work might vary depending on the final form to be given to the topic. In that connection he would point out that at the time of deciding on the final form for the draft articles on relations between States and international organizations, Reuter had wisely suggested that the Commission should choose the more elaborate form of a draft convention, which might even subsequently be transformed into a "soft law" text. That implicit philosophy of "he who can do more can do less", to which he fully subscribed, should also apply in the present instance. Lastly, he agreed with the Special Rapporteur that the title of the topic should be shortened to "Reservations to treaties".

11. Mr. ROBINSON said that it was clear from the report that the Special Rapporteur was continuing the tradition of scholarship, intellectual rigour and dedication of his predecessors working in the area of the law of treaties. The report provided a comprehensive outline of the major issues relating to reservations to treaties.

12. As he understood it, article 19 of the 1969 Vienna Convention set out the circumstances in which a State could formulate a reservation. Article 20 of the Convention set out the conditions for acceptance of and objections to a reservation which met the requirements for formulation under article 19. Thus, in stipulating that a reservation required acceptance by all parties to a treaty, article 20, paragraph 2, referred to a reservation formulated in accordance with the requirements of article 19, as did article 20, paragraph 3, when it stipulated that a reservation required the acceptance of the competent organ of an international organization, if the treaty was the constituent instrument of the organization.

<sup>2</sup> See 2400th meeting, footnote 9.

13. Was there, in fact, any objective way of determining whether the requirements of article 19 had been met? A more relevant approach would be to see if there was any way to determine with certainty whether those requirements had been met. Very few questions arising from treaty interpretation and application could be resolved "objectively" if that meant a unilateral, independent determination, uncoloured by the views of the parties involved, and close to mathematical certainty. Clearly, the parties would first have to make their own judgement as to whether the article 19 requirements of the 1969 Vienna Convention had been met; at a later point, recourse might be had to a dispute settlement body. It was possible to determine with some certainty whether a reservation was prohibited by the treaty and whether it was on a list of permitted reservations—subparagraphs (a) and (b) of article 19 of the Convention. However, it was notoriously difficult to evaluate objectively the question of whether a particular reservation was compatible or not with the object and purpose of a treaty—subparagraph (c) of article 19.

14. Thus, if under article 20, paragraph 2, of the 1969 Vienna Convention all parties accepted a reservation which was clearly incompatible with the object and purpose of or expressly prohibited by a treaty, the issue would first have to be determined, either by agreement among the parties (not by a unilateral determination) or by a dispute settlement body, whether the requirements for formulating a reservation set out in article 19, subparagraphs (a) and (c), had been met. If a determination was made that those requirements had been met, then a further determination must be made as to whether the reservation had, in accordance with article 20, paragraph 2, been accepted by all the parties. If, however, it was determined that the conditions of article 19, subparagraphs (a) and (c), had not been met, then no question arose as to whether the reservation had been accepted by all the parties. Yet if there was no agreement between the parties as to whether the requirements of article 19, subparagraphs (a) and (c), had been met, even in relation to a reservation obviously incompatible with the object and purpose of the treaty, the question would then have to be determined by a dispute settlement body. If that body's determination was in the affirmative, a further determination had to be made as to whether the reservation had been accepted by all parties in accordance with article 20, paragraph 2. If the dispute settlement body's determination was in the negative, then no question arose as to whether the reservation had been accepted by all the parties.

15. In the first place, that analysis could be said to make him a supporter of the "permissibility" school, to which he would say that he was a qualified supporter. He was not a supporter of that school if it implied that there was some certain method—or objective way—of determining the matters dealt with in article 19. And he was certainly not a supporter of the permissibility school if it implied—no matter how obviously incompatible with the object and purpose of the treaty a reservation might appear to be—that unilateral determination of such incompatibility sufficed to resolve the issue. The term "permissibility" must not be allowed to disguise the fact that, ultimately, a determination as to permissibility would have to be made either by agreement between the

parties or by a dispute settlement body: a reservation which was regarded by one party as patently incompatible with the object and purpose of a treaty might not be so regarded by another. In the circumstances, it would be preferable to speak of a reservation that met the requirements for formulation under article 19.

16. Secondly, the point he had wished to make in referring to a determination by a dispute settlement body was that it was not possible to conclude, from a proper reading of them, that articles 19 and 20 allowed for some unilateral, certain and objective determination as to whether the requirement of compatibility under article 19, subparagraph (c), had been met and, further, that the issue might not be settled by the parties themselves and might therefore require recourse to a dispute settlement body. In his opinion, therefore, an objection could be made to any reservation—whether permissible or impermissible—since the question whether the requirements of article 19 had been met would have to be determined either mutually by the parties or perhaps, ultimately, by a dispute settlement mechanism. It followed that the view that an objection could be made only to a permissible reservation, because an impermissible reservation was void *ab initio*, was sustainable only in theory. "Impermissible" really meant "arguably impermissible".

17. Part of the problem stemmed from the fact that, since 1969, dispute settlement mechanisms had rarely been used to resolve problems relating to reservations, which, in the vast majority of cases, had been settled by reference to practice. While he agreed with the conclusion, in the report, that there was a presumption in favour of the permissibility of reservations, that presumption was rebuttable. In that connection, it was interesting to note that the positive wording of article 19 of the 1969 Vienna Convention ("A State may . . . formulate a reservation unless") contrasted with the negative wording of article 62 ("A fundamental change of circumstances . . . may not be invoked . . . unless"); and, furthermore, that, as noted in the report, the draft articles by a previous Special Rapporteur, Sir Humphrey Waldock, had reflected the presumption in more explicit terms: "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation" provided that it "shall have regard to the compatibility of the reservation with the object and purpose of the treaty".<sup>3</sup>

18. Interpretative declarations were widely, but wrongly, used by the parties to a treaty. In his judgement, no less than one third of such declarations were disguised reservations since, under the terms of article 2, paragraph 1 (d), of the 1969 Vienna Convention, reservations excluded or modified the legal effect of certain provisions of the treaty in their application to the declarant State. Even where a convention expressly provided for a distinction between a reservation and an interpretative declaration, the parties to the convention did not respect the distinction. For instance, article 309 of the United Nations Convention on the Law of the Sea prohibited reservations unless they were expressly permitted under other articles in that Convention. Article 310,

<sup>3</sup> *Yearbook* . . . 1962, vol. II, p. 60, document A/CN.4/144, art. 17, paras. 1 (a) and 2 (a).



however, provided that article 309 did not preclude a State from making a declaration

... with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations ... do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

It was apparent that the effect of some of the reservations to the United Nations Convention on the Law of the Sea was to exclude or modify the legal effect of its provisions in relation to the declarant State. There appeared to be a view that the word "purport", as used in article 310, prevented a declaration from being a reservation simply because the alleged intent of the declarant State was that the declaration should not modify the legal effects of the Convention in relation to that State. His own view, however, was that the purport of a declaration under article 310 was irrelevant if its actual effect was to alter the legal effect of the Convention in relation to the declarant State.

19. The purport of a statement was of more significance in assessing whether it constituted a reservation within the meaning of article 2, subparagraph 1 (d), of the 1969 Vienna Convention. In other words, if the intention of the statement was to modify the legal effect of the treaty in relation to the State making it, that statement was perhaps a reservation, even if it did not have such an effect in law. A statement that was presented as an interpretative declaration but did in fact alter the legal effect of the treaty in relation to the declarant State, however, must rank and be treated as a reservation even though it did not purport to have that effect. It would be absurd if the mere fact of calling a statement an interpretative declaration could prevent it from being characterized as a reservation when it met all the requirements for the purpose as set forth in that subparagraph. He therefore agreed with the statement made by the Special Rapporteur in his report that "nominalism must be set aside on this point" and that declarations that met the requirements of that subparagraph should be subject to the same legal regime as reservations. That approach might of course result in an increase in the number of reservations to multilateral treaties or perhaps in a decrease in the number of States becoming parties to those treaties.

20. An interpretative declaration, unlike a reservation, had no effect on the conclusion of a treaty. It was no more than a unilateral statement which, while not altering the legal effect of the treaty in relation to the declarant State, provided the other States parties with an indication of how the declarant State interpreted a particular treaty provision. Unlike a reservation under article 20, paragraph 5, of the 1969 Vienna Convention, it was not capable of having legal effects on the other parties, even if those parties raised no objection. That followed because, *ex hypothesi*, if the declaration did not alter the legal effect of the treaty in relation to the declarant State it would have no legal effect in relation to other parties.

21. Could an interpretative declaration have any consequence for the interpretation of a treaty within the meaning of article 31 (General rule of interpretation) of the 1969 Vienna Convention? If it was a unilateral act and was not accepted by the other parties, it was unlikely to have any greater significance than as a clear indication

of how the declarant State viewed a particular provision in a treaty, which treaty must itself ultimately be construed in accordance with article 31. If, on the other hand, it was accepted by one or more parties to the treaty, it would provide not only an indication of how those parties and the declarant State viewed the treaty but could perhaps also be regarded, under article 31, paragraph 2 (b), as part of the basis for interpretation. To that extent, in his view, an interpretative declaration formed part of the legal regime governing treaty interpretation.

22. One point of such importance that it might warrant exceptional treatment by the Commission, concerned the relative incompatibility between the concept of reservations, based as it was on reciprocity, and human rights treaties.

23. As to the scope and form of the Commission's future work, he would draw attention to a number of facts. First, it was pointed out in the report that disputes had been fewer in number than the uncertainties of the law might suggest. Further, it was stated that the rules regarding reservations had come to be seen as basically wise and to have introduced desirable certainty; that the 1969 Vienna Convention was seen as having introduced "calm"; that, whatever their defects, the rules adopted in 1969 had proved their worth, and that difficulties had never degenerated into a serious dispute and had always been reconciled in practice (although he personally was inclined to regard that view, reflected in the report, as over-generous); and, lastly, that in the assessment of one study, albeit dating back to 1980,<sup>4</sup> the 1969 Vienna Convention had not led to an increase in the formulations of reservations and also that, on the whole, those which had been formulated had concerned relatively minor points. In view of those laudatory comments and of the residual character of the existing rules on reservations, it might be thought that a case had been made out not only for preserving what had been achieved but also for concluding that what had been achieved should not be disturbed at all. Nevertheless, to reach such a conclusion would be to exaggerate the achievements of the 1969 Vienna Convention and its provisions on reservations. The question to be answered was, rather, how to fill the gaps and clarify the ambiguities in the existing law so clearly indicated in the report. For his part, he favoured the modest approach advocated by the Special Rapporteur, which would consist in providing a commentary on the relevant articles in the various Conventions. However, while supporting that method as the general approach and while recognizing that any deviation from the general approach could be disruptive, he would not rule out the adoption of some special method to deal with human rights treaties.

24. Mr. LUKASHUK said that the problem of reservations to treaties was, in the last analysis, related to the character of, and especially the degree of unity prevailing within, the international community. That was why the problem had been exceptionally acute during the years of the cold war, and it accounted for the cautious

<sup>4</sup> J. K. Gamble Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", *American Journal of International Law*, vol. 74, No. 2 (1980), pp. 372-394.



position adopted by the Soviet Union and its allies at the sessions of the United Nations Conferences on the Law of Treaties<sup>5</sup> as well as for the large number of works on the subject of reservations published in the Soviet Union at that time. The ending of the cold war and the strengthening of links with the Western Powers had resulted in a diminution of interest in the problem of reservations in Russia as well as in most other countries. That did not mean, however, that the problem had lost its significance or was likely to lose it in future. Each one of the world's 200 or so States formed a complex socio-political entity with specific interests of its own; yet the rules established by treaties were the same for all parties. The idea of reservations was to ensure a unified rule of international law so far as essentials were concerned, while, on the other hand, offering States a possibility of safeguarding their special interests subject to specific conditions. Practice showed that in actual fact reservations to treaties were formulated in relatively few cases, but that was no reason to overlook their significance. The institution of reservations to treaties expressed the idea of respect for the legitimate interests of States.

25. Those considerations went some way towards explaining the nature of State practice in respect of reservations. The Special Rapporteur was right to note in the report that State practice in the area was relatively scarce and that there were *prima facie* uncertainties.

26. With regard to the questions raised in the report, the satisfactory conclusion of a study largely depended on the right questions being asked at the outset. In his opinion, the Special Rapporteur had performed that task very creditably. In view of the report's preliminary nature which the Special Rapporteur had been at pains to emphasize, his own answers to the questions raised would likewise be preliminary in character.

27. In the first place, he fully endorsed the Special Rapporteur's view that, in its future work on the topic, the Commission should proceed on the basis of the provisions of the Vienna Conventions, which established the right of States to formulate reservations. The first question concerned so-called impermissible reservations, or reservations prohibited by the treaty. In theory, such reservations were invalid *ab initio*, and that, too, was the view held by Mr. Bowett. In practice, however, since only the States parties to a treaty could decide whether or not a reservation was prohibited by the treaty, the acceptance of a reservation by other contracting States was evidence of its permissibility. That point had already been made by Mr. Robinson.

28. The answer to the question whether the will of the contracting parties as embodied in the text of the treaty prevailed over their will as embodied in the practice of the treaty's actual implementation was, to some extent, to be found in the provisions on interpretation of treaties in article 31, paragraph 3 (b), of the 1969 Vienna Con-

vention, according to which "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" was to be taken into account, together with the context. That position was the right one, for legal rules that were not free to develop in accordance with the demands of reality would be incapable of regulating situations which, like everything else in life, were subject to change. The same principle applied in the matter of reservations: both the text of the treaty and the will of the parties, as reflected in their practice, had to be taken into account, but the latter of those two factors was decisive. In that connection, he endorsed the idea expressed in the report that it would be appropriate for the Commission to undertake a study of the concept of the "object and purpose of the treaty".

29. If a majority of States parties to a treaty considered a reservation "impermissible", the reservation was thereby rendered invalid from the outset. If it was considered impermissible by only a few contracting States, the provisions of article 21, paragraph 3, of the 1969 Vienna Convention applied. In the absence of objections on the part of States parties, the "impermissibility" of a reservation did not entail any legal effects. Article 20, paragraph 5, of the 1969 Vienna Convention was clear on that point. In the event of doubts about the "permissibility" of a reservation, the depositary could draw the parties' attention to that rule, but the final decision lay with each individual contracting State.

30. With reference to the question of formulating objections, contracting States were certainly free to formulate objections to both permissible and so-called impermissible reservations, provided, of course, they did so within the framework of the law. The question appeared to relate only to cases where, in accordance with article 20, paragraph 1, of the 1969 Vienna Convention, a reservation expressly authorized by a treaty did not require any subsequent acceptance by the other contracting States. As a general rule, no objections should arise in such cases. That did not, however, deprive a contracting State of the right to declare that, in its view, the reservation was not "expressly authorized by a treaty". Moreover, exceptional cases could arise where a permissible reservation might enter into conflict with the specific yet legitimate interests of a contracting State, which would then be entitled to formulate an objection indicating its grounds for doing so.

31. As to the question of whether the contracting States must or should indicate the grounds for their objections, the obligation or otherwise to do so was a matter for *comitas gentium* rather than for international law. On the other hand, a remark about the desirability of indicating the grounds for objections could perhaps be included in the future draft.

32. The answer to the question of whether the objecting State could exclude the applicability of treaty provisions other than those covered by the reservations would be for the objecting State to formulate a reservation of its own distinct from the first reservation formulated by the reserving State. Such a procedure would be in conformity with article 21, paragraph 3, of the 1969 Vienna Convention.

<sup>5</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); and *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March-24 May 1968 and Vienna, 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

33. With regard to “interpretative declarations”, it was difficult to accept the view expressed by the Commission in its commentary to article 2 of the draft articles on the law of treaties<sup>6</sup> to the effect that a declaration made by a State could in some cases amount to a reservation. A reservation was a legal act whose effects were determined by law, whereas a declaration was a political act without any legal effects under the law of treaties. At the same time, a declaration fell within the category of “State practice” and, for that reason, could—if accepted—introduce changes in standards of international law (*opinio juris*). In answer to the question relating to reservations to a bilateral treaty raised in the report, he drew attention to the statement contained in paragraph (1) of the introduction to the commentary to article 20 of the draft articles on the law of treaties<sup>7</sup> to the effect that a reservation to a bilateral treaty amounted to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. That view had been supported by the participants in the United Nations Conferences on the Law of Treaties, and the resulting Conventions did not refer to the possibility of reservations to bilateral treaties, although they did not expressly prohibit them. Such instances that did exist of States formulating reservations to bilateral treaties when ratifying the treaties did not present a significant problem. Of more substantial interest was the question of what became of reservations to multilateral treaties when the provisions of the treaties became standards of general customary law. A persistent objection to a rule in the process of becoming customary was certainly possible, but could a reservation be formulated in such a case? In his opinion, since general international law was not subject to reservations, a rule of treaty law to which a reservation had been formulated became a rule not subject to that reservation once it became part of customary law. The point might perhaps be given some consideration by the Special Rapporteur.

34. On the other hand, interpretative declarations by States parties to a bilateral treaty were admissible and, if accepted by the other party, were taken into account in the interpretation of the treaty in accordance with article 31, paragraphs 2 (b) and 3 (b), of the 1969 Vienna Convention. Any attempt to equate declarations with reservations could inject an element of uncertainty into treaty relations. In that connection, he referred to a work by Henkin, which pointed out that a reservation usually required renegotiations.<sup>8</sup>

35. Mr. HE, expressing appreciation to the Special Rapporteur for the invaluable contribution his report made to the topic, said he was particularly pleased to see that the way in which the various problems had been arranged would reduce much of the difficulty inherent in an extremely complicated issue.

36. The question of reservations to treaties was, of course, one of the most controversial in contemporary international law. The many differences, both doctrinal and political, had been significantly reduced over a long

process of compromise between the traditional approach and the approach that favoured more freedom with regard to the formulation of reservations. The final text of the 1969 Vienna Convention pertaining to reservations had been based on proposals made by the Commission, which had abandoned the rule of unanimity in favour of a flexible system. Such flexibility would probably result in an increase in the number of parties to multilateral treaties and hence also in the number of reservations to those treaties; that could in turn undermine the integrity of multilateral treaties and cause them to split into a series of bilateral treaties of uneven content, thus hindering the establishment of a unified system of international law. In order to achieve a balance between opposing views on reservations to treaties, the relevant provisions in the 1969 Vienna Convention were couched in ambiguous terms and contained many gaps which required clarification and completion, as the Special Rapporteur had pointed out in his report.

37. Under the terms of the 1969 Vienna Convention, a reservation could be made to a treaty only if it was consistent with the object and purpose of that treaty. The key issue, therefore, was to clarify the precise meaning of the expression “compatibility with the object and purpose of the treaty” but also to determine who would be in a position to decide whether a reservation was compatible with the object and purpose of the treaty. The answer to that question, and to the others listed in the first report, would depend mainly on the approach adopted to reservations in the light of a comparative study of doctrine and State practice in the matter, particularly since the time of the 1969 Vienna Convention. Accordingly, a more flexible approach would make for a broader understanding of the issues raised in the report, while a stricter approach would result in a narrower understanding of those issues. In the case of “interpretative declarations”, for instance, the question was whether to treat them simply as declarations or as reservations that were subject to the legal rules applicable to reservations. State practice pointed in both directions. The term “declaration” was used either as the equivalent of, or as different from, the term “reservations”. According to the records of the United Nations Secretariat, while some States filed a “declaration” along with their reservations, others filed simply a “declaration”, couched in unequivocal terms, with a view to excluding or modifying the legal effects of certain provisions of the treaty as those provisions applied to them.

38. A problem would also arise if a treaty remained silent on the question of reservations. In that connection, the Special Rapporteur had cited Reuter’s view that, if the treaty was silent, the only prohibited reservations were those that would be incompatible with its object and purpose.<sup>9</sup> Once again, that raised the question of the precise meaning of the expression “compatibility with the object and purpose of the treaty”. It might also lead to a situation involving different and even conflicting interpretations of a treaty.

39. Yet another problem arose where a treaty contained wording that was open to different interpretations

<sup>6</sup> *Yearbook* . . . 1966, vol. II, pp. 189-190.

<sup>7</sup> *Yearbook* . . . 1962, vol. II, pp. 176-177.

<sup>8</sup> L. Henkin, “Foreign affairs and the Constitution”, *Foreign Affairs*, vol. 66, No. 2 (Winter 1987/88), pp. 284-310.

<sup>9</sup> P. Reuter, *Introduction to the Law of Treaties* (Pinter Publishers, London, 1989), p. 63.

as, for example, where the International Covenant on Civil and Political Rights provided that, in the case of certain provisions, there could be no derogations. It was not clear whether reservations could be made to such provisions. In practice, a number of States did declare certain "derogations" from the application of those provisions, but they did so under the heading of "reservations".

40. The result of the Commission's work on the topic could take a number of forms, in his view, but it was too early to make any firm prediction on that score. He did, however, agree with the Special Rapporteur about the title of the topic.

*The meeting rose at 11.40 a.m.*

## 2403rd MEETING

*Wednesday, 21 June 1995, at 10.05 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer.

### **The law and practice relating to reservations to treaties (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>1</sup> A/CN.4/L.516)**

[Agenda item 6]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)**

1. Mr. MAHIOU said that, in terms of quantity and quality, the first report of the Special Rapporteur (A/CN.4/470) was already more than a preliminary report because of the inventory it contained, the questions it raised and the analyses it suggested. The Special Rapporteur's concern to provide full information and facts and his clear and rigorous reasoning combined with a dialectical or adversarial approach that at times led him to break down questions and problems, not without some mischievousness. Thus, while he stated that the report endeavoured to enumerate the main problems raised by the topic and, in the title of chapter II, that it would present a brief inventory of the problems of the topic, he

raised 15 questions in a certain paragraph and 17 in another, for a total of 32 questions, in addition to those raised at various other points in the report. The Special Rapporteur had thus pushed to the limit the Cartesian method, whose first maxim, from the viewpoint of method, was to divide problems into as many parts as possible and necessary to solve them properly. That gave some indication of the richness of the "preliminary" report, which had more than enough to keep the Commission busy, not to mention the Special Rapporteur, who would certainly not fail to give his colleagues food for thought during the debate.

2. The aim at the present stage was not to engage in a substantive debate, even though the Special Rapporteur seemed to be inviting the reader of the report to do just that by drawing attention to many developments and providing supporting evidence. For instance, he discussed at great length the controversy, in respect of the validity or "lawfulness" of reservations, between those in favour of opposability and those who advocated permissibility. It was true that the controversy was perhaps more than a doctrinal one and that significant consequences might well be attached to each alternative. That problem, and many others, showed that the Commission was dealing with a highly technical and very complex issue because there was a whole set of principles and rules that it had to try to dovetail. The question of practice was, of course, also important: the Commission had to be able to find solutions which were acceptable to States and which would fill the gaps and clear up any obscurities in already adopted texts.

3. In that respect, the report went a long way towards elucidating earlier works. It had rightly been described as standing on its own, since it gave the members of the Commission all the information they needed to take decisions and, as appropriate, suggest guidelines for the Special Rapporteur.

4. Many of the numerous questions asked by the Special Rapporteur were interrelated so that the answer to one often provided the answer to others. None the less, some questions needed clarification because they might lead the Commission a bit too far away from the topic. Three examples were worth mentioning.

5. First, the Special Rapporteur stated that it would no doubt be appropriate for the Commission to undertake a study of the very notion of "object and purpose of the treaty". That notion went beyond the question of reservations and touched on other aspects, including the interpretation of treaties and, of course, even their application. A second example was where the Special Rapporteur indicated that it should be asked, *inter alia*, when a convention should be regarded as a limited multilateral treaty, by reference to article 20, paragraph 2, of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"). The third example, which was perhaps less clear, was one which related, among the problems which might arise, to the issue of the body which was competent to accept reservations to constituent instruments of international organizations. By those three examples, he wished to emphasize that the Commission must avoid any extension of creeping jurisdiction.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

6. Approaching the topic from another angle, he questioned how the Commission ought to proceed in view of the different issues dealt with in the three conventions, namely, the 1969 Vienna Convention, the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention"). The basic question in that regard was whether the Commission should work on those three areas at the same time or whether it should adopt the Cartesian method and divide the areas up by considering the Conventions one after another. If it decided to discuss simultaneously all the problems which related to the three Conventions and which were already complex in themselves, it might make its task more complex and, consequently, more difficult. On the other hand, if it were first to consider solutions which might be proposed for the "matrix" 1969 Vienna Convention, it would then have less difficulty dealing with the two other Conventions.

7. Referring to the question of options and guidelines to be given to the Special Rapporteur with regard to the form the Commission's work might take such as a study, model clauses or a draft convention, he said that it could, of course, be asked whether it was not premature to decide on that point at the present stage because, when the Commission started on a topic, it usually preferred to begin considering it, ask questions and draw up an inventory before the form of its work took shape. Such an approach was undoubtedly the right one in the case of a new topic, but, since the topic under consideration was one on which the Commission had already done a great deal of work, the Special Rapporteur should be clear about the form which the results of the work would take. That was why he wished to state his opinion on the relevant paragraphs of the report in which the Special Rapporteur gave the Commission several options.

8. One solution proposed in the report, which was also the most timid, consisted in preparing a detailed study or, possibly, a commentary on existing provisions with a view to clarifying the reservations regime. He personally was not strongly in favour of that solution, perhaps as a matter of principle, because he had always regarded codification as the Commission's main task under its Statute and thought that it should follow other courses of action only by way of an exception. That position was, he thought, particularly justified in the present case because a study would amount merely to identifying the existing gaps and ambiguities and would thus be a kind of exercise in self-criticism by the Commission.

9. The second solution proposed by the Special Rapporteur, which consisted in the preparation of model clauses, would be more acceptable in that the Commission would draw up a text that could serve as inspiration or a guide for States. For that reason, he might be prepared to go along with a solution of that type.

10. However, he confessed that he was somewhat more ambitious on the Commission's behalf. There was, after all, nothing to stop the Commission from setting itself the goal of drafting a set of articles on the under-

standing that a decision would be taken at a later stage on what should become of that draft. As the Special Rapporteur pointed out, that third solution itself was subdivided into two possible alternatives: either a draft protocol to each of the existing Conventions or a consolidated text applicable to all three Conventions, which would in a sense be a separate convention on reservations.

11. He had some hesitations about a single consolidated text, which was an ambitious, but delicate idea. In that connection, he recalled the Commission's experience in relation to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. On that occasion, the Commission had had four instruments before it: the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. At the outset, its ambition had been to codify the topic for all of those four instruments, but its work had gradually led it to adopt a more modest approach. It had therefore confined itself to a consolidated text for the first two Conventions, the problem in the case of the two others being solved, by means of protocols.

12. In view of the difficulties involved in any consolidation exercise, he would be inclined to recommend that the Commission should start by drafting a protocol that would fill the gaps and remove the ambiguities of the 1969 Vienna Convention; such a text would mark out the ground very clearly as far as problems and possible solutions were concerned.

13. In conclusion, he commented on the need, referred to several times in the report to preserve what had been achieved if the Commission adopted the idea of draft articles. He did, of course, share the Special Rapporteur's very legitimate concern to respect what had been laboriously drafted and adopted by States, but he did not think that that concern could be fully met. If an interpretation was already an amendment, how, a fortiori, could ambiguities be removed and gaps filled without at least some amendment of the provisions of existing conventions? The members of the Commission should therefore not have their hands tied, even though that might mean that caution was called for. It was far more in spirit than in letter that the Commission had to respect the existing instruments if it wanted to improve them on certain points, without, of course, calling in question their basic principles.

14. Mr. VILLAGRÁN KRAMER recalled that American jurists had undertaken as early as 1956 to codify inter-American rules on reservations to treaties and that the codification work done in the framework of the 1969 Vienna Convention had introduced enough flexibility so that they were able to endorse the solutions proposed on that occasion. He did not think the topic had undergone any significant change since then in terms of the development of international law. It was nevertheless useful for the members of the Commission to try to spell out their ideas on the topic and make some suggestions. The Special Rapporteur should also continue his efforts, as his comments were very pragmatic and interesting. ICJ

had stated at least twice that the 1969 Vienna Convention codified the law of treaties. Contrary to the view expressed in the report, there was therefore no presumption in favour of the permissibility of reservations, since articles 19 and 20 of the Convention were rules of international law in force. However incomplete it might be, the applicable legal regime was very real. Both PCIJ and ICJ had declared that States could restrict the exercise of their sovereign rights, either by self-limitation or through international agreements. Reservations being the expression of a sovereign right of States, the latter could impose limits on themselves either through an international policy decision by the Government or by accepting restrictions within the framework of an international agreement. The practice in that respect, of which the United Nations Convention on the Law of the Sea and the human rights conventions were examples, showed that solution to be satisfactory: in the exercise of their sovereign rights, States decided on a case-by-case basis whether or not they accepted reservations to a particular instrument. Extending the codified regime by opting for the second limb of the alternative set out by the Special Rapporteur in his report was a course of action that deserved to be considered by the Commission, but it was not necessarily the solution to be adopted in the last analysis.

15. There were, of course, areas in which reservations were not recommended. The exercise of the right to make reservations must unquestionably be restricted in certain very particular cases, for example, in connection with the human rights conventions. But it was worth recalling that, thanks to the admissibility of reservations to the inter-American human rights conventions, those instruments had gradually been accepted and then applied in all countries in the region, States having progressively renounced the reservations formulated in the 1960s. Legal experts in developing countries in particular ought to consider whether there was not cause for some flexibility with regard to reservations to human rights instruments or other difficult and important questions. The Special Rapporteur should also look more closely at how reservations were handled in the constituent instrument of the International Labour Organisation, i.e. the fact that they could be accepted or rejected at the time of ratification. The solution chosen by ILO was interesting and showed that States were prepared to accept the regulation of reservations in a treaty context in sufficiently clear terms and in such a way as to guarantee an instrument's adoption and implementation. As to the practice of making declarations containing reservations to a treaty, the criterion of admissibility should not be form, but substance. If a declaration contained a reservation and the treaty prohibited it, the declaration was inadmissible, since it was for the authority responsible for registering the instrument to make that determination. The Special Rapporteur should therefore give closer study to all matters relating to mechanisms for settling the disputes to which reservations might give rise. The distance travelled since ICJ had discussed the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide indicated that States had learned to make the most of the current regime of reservations, but that regime was not uniform and, with the help of the settlement of disputes, it might be possible to specify the

most important aspects of the question in order to move towards the greatest possible uniformity.

16. In closing, he said that he endorsed the Special Rapporteur's proposal to change the title of the subject and was in favour of doing so as quickly as possible. He also supported what the Special Rapporteur, in his report, had termed a "modest" approach, which, to his mind, was realistic, not modest, because it was by stating the existing rules that most problems could be overcome. Furthermore, a clarification of past practice in respect of reservations would allow such practice to be set forth as rules, something that would in part involve codification and in part the progressive development of international law. For the time being, he was opposed to any changes in the 1969, 1978 and 1986 Vienna Conventions. Lastly, the interesting idea of model clauses proposed by the Special Rapporteur was worth adopting. In short, the current regime of reservations was satisfactory, but should be made more specific and be enlarged, although that did not mean that the amendment of existing texts, in particular articles 19 and 20 of the 1969 Vienna Convention, should be encouraged.

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

##### [Agenda item 2]

17. The CHAIRMAN proposed that the meeting should be adjourned to allow informal consultations to be held.

18. Mr. ARANGIO-RUIZ asked what the subject, nature and purpose of such consultations were.

19. The CHAIRMAN said that the purpose of the proposed consultations was essentially to allow an exchange of views on the follow-up to the consideration of the topic of State responsibility. Should the draft articles be referred to the Drafting Committee or should the Commission refrain from doing so if the Special Rapporteur and other members regarded that second alternative as preferable? Many members of the Commission thought that proposals should not normally be referred to the Drafting Committee unless accompanied by sufficiently clear instructions and that the Drafting Committee could not very well consider draft articles on which the Commission remained divided in plenary. Thus, the point was to review the situation in order to help the Drafting Committee in its work if the decision was taken to refer the draft articles to it.

20. Mr. ARANGIO-RUIZ, speaking as Special Rapporteur on the topic of State Responsibility, pointed out that it had always been the Commission's practice not to decide on referral to the Drafting Committee until after the final summing-up by the Special Rapporteur on the topic in question. Hence, the Commission was clearly in the presence of an extraordinary procedure. He did not know who had taken that initiative, of which he personally had been completely unaware, having even been absent a few days from Geneva when the decision had

\* Resumed from the 2401st meeting.

been taken. He had noticed that a list of supposedly interested members had been circulated and the first meeting had been attended by a number of persons, some of whom had not even known that the meeting had been scheduled. The document in his possession spoke of “informal consultations on State responsibility”. He repeated that it was an extraordinary procedure and he could only wait to see what would come of it. Considering the known brevity of his absence, he wondered how it came about that the meeting should be proposed before he came back: unless, of course, the meeting represented an attempt to remove article 19 of part one beforehand.

21. The CHAIRMAN said it went without saying that the Commission’s informal consultations were open to all members. If names had been circulated, it had been only to make sure that at least a few members would be available on that day. A decision had to be reached on an important matter, hence the need to take a position that was unanimous in every respect. There could be no talk of an extraordinary procedure; the idea was merely to review the question and to decide together how to proceed.

*The meeting rose at 10.55 a.m.*

## 2404th MEETING

*Thursday, 22 June 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer.

### **The law and practice relating to reservations to treaties (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>1</sup> A/CN.4/L.516)**

[Agenda item 6]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)**

1. Mr. de SARAM thanked the Special Rapporteur for an excellent introduction to what was a very specialized field and for setting out in his first report (A/CN.4/470) the modern and convoluted history of reservations.

2. As to the question of overall direction, in his opinion the preparation of a consolidated draft convention on reservations to take the place of the reservations provisions in the Vienna Convention on the Law of Treaties (hereinafter referred to as the “1969 Vienna Convention”), the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the “1978 Vienna Convention”), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the “1986 Vienna Convention”), and to deal with other matters deemed of relevance would be far too formidable an undertaking. Moreover, in the real world of inter-State treaty negotiations, it was unlikely that a consolidated convention would be judged worthwhile, and such an instrument might very well make matters more confusing than they already were. Nor, for similar reasons, did the preparation of draft protocols to the above-mentioned Vienna Conventions seem justifiable. Furthermore, as the Special Rapporteur had noted, the parties to a treaty and the parties to an additional protocol might not be the same, and many States would then find themselves at cross-purposes, thus creating even more confusion.

3. As the Commission knew, the subject of reservations to treaties lay in a grey zone between, on the one hand, a desire for complete logical consistency (the simplest expression having been the original “unanimity rule” prescribing that a reservation proposed to a multi-lateral convention required the consent of all States parties) and, on the other hand, the concept that every State, in its sovereignty, was entitled to make the reservations it wished and to become party to a convention subject to such reservations, regardless of any objections made. The uncertainties of the reservation provisions in the 1969 Vienna Convention and the many difficult technicalities experienced in their application were a measure of the problems faced in treaty negotiations when the compulsion for logical symmetry encountered the concern that a State’s sovereign discretion to determine the extent of its binding commitments should not at any stage be overly constrained. Accommodating those two opposing factors in the higher interests of “international cooperation” was not at all easy, as those provisions showed.

4. Consequently, guidelines and model clauses would seem to be a reasonable objective. That would enable the Commission to examine and fully appreciate the technicalities involved and broaden the focus of attention to include not only what could transpire after, but also what should transpire before, the adoption of a treaty.

5. Before the Commission began the actual drafting of guidelines and model clauses, it must have a clear view of all the inconsistencies and uncertainties in the articles of the 1969 Vienna Convention, much as the Special Rapporteur had done in the list in his report. It was doubtful, however, whether the Commission should immerse itself in “doctrine” or “doctrinal” materials, apart from Mr. Bowett’s pioneering article.<sup>2</sup>

<sup>1</sup> Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

<sup>2</sup> See 2400th meeting, footnote 2.



6. It seemed to him that once the Commission had a listing of the points of inconsistency and uncertainty in the provisions of the 1969 Vienna Convention, it must examine each point thoroughly and consider how they were all interrelated. To that end, it would be useful to have, for each such point, the relevant chapter, articles and commentaries that the Commission submitted to the United Nations Conference on the Law of Treaties,<sup>3</sup> as well as any amendments proposed to the Commission's draft articles, whether or not finally adopted. The adoption or non-adoption at the Conference of some of the proposed amendments had probably caused much of the inconsistency or uncertainty in the articles of the 1969 Vienna Convention. Examples that came to mind were the failure to adopt a proposed amendment to the definition of a reservation—in what had come to be article 2, paragraph 1 (d), of the Convention (and which, had it been adopted, would have dispelled much of the resulting uncertainty as to what was and what was not a “true” reservation)—and the eleventh-hour amendment adopted to what had become article 20, paragraph 4 (b), which had been inconsistent with the overall balance that the Commission had tried to establish in the articles on reservations submitted to the Conference.

7. He agreed with those who believed that it would not be very helpful at the present time to embark on a study of State practice. However, at an early stage in the work, the principal depositaries of treaties within and outside the United Nations system should be asked for information on their experience, in particular how they resolved in practice some of the uncertainties and inconsistencies that the Commission would have to examine, and on what main subjects States commonly deposited unilateral statements at the time of signature, ratification or accession.

8. In his report, the Special Rapporteur, in discussing the effects of reservations on the entry into force of a treaty, referred to “doctrinal criticism” of the practice followed by the Secretary-General in his capacity as depositary. Surely, the Secretary-General's practice as depositary scrupulously conformed to General Assembly resolution requirements. There again, the Commission would need to know what the relevant General Assembly requirements were and what consequences they might have with regard to the establishment of treaty relations between the parties and respect to a treaty's date of entry into force.

9. He sympathized with the Special Rapporteur's view that the title of the topic should be changed to “Reservations to treaties”, but the title had been established by the General Assembly and he was inclined to feel that it ought to be maintained unless change was essential. Modifying the title now would almost certainly lead to an unpredictable debate in the Sixth Committee, in which the incorrect impression might be gained that the proposed change reflected a shift in the Commission's substantive approach to the topic. That might distract the Sixth Committee from more important issues.

10. Like Mr. Tomuschat, he preferred to exclude “reservations” to bilateral treaties from the Commission's work or at least to confine matters to reservations to multilateral treaties as a first stage, taking up reservations to bilateral treaties later if it was deemed necessary. The context in which bilateral and multilateral treaties were negotiated and concluded was completely different and if the Commission was to be working towards guidelines and model clauses there would be no practical need to cover bilateral treaties, or indeed treaties establishing international organizations, which were of a very specialized nature.

11. Again, the Commission might have to leave aside the provisions of article 20, paragraph 2, of the 1969 Vienna Convention, dealing as they did with treaties whose reservations required the consent of all States parties, because of the limited number of States parties and because the nature of the treaty's object and purpose made it essential that all the parties consent. The Commission's commentaries in 1966 showed that the question of how to determine what was a small group of States had been examined in the light of comments by Governments, and the wording of article 20, paragraph 2, had been considered an appropriate solution at that time.<sup>4</sup>

12. As to the categorization of reservations according to problems connected with the specific object of certain treaties or provisions, a general legal aspect had to be carefully considered in connection with the Commission's 1966 draft articles and commentaries, which had served as the basis of the work at the United Nations Conference on the Law of Treaties. The commentaries appeared to show that in the 1960s the Commission had in fact examined whether provision should be made for different procedures for establishing the “permissibility” of a reservation for different kinds of multilateral treaties. Paragraph (14) of the commentary to draft articles 16 and 17,<sup>5</sup> corresponding to articles 19 and 20 of the 1969 Vienna Convention, stated:

The Commission accordingly concluded in 1962 that, in the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a ‘collegiate’ system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned.

There then followed a puzzling sentence which the Commission would have to look into much more fully than was possible at the present session

Having arrived at this decision, the Commission also decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of States for which the unanimity rule is retained.

13. The issue that arose from such a commentary was that, if the Commission agreed to preserve the general reservations regime established in 1969 as the general

<sup>3</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7).

<sup>4</sup> *Yearbook... 1966*, vol. II, p. 69, document A/6309/Rev.1, in particular, pp. 207-208, commentary to article 17.

<sup>5</sup> *Ibid.*, p. 206.



international regime on reservations, it would then be very much in the area of progressive development. If it were also to proceed to establish different reservation systems according to different kinds of general multilateral treaties, those systems would in their fundamentals be at variance with the general international regime established under the 1969 Vienna Convention. That was a matter which would need to be fully considered at a later stage.

14. A final point concerned the importance that the Commission should attach to the need to look not only at how reservations were formulated under the articles of the 1969 Vienna Convention and applied after the adoption of a treaty but also at how, prior to adoption, the need for making reservations could, as far as practicable, be reduced or eliminated. He had in mind not only the procedure for stating that there were to be no reservations to a treaty or to particular articles, but also the more general consideration that all participants in treaty negotiations and their decision-making authorities back home in their capitals, were often working with a limited administrative infrastructure and in the midst of domestic pressures. They should be kept informed as early and as fully as possible of the central issues on which agreement was likely to be reached and on those on which agreement was unlikely. In addition, the Commission should give some thought to how those authorities might be advised about provisions left intentionally ambiguous because it was felt more important to have an agreement on some rather than on all matters. If that could be done, the requisite definition or redefinition of central issues could take place while a treaty was still being negotiated and could be expressed in a State's decision to become, or not become, party to that treaty, rather than expressed after the adoption of the treaty and in the confusion of unilateral statements accompanying signature, ratification or accession, when there was no easy way of determining objectively what they were intended to mean.

15. It would be unrealistic to expect Governments not to insist on protecting their national interests even after the adoption of a treaty, in the form of reservations, as they often did in the final stages before the adoption of a treaty in statements for the record—for inclusion in the *travaux préparatoires*. Yet it also seemed reasonable to assume that Governments—being fully aware of the central issues or agreements and disagreements and, having made up their minds to become parties to a treaty—would not wish to disengage themselves from the central core of obligations within a treaty: what had been referred to in an advisory opinion of ICJ as the object and purpose of a treaty.<sup>6</sup> Moreover, there was no statistical or other basis for assuming that reserving States acted in bad faith. Indeed, in practice, States that were making non-permissible reservations might well be under the misapprehension that the reservations were in fact permissible or might not have looked into what were or were not permissible reservations under the treaty. If such assumptions were correct, then the Commission's future work should focus on two areas: how reservations in their intentions and effects might in practice be rendered more precise, and how decision-making authorities

might in the course of a treaty's negotiation be made more fully aware of the central issues involved in the treaty.

16. Mr. PAMBOU-TCHIVOUNDA said that he had already had occasion to commend the Special Rapporteur on the calibre of his first report and his presentation, which had successfully led the Commission through the jungle of reservations to treaties. It was an examination of the law and doctrine, rather than of the law and practice, relating to reservations to treaties. On the one hand, the report was impressive in its nearly perfect architecture, which included a panorama of the relevant treaties and the context in which they had been elaborated. On the other, it produced a somewhat disconcerting reaction in that it showed how the system developed by the Commission, with its ultimate expression in the Vienna Conventions of 1969 and 1986, had quickly revealed its own limitations. It had become clear that the codification of the law of treaties was far from complete in many respects, such as reservations to and interpretation of treaties. Indeed, the edifices of the 1969 and 1986 regime were marred with cracks and fissures, with gaps and ambiguities that it was the Commission's task to remedy. Any legal structure, even the most elaborate, had limitations and could always stand to be enriched by the way it actually functioned in the real world. Every legal structure was the result of "judicious ambiguities", as the Special Rapporteur had stated in the report—ambiguities that betrayed the hidden motives which were part of every international treaty. The Commission should be grateful to the Special Rapporteur for his guidance in helping it discover those flaws.

17. With regard to the general structure underlying the law of treaties, which was set forth in detail in chapter I of the report, he noted that the Commission had been motivated by a desire for change, which had manifested itself in the substitution of a "flexible" system for what some had called the traditional regime that had been in effect up to the time ICJ had given its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in 1951.<sup>7</sup> The idea that the reservation had to be compatible with the object and purpose of the treaty was, seemingly, the more flexible version of the rule of unanimous acceptance. However, he did not see how the criterion of compatibility had acquired such a function. The Special Rapporteur had remained very discreet on that issue, simply placing the words "flexible" and "flexibility" between quotation marks each time they appeared in the report. He could well understand the dismay of Georges Scelle at the elevated level to which the idea of compatibility between a reservation and the object of the treaty had been raised.<sup>8</sup> That idea had been considered variously as a rule, a criterion, and even as a principle. Nothing about it was straightforward. It would not be minimizing the importance of the ICJ requirement of compatibility to view it not as a condition for the existence of the reservation but simply as a characteristic of the reservation, since the power to formulate reservations was not subject a priori to any control, namely, control of validity.

<sup>7</sup> Ibid.

<sup>8</sup> See *Yearbook* . . . 1951, vol. II, p. 23, document A/CN.4/L.14.

<sup>6</sup> See 2400th meeting, footnote 5.

18. In the efforts to make the rule of unanimity more flexible and so better reflect the new realities of international life, the Commission and, later on, the Vienna conferences had not needed, for the purpose of progressive development of the law of treaties, to endorse the advisory opinion of ICJ, which had been formulated in a precise context and in reference to a specific multilateral treaty. The Commission had needed only to draw the logical conclusions from the new international realities and to decide that a reservation had to be accepted by a simple or qualified majority, because unanimous acceptance was clearly very difficult to achieve. In fact, the Court's opinion did not alter in any way the rule of unanimity; the hypothesis of unanimous acceptance had found a place in article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions, although doubts had been raised as to whether it was applicable to all multilateral conventions.

19. A second source of ambiguity was the excessive liberalism surrounding the very concept of a reservation, as embodied in the relevant instruments. According to article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions, "reservation" meant "a unilateral statement, however phrased or named, made by a State [or international organization] ... whereby it purports to ...". In what manner was that a source of ambiguity? A unilateral declaration serving as a reservation could clearly be called by any name whatsoever; it was merely a question of form. In contrast, the wording of the declaration, relating to the very purpose of the reservation, was highly significant. In his view, the wording of any reservation should meet certain minimum requirements of precision with regard to three aspects: formulation, motivation and structure. Those requirements would satisfy the interests of all concerned: the State which had made the declaration, since it was motivated by the desire to become party to the treaty, and States which were already parties, since they would not wish to be accused at a later point of being arbitrary in objecting to a particular reservation. The treaty instrument itself, the scope of which it was generally hoped would be enlarged *ratione personae*, demanded a strict parallelism between the reservation and any objection to it, which implied as clear as possible a legal framework for the material elements involved. Lack of clarity in the wording of a reservation led only to confusion and disorder by giving free rein to all kinds of interpretation. One could easily imagine the torrent of interpretive declarations which could be made in reference to a reservation formulated by the State before or once it had become a party and, by implication, in reference to provisions of the treaty itself which would be considered as inapplicable because they were the subject of a reservation. In those circumstances, there were countless ways to undermine the provisions of a treaty. Difficulties arose when the reservation was vague and general, as noted by the Special Rapporteur in the report.

20. The wording of article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions also gave rise to problems with regard to the type of treaties to which it was applicable. In his report, the Special Rapporteur pointed out that, while an objection to a reservation would cause a bilateral treaty to "fall to the ground" and would exclude the participation of the State which

had formulated the reservation, the situation was different with respect to multilateral treaties. In his view, the Special Rapporteur had made a distinction which could not be made under the system proposed by Sir Humphrey Waldock in his first report in 1962.<sup>9</sup> An objection to a reservation would not cause a bilateral treaty to "fall to the ground"; it was the reservation which nullified a bilateral treaty by rendering it inexistent both legally and materially. No objections were possible in such circumstances because no reservations were possible. That statement should therefore be eliminated from the report.

21. In reviewing the preparatory work on the reservations provisions of the 1969 Vienna Convention, the Special Rapporteur had rightly observed that the system finally adopted might be characterized more as "consensual" than "flexible" in the sense that, ultimately, the contracting States could change the system of reservations and objections as they saw fit and practically without restriction. He agreed that the system was certainly not flexible. It was, in fact, anachronistic and self-contradictory, because it was built on ultra-voluntarist foundations which had been valid for the closed societies of the sixteenth to nineteenth centuries but which might lead to conflict in a divided yet falsely egalitarian international community.

22. A doctrinal approach could not resolve that difficulty because doctrine was not the same as policy, although the two might coincide. The policies of States or international organizations with regard to reservations and objections were clearly tied in with their legal policies, which were elaborated to serve their own interests. Each State or organization naturally wished to become a party to a treaty under the most favourable conditions, at the best price, and to profit from the potential advantages of being a party. The entire system of reservations and objections was thus dominated by market forces. Moreover, a State or organization's assessment of the advantages of becoming party to a treaty was necessarily made before its consideration of the law and was thus "outside" the law. Where such an assessment of interests was not prohibited by law, the question of the validity of the reservation did not arise. It only arose in the case of prohibition or authorization of the reservation. In the first case (prohibition), the reservation was simply not admissible. In the second case (authorization), the reservation was presumed to be admissible as long as it was not subject to an objection on the grounds of incompatibility with the object and purpose of the treaty. Thus, the requirement of compatibility served as a method of proof that could be used only by those entities which were already party to the treaty in order to establish the non-validity of a reservation in the light of the legal framework of which they, by virtue of their capacity as parties, were the guardians. Those working to elaborate treaty law and codify it had never foreseen that such a role would be played by a third party, something which, in his view, was a major flaw. As a result, the regime of reservations had not received the same treatment as had the regime of nullity by the codification of international

<sup>9</sup> See 2400th meeting, footnote 6.

law and by the Vienna Conventions. Perhaps the time had come to redress that imbalance.

23. Mr. BARBOZA expressed his congratulations to the Special Rapporteur on an excellent and lucid report but said he had one small word of reproach: a reader unversed in the topic would have been left unaware of the historic importance of the so-called pan-American rule in the development of the topic. Admittedly, the report did make passing reference to the rule, but nowhere did it mention that the structure of the present system had been taken from the pan-American rules that had been the very first to interpret the needs of the modern international community in regard to multilateral conventions. The main priority in that connection was to ensure the widest possible participation of States, failing which those conventions would lose much of their value and force.

24. Chapter I of the report gave a historical account of the Commission's work on reservations, which had culminated in the 1969, 1978 and 1986 Vienna Conventions, and called for little comment. Chapter II contained an inventory of the problems that had arisen in practice and would have to be considered in more detail in due course. Once the Special Rapporteur had taken a closer look at those problems, had offered guidance and had proposed solutions, the Commission could make its own contribution in the form of commentaries, criticism and support. The problems involved would, given their number, obviously have to be dealt with in groups. One possibility, already suggested, was that the Commission should divide its work into three parts, according to the Convention it was dealing with. Separating the problems by groups or sub-topics and considering the elements in each group that were common to the three Conventions might also yield good results.

25. The Special Rapporteur believed that the validity of reservations was the area in which the ambiguity of the provisions of the Vienna Conventions was the most apparent and had therefore dwelt at some length on the permissibility and opposability of reservations. For instance, he had raised the important question of the effect that a reservation which seemed to be "impermissible" would have on the expression of consent by the reserving State to be bound by the treaty and also the question whether it would produce effects independently of any objections that might be raised to it. In that connection, a systematic study of the practice of States and international organizations, as proposed in the report, would be of fundamental importance, for even if such a study might prove to be a disappointment because the practice was relatively scarce and would merely reveal the uncertainties, it was the only way of knowing how the system had functioned in practice.

26. Another aspect of the matter which was of fundamental importance concerned the regime of objections to reservations, in other words, their opposability. In the report, the Special Rapporteur summed up the problems arising out of the interpretation and application of the 1969 and 1986 Vienna Conventions, listing 15 questions, all of which were relevant. Some might go rather far, such as the first question on the object and purpose of the treaty, since, as had already been pointed out, it

had to do with other parts of the law of treaties, including interpretation. Yet those questions must be asked and, where necessary, clarified, something which would be to the general benefit of the 1969 and 1986 Vienna Conventions. That would not run counter to the policy of preserving what had been achieved—with which he agreed—nor would it be incompatible with shedding light on what had been achieved.

27. Chapter II identified the most important gaps in the provisions relating to reservations in the Vienna Conventions, and, in particular, in those relating to interpretative declarations (for which a definition was required), the effects of reservations on the entry into force of a treaty, reservations to human rights treaties, and reservations to provisions codifying customary rules. Subsequent consideration of the problems identified by the Special Rapporteur would undoubtedly show that he had made the right choice.

28. According to the Special Rapporteur, chapter III dealt with the more immediate concerns. Unlike the Special Rapporteur, he did not believe that one of those concerns should be the form that the results of the Commission's work should take. The Commission normally dealt with that matter only at the end of its work on a topic, when it was best able to decide what recommendation to make to the General Assembly.

29. The articles the Commission would most probably propose would clear up the ambiguities and fill in the gaps, yet respect what had been achieved. Nevertheless, the Commission must not make a fetish of such respect; otherwise it would put its draft into a strait-jacket and divest it of its *raison d'être*. If the articles, which could take the form of an additional and explanatory protocol, did not meet with general approval, there would be two systems of reservations: one with and one without a protocol. Provided that the substance of the matter was not modified, however, and that the changes proposed were valid, the existence of the two systems should not give rise to any serious problem, although clarifications would be necessary in the long run.

30. The Special Rapporteur had proposed two other solutions: a guide to the practice of States and international organizations, and model clauses. The idea of a guide was interesting. However, the codification and progressive development of international law would have benefited if, rather than codifying conventions, the Commission had adopted a system of "restatements of the law", one which was followed in the United States and was well suited to the special features of international law and the formation of what was now known as "new custom", in other words, the custom which was founded on multilateral treaties and on certain declarations of the General Assembly and which occupied an important role in the progressive development of contemporary international law. Such restatements would not only take account of the existing law, but would also include a component *de lege ferenda*. That possibility would remain unexplored if a simple guide to practice were to be issued. There was also a risk of putting out a message that the proposed instrument would be a second-class instrument. Model clauses would be useful if they were additional to the articles, as mentioned in

the report, but not if they were to be the sole outcome of the Commission's endeavour.

31. As Special Rapporteur for the topic with the longest title in the history of the Commission (International liability for injurious consequences arising out of acts not prohibited by international law), he could not fail to agree that the title of the present topic should be changed to "Reservations to treaties".

32. Mr. FOMBA expressed his congratulations to the Special Rapporteur on the high quality of his preliminary report, and said the main question was to determine whether and to what extent the present general legal regime of reservations constituted a sufficiently clear and comprehensive body of legal rules, and to what extent it represented a valid compromise between two requirements that were difficult to reconcile: respect for the State's freedom to express consent, and the need to preserve the integrity of the treaty. Should the conception of those two requirements be absolute and rigid or relative and flexible? And was it possible to avoid divesting the treaty of its substance?

33. Depending on whether a *de lege lata* or a *de lege ferenda* approach were adopted, the practical consequences would not be the same in terms of the actual operation of a treaty that was vital for international relations. The Special Rapporteur, in an unerring diagnosis, had pinpointed the precise nature of the problem and had demonstrated the limits of positive international law. Those limits were set by the ambiguities and gaps in the 1969, 1978 and 1986 Vienna Conventions and they had been identified by the Special Rapporteur in a series of questions that was entirely adequate, quantitatively and qualitatively, for the purposes of the topic. As to the cure, the Special Rapporteur had taken care not to reply, at that stage, to the substance of those questions. He had, however, marked out the path to be followed and indicated the various areas that merited reflection. For his own part, he merely wished at that point to endorse much of the general philosophy underlying the report and to support the Special Rapporteur's preliminary conclusions. He had also listened to Mr. Mahiou's comments with great interest.

34. Mr. ELARABY said he paid tribute to the Special Rapporteur for his well-articulated report, which reflected the calibre of his scholarship and his masterly grasp of the subject-matter. The report provided the Commission with a sound basis for revisiting a topic that had rightly been described as one of baffling complexity.

35. The Vienna Conventions of 1969, 1978 and 1986, prepared by the Commission, had not clarified the ambiguities inherent in the question of reservations, and the many problems and unanswered questions remained. Sometimes, the solutions afforded by practice and jurisprudence had merely complicated the issue or, at best, papered it over. That was not surprising, since reservations to treaties now formed an integral part of the contemporary international legal order in a world that was witnessing an unprecedented trend towards the codification and progressive development of the rules of international law affecting many areas of life throughout the world—the oceans, outer space, the global environment itself. The general framework for the regime of reserva-

tions was introduced in article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention which, in subparagraph (c), also provided a safety net by laying down the concept of incompatibility with the object and purpose of the treaty. To a large extent, and in so far as the realities of the 1960s had permitted, the 1969 Vienna Convention regime had managed to reconcile two fundamental requirements: the importance of attracting the widest possible participation in treaties, and the need to recognize that in certain cases—whether due to religion, culture, deep-seated traditions, or even political expediency—a State would be willing to be bound by all the obligations under a treaty if its position on a specific issue were reflected. In a sense, reservations were the price paid for broader participation.

36. Modern political realities confirmed that States would not discontinue that practice. Indeed, the Special Rapporteur had pinpointed that fact with the statement that the history of the provisions of the 1969 Vienna Convention showed a definite trend towards an increasingly stronger assertion of the right of States to formulate reservations. That explained the practical importance of the topic and the need to re-examine certain issues with a view to attaining a more consistent, a clearer and, it was to be hoped, a more stable reservations regime.

37. In the final analysis, it might not be possible to remove all the ambiguities and fill in all the gaps referred to by the Special Rapporteur. However, one area for further elaboration was the determination of the criterion of the compatibility of a reservation with the object and purpose of the treaty. The 1969 Vienna Convention was a product of the 1960s and of the era preceding it. The intervening years had brought significant changes which should have a direct bearing on the international codification process. In disarmament, for example, the Treaty on the Non-Proliferation of Nuclear Weapons concluded in 1968 and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction did not provide for any verification or fact-finding mechanism, whereas the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction did include an elaborate verification system. States were perhaps giving certain indications pointing to the possible emergence of a trend towards exploring third-party modalities in multilateral treaties, a trend which, although it might not yet represent a conscious conceptual recognition of the need to promote the progressive development of international law, stemmed from a *de facto* pragmatic approach designed to ensure a more satisfactory functioning of treaties. Such limited indications should be seized, further refined and elaborated to help provide clarifications of the many ambiguities referred to in the report and in particular, the ambiguity mentioned in the report, where the Special Rapporteur stated that the 1969 Vienna Convention "doctrinally" paid tribute to the criterion of the reservation's compatibility with the object and purpose of the treaty but failed to draw any clear-cut conclusions therefrom. In considering the question of the compatibility criterion, the Commission should be guided by recent State practice in that area.

38. Other aspects of the legal regime for reservations which needed to be addressed included the “permissibility theory” discussed at some length in the report, a theory which raised a host of legal issues regarding the obligations of reserving States as well as those of objecting States and, more generally, of third parties which had a clear interest in the outcome. Mr. Bowett had made several valid points in that connection.

39. The regime governing acceptance of and objections to reservations was set forth in article 20, paragraph 4, of the 1969 Vienna Convention, which provided for multiple legal regimes between parties to the same treaty. On the other hand, the Vienna Conventions were, as pointed out in the report, silent on the question of the distinction between reservations and interpretative declarations. When, by whom, and by what majority of contracting States was a declaration to be considered a genuine reservation? As noted in the report, it was extremely difficult to make a distinction between “qualified interpretative declarations” and “mere interpretative declarations”. The question of declarations and their legal effects should be further examined, especially since, as rightly pointed out, States seemed to resort to them with increasing frequency.

40. As to the scope and form of the work on the topic, it was true that the Vienna Conventions had not frozen the law, yet it would be a mistake at the present early stage to go back to the drawing board so as to remove the ambiguities at one go. Instead, he favoured the more modest and realistic approach proposed by the Special Rapporteur. It would be remembered that in the late 1960s and early 1970s the international community had been confronted with similar choices in two areas, that of the law of the sea, where the four international conventions covering the territorial sea, the high seas, the continental shelf and fishing and conservation of living resources had eventually been replaced by the United Nations Convention on the Law of the Sea, and that of the Geneva Conventions of 1949, where it had ultimately been decided on grounds of realism to retain the existing instruments while updating them through additional protocols. He was inclined to think that the circumstances facing the Commission were somewhat similar to those that ICRC had faced in the latter of those two instances. For the moment, the Committee would be well advised to confine itself to a similarly realistic approach.

41. It would not be appropriate now to envisage the preparation of a set of draft articles, either in the form of a draft protocol or of a consolidated convention, but he was attracted to the idea of a guide to the practice of States and international organizations on reservations. He attached considerable importance to the note of caution sounded in the report, where the Commission was advised to proceed “prudently and with due regard for the flexibility that facilitates the broadest possible participation in multilateral conventions while safeguarding their basic objectives”. That balance should always be carefully maintained in any guiding principles that might be elaborated. Lastly, he was persuaded by the arguments for changing the title of the topic to “Reservations to treaties”.

42. The CHAIRMAN, speaking as a member of the Commission, said he had no difficulty in accepting the

Special Rapporteur’s suggestion for a shorter title. Furthermore, the Commission should not concern itself at the present stage with the question of reservations to bilateral treaties, but should focus exclusively on those to multilateral treaties. He agreed with previous speakers that the objective of the Commission’s study of the topic should be to produce guidelines and model clauses.

43. While the study should show a healthy awareness of the doctrinal setting in which the subject of reservations was examined, any attempt to reopen the various lines of argument should be eschewed as it could only lead to further confusion or controversy. A certain constructive ambiguity was demanded by the political process that inevitably enveloped the legal process, and the framers of the Vienna Conventions had in all likelihood been aware of that fact. An inquiry into the reasons and the contextual factors that had led to such constructive ambiguity would have been most interesting and instructive, and the Special Rapporteur might give the matter some consideration in a future report.

44. Some of the factors involved were not difficult to identify. At the fundamental level, they included the diversity of historical, political, economic and cultural backgrounds—a point also made by Mr. Elaraby—as well as differences in the judicial and legal systems adopted by States and the differing interests involved, which the treaties sought to reconcile. A number of questions also arose at a secondary level of the process of negotiating a treaty, such as whether the proposal for a treaty made by a State or States was timely or necessary or whether it had been properly and fully prepared; in what forums, and through what process, should the proposal be allowed to mature; what was the level of participation of all the States targeted as potential parties; how thoroughly was a consensus on the basic objectives and purpose of the treaty allowed to develop; what methods were adopted in concluding the treaty; and, lastly, at what stage were those methods adopted? Those and other factors were central and even crucial to assessing why and in what form reservations or declarations to a treaty were formulated by States parties.

45. A major policy which had always guided the law-making process at the international level was that, in view of the character of international society, legal principles and obligations had generally to be based on a consensual approach, for the sake of wide and voluntary adherence. That alone was the guarantee for the development of universal principles of international law. Accordingly, in order to encourage such adherence to treaty obligations, it was necessary to respect—and even, perhaps, to systematize—a certain diversity in unity, as opposed to unity in diversity. Hence it was not difficult to understand why the regime of reservations to treaties practised so far had followed the principle that, as long as the basic object and purpose of the treaty were served, reservations were permissible. It was, of course, expected that a State opposed to the object and purpose of the treaty would not consider becoming a party at all. But once that was not an issue, the manner and method, and sometimes the time-frame, in which a State party wished to implement the treaty obligations were not of central importance to the unity of the treaty’s purpose or the integrity of the obligations it incorporated.

46. Such wishes, then, were expressed in the form of reservations, declarations or statements of understanding. Any ambiguities perceived from either a theoretical or a practical perspective could be resolved by the time-honoured method whereby the depositary circulated the reservation, declaration or statement of understanding, without attaching any value judgement, to the other States parties. It was then for the States parties to determine the legal value of the reservation, declaration or statement and hence to determine the legal relationship that could exist as between the reserving State and themselves.

47. There was, no doubt, a certain fluidity in such a position, but it was a fluidity that could be tolerated and that was better suited to the promotion of widely subscribed and implemented treaty obligations. Any other system imposing a cut-and-dried formula would only break, because of its brittleness, under the weight of the variety of different interests and stages of economic development of States.

48. It was also important that the Commission should not, in its study, isolate various categories of multilateral treaties in an attempt to establish different standards within a universal regime of reservations to treaties. As noted by Mr. de Saram, that so-called discriminatory approach had been considered earlier and had not been accepted. Considerations that had prevailed in the 1960s and 1970s when only 120 to 130 sovereign States had existed were all the more relevant and important now that there were nearly 200 such States and the gaps between them in terms of economic, political and other factors had grown wider. In the circumstances, the Commission's task was to guide and help States in expressing their intent more methodically and in a legally consistent manner. Its objective was not to suppress reservations as a method but, where they were otherwise permitted by a treaty, to allow them to be made in a certain format within a certain degree of acceptable flexibility.

49. As for the difference between interpretative statements and reservations, the key would seem to lie in what was permitted or not permitted under a State's domestic law and to what extent that State was prepared or able to change its domestic law in the prevailing political, economic, social or religious conditions. A declaration, in his view, was more a matter of the time-frame needed for the full acceptance of the treaty by the State in question. It was not a reservation and could not be prohibited on the same grounds as a reservation.

50. In conclusion, he wished to congratulate the Special Rapporteur on his first report, which had commendably guided the Commission in its deliberations, and said that he looked forward to the future reports on the topic.

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

[Agenda item 2]

51. The CHAIRMAN, recalling that the Commission had not yet referred to the Drafting Committee the issue of wilful damage to the environment, which the Special

Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind had proposed for inclusion in the list of crimes against the peace and security of mankind, said that, after consultations, he wished to recommend the establishment of a small working group to examine the possibility of covering that issue in the draft Code in an appropriate way. There would be no time for the working group to hold any meetings at the present session, but it could hold four meetings over a period of two weeks at the beginning of the next session. If the working group succeeded in producing an acceptable formula, the formula could then be briefly considered in plenary and referred to the Drafting Committee. Alternatively, given the greater priority assigned to completing the work on the draft Code within the quinquennium due to expire in 1996, the working group might decide to do no more than think about the problem. The group would be chaired by Mr. Tomuschat and would, of course, include Mr. Thiam *ex officio* in his capacity as Special Rapporteur. The decision as to the remaining membership of the group would be left to Mr. Tomuschat and Mr. Thiam.

52. Mr. THIAM (Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind) said that he had no objection to the suggestion, but feared that the Drafting Committee would have no time at the next session to consider the results of the proposed working group's deliberations. Would it not be possible, in the circumstances, to omit the Drafting Committee stage?

53. The CHAIRMAN said that if the working group felt, after initial deliberation, that it could come up with a satisfactory text, he saw no reason why the text should not be considered quickly in plenary and then transmitted to the Drafting Committee. If that was not possible, the issue should be allowed to mature within the working group. The precise mechanics could be considered at the next session. If he heard no objection, he would take it that the Commission agreed to the establishment of a working group on the issue of wilful damage to the environment.

*It was so agreed.*

*The meeting rose at 1 p.m.*

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## 2405th MEETING

*Tuesday, 27 June 1995, at 10.10 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Ro-*



senstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (*continued*)\* (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)**

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)\*

1. Mr. ARANGIO-RUIZ (Special Rapporteur), summing up the debate in the Commission on State responsibility, said that, to respond to all the interesting comments made on his seventh report (A/CN.4/469 and Add.1 and 2), he would group them into two sets of questions. He would first refer to the “if”, that is to say the question whether crimes should be the subject of provisions in part two of the draft articles, and then the “how”, namely, which provisions should govern those crimes or, more specifically, their consequences.

2. The “if” question, which concerned the basic concepts, had drawn comments from several members, who had all dealt with the appropriateness of the term “crime” and, more fundamentally, with whether a “criminal liability” of States was conceivable. For part two, which was currently under consideration, he suggested leaving aside problems of terminology, which had been temporarily settled by article 19 of part one.<sup>2</sup> As to the concept of the “criminal liability” of a State, he fully agreed with the above-mentioned speakers when they contested the possibility of bringing into international law the concepts of punishment and criminal procedure typical of domestic legal systems. In fact, at no time had he used any of those concepts in his draft articles and, if he had employed terms borrowed from national criminal law, for example “prosecutor”, he had done so very rarely and only in order to make himself clear. He had been so cautious that some members of the Commission had suggested that more room should be made in the draft articles for “severe” forms of responsibility.

3. One serious problem which in a sense lay halfway between the “if” and the “how” was the relationship between the international crimes listed in article 19 of part one and individual crimes against the peace and security of mankind contemplated in the draft Code of Crimes against the Peace and Security of Mankind. Comments on that point had been made by Mr. Thiam (2397th meeting), Special Rapporteur on that topic, as well as by several other members. The connections were striking, as the same fact might give rise, albeit from dif-

ferent viewpoints, to individual crimes and State crimes. However, the area of wrongful acts singled out as crimes in article 19 of part one appeared to be broader than what he would refer to as the “Thiam code”. While individual crimes against the peace and security of mankind (such as a State crime against the environment) would not necessarily be found “behind” a crime under article 19, an individual crime under the “Thiam code” would almost always also be an international crime of a State, especially as such crimes were often committed by individuals who were at the head of a State. But apart from that, individual crimes and State crimes were very different. The former entailed the criminal responsibility of individuals, who must be prosecuted in accordance with domestic criminal law and criminal procedure, whereas the latter—“monstrous” violations, according to the terminology used by one member, or “most heinous” violations, to use the wording employed by Mr. Pellet, of the fundamental interests of the international community—were committed by States as collective entities and gave rise to responsibility in inter-State relations.

4. It was, however, clear that the reaction to certain forms of individual responsibility of the type covered by the draft Code could become part of the “sanctions” to which a State might be subject as a consequence of a crime of its own. The prosecution of the individuals responsible was thus envisaged as a derogation from the general rule of immunity of State bodies acting within the scope of their competence. That was precisely the purpose of draft article 18, paragraph 1 (e), proposed in his seventh report, which Mr. Rosenstock (2392nd meeting) had somewhat playfully defined as a fugitive from the draft Code of Crimes against the Peace and Security of Mankind. On the other hand, Mr. Barboza (2396th meeting) had rightly pointed out that the prosecution of the responsible individuals could not represent *per se* an adequate response to the international crime of a State. Obviously, the punishment of a few individuals could not solve the problem of physical and moral reparation of the damage caused by the conduct of the State’s machinery as a whole (because in reality, it was the conduct of the State itself that constituted the particularly “heinous” or “monstrous” wrongful act). As noted by some members, it would be a serious error to believe that the problem of the “monstrous” acts of a State could be settled by relying exclusively on the Code of “individual” Crimes against the Peace and Security of Mankind, assuming that the latter eventually became a legal reality.

5. Two other general issues raised during the debate related to the need to examine separately the question of State crimes and of acts that constituted a threat to international peace and security, on the one hand, and the potentially negative reaction of Governments to his proposed solutions, on the other. He would revert later to Mr. Rosenstock’s argument (2392nd meeting) about “overlapping” when he dealt with institutional aspects. As to the potentially negative attitude of Governments, he shared the views of several members, which could be summed up in the following way: the Commission, composed of independent members taking part in their personal capacity, should not subject its work to the real or presumed will of one or more—or even all—States. Its purpose was to contribute, through exploratory work, to

\* Resumed from the 2398th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> See 2391st meeting, footnote 8.



the progressive development of existing law, which of course, it had no power to alter, and realism in that regard must consist in striking a fair balance between the ideal and what was possible. Mr. Briery, who had represented the United Kingdom of Great Britain and Northern Ireland during the drafting of the statute of the Commission, had stressed that the purpose of the Commission was the progressive development of international law and not merely the codification of existing rules, which was taken care of at universities. He also shared the view of Mr. Mahiou (2395th meeting) that the Commission should, if necessary, present to the General Assembly (and to Governments) not just one, but two or more alternative versions of a regime of the international crimes of States. That point of view seemed to have been endorsed, or at any rate had not been contested, by a number of members. An alternative solution, however, would not be to postpone the problem of the consequences of crimes to the second reading. That would be not a solution but an arbitrary suppression of the problem by turning article 19 of part one into a dead letter. It would amount to a simple refusal, on the part of the Commission, to deal with a problem whose existence was recognized since, at least, 1976.

6. Turning to the "normative" aspect of the subject, the consideration of draft articles 15 to 18 of part two, he said that the Commission had reached a relatively high degree of consensus on the "supplementary consequences" of the crimes covered in draft article 15. Most speakers were in favour of excluding or reducing, in the case of crimes, the "attenuating circumstances" envisaged for the wrongdoing State in the case of delicts. For example, on the question whether the territorial integrity of the wrongdoing State should be preserved under all circumstances, some members had not excluded that the obligations of cessation, restitution, satisfaction and guarantees of non-repetition might have territorial consequences (contrary to the present formulation of draft article 16 as proposed in the seventh report), whereas other members were in favour of territorial integrity being in any case respected. That question called for further reflection, particularly in a number of specific cases, such as that of the secession of a population which had been denied the right to self-determination or of a territory acquired by force.

7. Doubts had also been expressed about the propriety of the distinction that he had drawn between two concepts of political independence, one recognizing a State's status as an independent member of the inter-State system and the other considering that all political regimes in power, regardless of how objectionable, must be preserved. Comments had been made on that issue particularly with regard to the freedom of States to choose their own form of government (a freedom surely covered by *jus cogens*, if any). He personally felt, however, that a despotic regime that had committed a crime should not be able to avail itself of that freedom in order to evade its obligations of restitution and compensation or to refuse satisfaction and adequate guarantees of non-repetition. He admitted, on the other hand, that the matter deserved closer examination by the Drafting Committee at the appropriate time.

8. Another point raised had been the distinction, now generally accepted, between the responsibility of a State and that of the State's population. While recognizing that the vital needs of the population, both physical and moral, must be duly protected, as in fact they were in his proposed draft article 16, paragraphs 2 and 3, he believed that that distinction should not be pushed too far because it might encourage those elements of the population that were the least peace-loving and the least inclined to abide by international law and were thus ready to lend support to the reprehensible and, indeed, criminal policies of their leaders.

9. With regard to satisfaction, interesting remarks had been made by Mr. Yankov (2396th meeting) and Mr. Pellet (2391st meeting) about "punitive damages", which should not be just symbolic. Mr. Yankov had suggested that a sharper distinction should be drawn between delicts and crimes in that respect than that drawn in the seventh report.

10. Mr. Tomuschat (2392nd meeting) had deplored the absence of a specific provision on compensation in the case of crimes. That was not an oversight on his part: as article 8<sup>3</sup> already provided for full compensation, no "aggravation" of that provision seemed to be called for with regard to crimes (contrary to the case of restitution in kind, for which the higher degree of seriousness of the wrongful act was taken into account by an express provision).

11. Another problem which had been raised by many speakers was the fact that States were not necessarily injured to the same degree by a wrongful act and that there was a need to distinguish between the various categories of injured States. The problem, which he had already dealt with in his fourth report,<sup>4</sup> primarily with regard to delicts, probably deserved further study in respect of crimes. The first point to be made in that regard was that the very definition of crimes contained in article 19 of part one implied that all States were directly injured by such wrongful acts (and did not simply suffer the indirect legal effects of the infringement of the rights of one or more other States). That was not to suggest that a crime could not affect different States differently. Three hypotheses could be considered in that connection: the first was that a crime resulted *grosso modo* in equal damage to all the injured States (for example, the wilful massive alteration by a State of the ozone layer). In such a case, all States would be entitled to demand cessation and "restitution in kind" (to the extent possible) of the global commons, as well as to demand guarantees of non-repetition and to resort to countermeasures. The sole difference would concern compensation if the economic damage was not the same for all States. That hypothesis could be covered by combining the provisions of draft article 15 proposed in his seventh report and the provisions of article 8, as adopted.

12. The second hypothesis was that a crime, while affecting the fundamental interests of the entire international community, did not affect any State in particular

<sup>3</sup> See 2391st meeting, footnote 9.

<sup>4</sup> *Yearbook* ... 1992, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3.

in material terms. That was true, for instance, of crimes which had been committed by a State against its nationals or against minority groups and which involved human rights or self-determination. In such cases, all States were equally entitled to demand cessation, restitution in kind, satisfaction and guarantees of non-repetition as provided for in draft article 16 and to take interim and other measures necessary to obtain redress. Since no State had suffered economically assessable harm, however, there should be no distinction among States with regard to compensation. In such cases, it also did not seem necessary to establish a special regime for crimes as opposed to *erga omnes* delicts.

13. The third hypothesis was that a crime, while affecting the entire international community, was particularly injurious to one or more specific States. That might apply not only to crimes of aggression, but also to crimes against human rights and the principle of self-determination or crimes against humanity which had a more direct impact on certain States by virtue of their geographical proximity to or their ethnic or religious ties with the victim populations. Similarly, grave and wilful pollution might affect certain States more than others. It was obvious that, in such cases, the principal victims of the crime could not be placed on the same footing as the rest of the international community. There again, however, the need to strengthen the protection of the principally injured States did not seem to require any particular qualification of the special or supplementary consequences provided for in draft articles 15 to 18. With regard to substantive consequences, the principally injured States were, as a result of the greater amount of material or moral injury they had suffered, clearly entitled to “demand more” than the other injured States by way of restitution in kind, compensation and even satisfaction and guarantees of non-repetition.

14. The same could be said of countermeasures. It was reasonable to assume that paragraph 2 of draft article 17, which concerned urgent interim measures, should not apply in the same way to all injured States. While any injured State was entitled to take immediately any measures needed to obtain cessation and avert an irreparable disaster, only the most directly concerned States were entitled to take the urgent interim measures needed to protect—in the case of aggression—their territorial integrity or their political independence. The principle of proportionality referred to in article 13,<sup>5</sup> by nature a flexible principle, was bound to apply in such cases even if it had not been expressly designed for that purpose. At any rate, it would be preferable to resolve the matter of variously injured States, as suggested in one of his previous statements (2395th meeting), by adding appropriate wording to the article 5 *bis* he had proposed in his fourth report.

15. A number of interesting comments had been made on the supplementary consequences of crimes dealt with in draft article 18. He was referring in particular to the question raised by two members, namely, whether paragraph 1, subparagraphs (a), (b) and (c), of that article should not be applicable equally to delicts, and to the suggestion by two other members that, at least with re-

gard to paragraphs 1 (a) and 1 (b), the requirement of a prior institutional decision might be waived. Those questions might be examined further by the Drafting Committee. In considering the possibility of applying the provisions of subparagraphs (a), (b) and (c) to delicts, a distinction should be made between ordinary “bilateral” delicts and *erga omnes* delicts. Account must also be taken of the position of “third” or less directly injured States with regard to the consequences of the internationally unlawful act. As to the second question, he was hesitant to accept the suggestion that the essential condition of a preventive collective determination should be left aside. He was rather inclined to share the concern of Mr. Barboza (2396th meeting), who had wondered whether, in the absence of prior determination by a judicial body, the obligations set forth in paragraph 1, subparagraphs (c), (d) and (f), of draft article 18 might not imply that all States would be bound to follow the measures which had been taken by any one of them and which might well be excessive, inadequate or even unlawful. The ideal solution would, of course, be to entrust the determination of the appropriate measures to the judicial body called on to decide on the existence or attribution of the internationally wrongful act or to an ad hoc coordination mechanism which would be set up collectively by the injured States. He had, however, put that idea aside for fear of excessive institutionalization which might have made the proposed mechanisms more difficult to accept. He had limited himself to saying, in paragraph 1 (c), that States should, in so far as possible, coordinate their respective reactions through available international bodies or ad hoc arrangements or, in paragraph 1 (g), that States should facilitate, by all possible means, the adoption and implementation of any lawful measures. He hoped that those elements would at least help induce States to consult each other; but the Drafting Committee would probably be able to find more appropriate formulations.

16. Two main objections had been raised with regard to draft article 18, paragraph 1 (f): first, a possible intrusion into the area of collective security and, secondly, an inappropriate incidence on the legal effects of resolutions of international bodies. He would deal with the first objection when he discussed the institutional aspects of the topic. He did not see any major difficulties with regard to the second. In the case where the international organization’s resolution was binding, no problem arose. In the case of a simple recommendation, the States parties to the convention on State responsibility could decide among themselves whether to abide by it. There again, though, the question might usefully be reviewed by the Drafting Committee. The same applied to Mr. Pellet’s suggestion (2397th meeting) that a clause should be included in the draft articles stating that the provisions of the future convention did not in any way prejudice questions which might arise in the context of the Code of Crimes against the Peace and Security of Mankind.

17. Turning to the more difficult “institutional” aspects of the topic or the way in which the consequences of crimes should be implemented, he pointed out that all the speakers, including those who had rejected the concept of international crimes of States, had acknowledged the need for an institutional mechanism.

<sup>5</sup> See 2391st meeting, footnote 11.

18. With regard to the nature of the mechanism, the prevailing viewpoint was apparently that, at the least, the conclusive determination of the existence and attribution of a crime should be entrusted to a permanent judicial body such as ICJ, which was more likely than any other body to offer the guarantees of competence and impartiality which were indispensable. That had been the opinion of several members and, despite a reservation with regard to the specifically "civil" competence of the Court, of another. The role of ICJ had also been recognized by Mr. Pellet (2393rd meeting), although he would attribute jurisdiction to the Court a posteriori. At the same time, the possibility of entrusting such tasks to the Court had given rise to various objections. A few members had first of all emphasized that it was unlikely that States would accept the compulsory jurisdiction of the Court with regard to crimes.

19. Leaving aside the question whether such a skeptical evaluation was plausible, it was inevitable that any mechanism chosen would have to include a certain measure of obligation in order to guarantee a minimum of reliability and efficiency to the process of determining conclusively the existence/attribution of a crime. It was precisely with a view to avoiding the indiscriminate use of the compulsory jurisdiction of the Court that he had proposed to subordinate it to the prior adoption of a resolution by a political body. Screening by a political body, in addition to eliminating any clearly unfounded allegations of criminal conduct, would help to exclude or at least keep to a minimum any abuses on the part of Governments which were trying to take advantage of the Court's compulsory jurisdiction and bring before it cases concerning responsibility for ordinary delicts.

20. In connection with one of Mr. Szekeley's remarks (2395th meeting), he noted that there were precedents for the acceptance of the compulsory jurisdiction of ICJ over disputes concerning particularly grave violations. He was referring in particular to the conventions mentioned in his seventh report on genocide, racial discrimination, apartheid, discrimination against women and torture. States were perhaps less reluctant than it appeared and, in any event, it was better to encourage them than to discourage them.

21. A second objection to the attribution of a role to ICJ, which had been raised by several speakers concerned the lengthy nature of the Court's proceedings. Two proposals had been made with a view to avoiding that difficulty. Mr. Bowett had suggested (2392nd meeting) the establishment of an ad hoc committee of jurists assisted by an ad hoc prosecutor or prosecuting body. Mr. Pellet had proposed (2393rd meeting) that the decision of ICJ should be considered as an a posteriori rather than an a priori verification of legality.

22. Those proposals, which both merited careful consideration, had given rise to an interesting debate. In reference to Mr. Bowett's proposal, it had rightly been agreed that the appointment of members to an ad hoc body might be influenced by political considerations and, consequently, might give rise to concerns of partiality. In that regard, he recalled the remarks of Mr. Robinson (2396th meeting), Mr. Al-Khasawneh (2394th meeting) and Mr. Szekeley (2395th meeting). Furthermore,

entrusting the task to an ad hoc body would mean, in his view, renouncing the inestimable advantage of continuity of legal interpretation and application which was inherent in decisions of ICJ. The value of precedent would be lost in an area which was even more sensitive than others to the need for consistency.

23. With regard to the reluctance of States to accept the compulsory jurisdiction of ICJ, the same could be said with regard to the proposed ad hoc body. The only difference—and apparently for the worse—was that, in the case of an ad hoc body, States would have to accept that the basic determination would be entrusted to a special body appointed, on a case-by-case basis, by a political body rather than to a standing tribunal specifically indicated in a convention on State responsibility. If States had to choose between the compulsory jurisdiction of ICJ and the equally compulsory jurisdiction of a group of judges specially—and politically—appointed, it would hardly be surprising if most Governments preferred the former.

24. He was, on the other hand, well aware of the merit of assigning to an ad hoc body, obviously a different one, the role of prosecutor and the task of carrying out a thorough and expeditious investigation of the facts. The presence of such a body would also help speed up the judicial proceeding itself. That aspect of the ad hoc solution thus dovetailed usefully with the role of ICJ which he himself had proposed.

25. Making use of the Court for an a posteriori rather than an a priori verification, as suggested by Mr. Pellet, would, of course, eliminate any delay in the international community's response to the crime. However, that would imply an exceedingly high degree of reliance on the unilateral evaluation of—supposedly all—the injured States. Furthermore, as Mr. Mahiou had correctly pointed out (2393rd meeting), an a posteriori verification did not really solve the problem of delays, but simply transferred, to the detriment of the accused—and possibly wrongly accused—State the consequences of the lengthy procedure before the Court. The accused State would be exposed immediately, by a unilateral decision of the injured States, to the aggravated consequences of a crime. Only at a later stage could it benefit by the possible determination by the Court that it had not actually committed a crime or even, in some cases, a simple delict. In his own view, moreover, the disadvantages of the delay arising from the need for prior judicial determination of existence/attribution were not as serious as it might appear.

26. First of all, under the proposed system, the States injured by a crime would not be completely powerless to act against the wrongdoing State while waiting for a judicial pronouncement. In fact, under paragraph 2 of draft article 17, a provision which had perhaps been insufficiently considered by Mr. Pellet, injured States were authorized to take "urgent interim measures" in order to reduce or eliminate the risks and to limit the damage caused by the crime.

27. Secondly, States injured by a crime would not be prohibited, prior to the judicial determination of that crime, from putting forward any claims and from resorting to any countermeasures which were justified as a re-

sponse to an “ordinary” wrongful act, namely, a delict, in accordance with articles 6 to 14,<sup>6</sup> as adopted or soon to be adopted, as they applied to that portion of a crime which constituted a delict.

28. Thirdly, as he had already suggested on an earlier occasion, the length of the proceedings before ICJ was not unalterable. As he had also suggested in the informal addendum to the seventh report, it might be envisaged that, once a case of “crime” had been brought before it, the Court would appoint an ad hoc chamber for that specific purpose, in view of the urgency of the situation. Such an arrangement might be sufficient. If not, it might be possible to add five judges to the Court so that the establishment of an ad hoc chamber would not interfere with the Court’s ordinary operations. Considering the gravity of the wrongful acts involved, that would be a relatively modest innovation. In contrast, it would be much more dramatic, in cases of State crimes, to let the matter be decided by a unilateral decision of the injured States, by the purely political findings of a political body or even by the legal decision of an ad hoc body whose members had been appointed by a political body.

29. He none the less considered that the various solutions proposed by the members of the Commission should be studied closely and, where appropriate, put forward in the final document that the Commission would submit to the General Assembly and Governments as possible alternatives. He fully endorsed the proposals made in that connection by Mr. Barboza (2396th meeting), Mr. Mahiou (2395th meeting) and Mr. Al-Khasawneh (2394th meeting).

30. With regard to the question of the compatibility and conformity of the proposed institutional mechanism with the Charter of the United Nations, he would first answer the questions raised concerning the “constitutionality” of the role assigned to the General Assembly and the Security Council under draft article 19 of part two as proposed in the seventh report.

31. According to some speakers, the proposed mechanism would vest in either political body the power to make a binding decision concerning the jurisdiction of ICJ or the activation of the jurisdiction of the Court. But it was in no way his intention, in his proposed draft article 19, to vest any new power of that kind in the General Assembly or the Security Council. The compulsory jurisdiction of the Court would be created not by the “concern resolution” that either body would adopt on the initiative of any Member State of the United Nations which was party to the convention on responsibility, but by the convention itself. The “concern resolution” was conceived merely as a “triggering” condition which would simply bring into effect, in a given case, a jurisdictional link already created by the convention. It would not result in any alteration in the functions of the Assembly or the Council. In other words, paragraph 2 of draft article 19 was simply an arbitration clause which provided directly for the competence of the Court to settle by a judgement any dispute between contracting States over the existence/attribution of a crime.

32. Another “institutional” preoccupation had been manifested with regard to the qualified majority requirements set forth in paragraph 3 of draft article 19. As he saw it, a qualified majority should be required on account of the moral, political and legal gravity of an allegation of crime brought against a sovereign State. It did not, however, follow that the convention should dictate the conduct of the General Assembly or Security Council with regard to their respective voting procedures. Articles 18 (for the General Assembly) and 27 (for the Security Council) of the Charter of the United Nations would not be affected save in so far as either body was disposed to take account of the particular consequence that paragraph 2 of draft article 19 (once embodied in a convention on responsibility) would attribute to a “concern resolution”. It would be implicit that, if the Assembly decided, in any given case, that an allegation of crime should not be dealt with as an important question, within the meaning of paragraph 2 of Article 18 of the Charter, a “concern resolution” within the meaning of draft article 19 would simply not come into being. If the resolution were adopted by a simple majority, under paragraph 3 of Article 18 of the Charter, the jurisdictional link created by draft article 19 would simply not become effective. The same applied to the qualified majority requirement referred to in paragraph 3 of draft article 19 concerning the Council.

33. In his view, therefore, the provisions proposed for a future convention on State responsibility would not be “constitutionally” incompatible with the Charter of the United Nations. Those provisions would be and would remain part and parcel of an instrument other than the Charter and would not contradict any of the provisions of the Charter. As he had already indicated, however, it would not be absolutely essential to refer expressly to those majority requirements in the draft articles. He nevertheless trusted that the Drafting Committee would examine closely the allegedly “constitutional” issue before deciding to remove those requirements from the text. They were particularly necessary, in his view, given the gravity of the consequences of a judgement by the Court relating to the existence/attribution of a crime.

34. Mr. Bennouna had raised certain questions concerning the “universalization” of the category of injured States and the mechanism of implementation envisaged in draft article 19. He had stated, first, that to consider all States as being injured by a crime implied that they were all entitled to resort to countermeasures. Consequently, the treaty would function for the entire community of nations, not just for the States parties. To that, his answer was that the difficulty arose in the case not only of crimes, but also of *erga omnes* delicts. Secondly, it was normal that the conclusion of a codification convention resulted in the coexistence, at least temporarily, of general and conventional rules, as had occurred in the case of the law of the sea and in other areas. At all events, the right of all injured States to take countermeasures was a matter of the norms and principles of general international law which the convention on responsibility would simply codify and clarify.

35. Mr. Bennouna had remarked, secondly, that a future convention on responsibility would create a situation of inequality where the participating States might be

<sup>6</sup> See 2391st meeting, footnotes 9 and 11.

the subject of a determination of international concern made by a political body—the General Assembly—some of whose members would not be parties to the convention and might therefore not be the subject of such a determination. While such a situation might indeed occur, its undesirable effects would be considerably reduced because of the guarantees provided by the proposed mechanism. First of all, any accused State which was the subject of a “concern resolution” by the Assembly would be entitled to refer the matter unilaterally to ICJ. Secondly, a “screening” of the allegations of crime, made by a qualified majority of the Assembly, would in any event offer better guarantees of objectivity than accusations made unilaterally by one State or a group of States outside any institutional framework. Thirdly, before rejecting the proposed mechanism because of that disadvantage, the other solutions should be considered carefully. The only existing alternatives were either unverified unilateral allegations emanating from one or more States or the pronouncement of the restricted political body entrusted with the implementation of Chapter VII of the Charter for purposes of collective security and not of State responsibility. As an alternative, Mr. Bennouna had suggested that some separate instrument should be adopted by the Assembly, by consensus or by a simple or two-thirds majority, which would overcome the difficulty in question. He personally, however, was unable to see how such a result could be achieved by an organ which, like the Assembly, was not empowered to enact binding rules. A treaty would be essential.

36. Some members of the Commission had, moreover, called into question the compatibility of the proposed mechanism with paragraph 1 of Article 12 of the Charter, under which the General Assembly must refrain from making any recommendation on disputes or situations with regard to which the Security Council was exercising, in respect of such dispute or situation, the functions assigned to it in the Charter. Without entering into a discussion of the precise interpretation to be given to that provision, he would recall that the Assembly had frequently ignored or circumvented that limitation, so much so that some commentators, and even the legal services of the United Nations, were wondering whether that limitation had not become largely obsolete. He would refer the members of the Commission to the relevant paragraphs of the works of Yehuda Blum,<sup>7</sup> Hailbronner and Klein<sup>8</sup> and P. Manin.<sup>9</sup>

37. In any event, his view, was that paragraph 2 of draft article 19 did not present any real incompatibility with paragraph 1 of Article 12 of the Charter. Were the General Assembly to be seized of an allegation of crime under paragraph 1 of draft article 19, at a time when the Security Council was dealing with a related or even with the same question under Chapters VI or VII of the Charter, the only consequence, even on a strict application of

paragraph 1 of Article 12, would be to preclude the Assembly from proceeding to the adoption of a “concern resolution” under draft article 19 as a condition for a possible unilateral referral of the matter to the Court by the States for it to decide on the existence/attribution of a crime. That would not, however, preclude the adoption by the Council of a “concern resolution”, for the purposes of paragraph 2 of article 19, thus paving the way for the States to seize the Court. If, on the other hand, neither body were to adopt a “concern resolution”, the State or States referred to in paragraph 1 of article 19 would have to resign themselves to the fact that an essential element of the institutional mechanism had not materialized. That might mean either that the “community” so represented—*faute de mieux*—by the Assembly or the Council failed to acknowledge the existence of sufficient grounds for concern or that the “community” deemed that it was expedient to deal with the matter as one involving the maintenance of peace and security rather than as a matter of State responsibility. It therefore seemed to him, unless he was mistaken, that there was no real incompatibility between his proposed draft article 19 and Article 12 of the Charter.

38. Considerations that were similar in part applied to the delicate question of the relationship—and possible interference—of the proposed mechanism and the existing system of collective security. Despite the safeguard clause contained in draft article 20 proposed in his seventh report, some speakers had expressed the opinion that the proposed mechanism, and particularly draft article 19, would interfere with the powers of the Security Council and particularly with its powers under Chapter VII of the Charter.

39. Mr. Tomuschat (2392nd meeting), for instance, had pointed out that the reference to Chapter VI of the Charter in draft article 19 would not be appropriate in that a decision according to which a State was subjected to the jurisdiction of ICJ did not come within the scope of Chapter VI, but necessarily fell within the scope of Chapter VII. Furthermore, whenever international peace and security were at stake, any decision must be left, according to Mr. Tomuschat, to the Security Council. According to Mr. Rosenstock (*ibid.*), international crimes were always susceptible of endangering international peace and security for the maintenance of which the Council was responsible, especially with regard to the “special” measures necessary to meet the emergencies brought about by those crimes. In Mr. Rosenstock’s opinion, that fact of life would strengthen the view that the Commission should refrain from dealing at all with the grave violations in question (and their consequences) within the context of the draft on State responsibility.

40. Accordingly, if he interpreted Mr. Rosenstock’s and the other named members’ remarks correctly, the Commission should confine itself to a mere “*renvoi*”—to borrow the terminology of private international law—of the matter to the system of collective security provided for in the Charter. Another alternative, according to Mr. Rosenstock, would be to adapt the concept of international crimes of States in such a manner as to turn it into a synonym of “threat to the peace”. A similar, though not identical, vein seemed to characterize the views of certain members of the Commission who ap-

<sup>7</sup> Y. Z. Blum, *Eroding the United Nations Charter* (Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993), pp. 103 *et seq.*

<sup>8</sup> K. Hailbronner and E. Klein, “Article 12”, *The Charter of the United Nations: a commentary*, B. Simma, ed. (Oxford University Press, 1994), pp. 254 *et seq.*

<sup>9</sup> P. Manin, “Article 12, paragraphe 1”, *La Charte des Nations Unies: commentaire article par article*, 2nd ed., J. P. Cot and A. Pellet, eds. (Economica, Paris, 1991), pp. 295 *et seq.*

plauded the current tendency of the Security Council to extend the concept of “threat to the peace” so as to encompass, actually or potentially, the whole spectrum of hypotheses contemplated in article 19 of part one. According to those members, the Commission should actually go along with that trend. It should refrain not only from including in its draft any provision that was not perfectly compatible with the *de lege lata* powers of the Council, but also from proposing any solutions which might be an obstacle to *de lege ferenda* developments that might be perceptible in the Council’s broadened capacity for action which manifested itself since the end of the Cold War.

41. According to his own understanding of that view, the draft should contain a clause under which the law of State responsibility would “withdraw”, yield as it were, whenever the dispute or situation to which any provision of that law should in principle apply might involve—or be connected with—one of the hypotheses with regard to which the Security Council might be called upon to exercise its functions under Chapter VII of the Charter. Mr. Pellet (2397th meeting) had even referred expressly to article 4 of part two, as adopted, according to which

the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security<sup>10</sup>

and Mr. Pellet had emphasized, in particular, the importance of that provision and the need, *inter alia*, for strict adherence to it in dealing with the consequences of crimes.

42. Before making some comments on the many difficult problems raised by certain members of the Commission, he wished to clarify a general and vital point relating to the interpretation of the Charter: a matter with regard to which his views differed from those of a few members. Of course, it was not the task of the Commission, as a subsidiary organ of the General Assembly, to interpret the Charter, except to the extent necessary for the performance of its functions. The principal organs themselves could do so only for the purposes of their functions, without such interpretation being binding on other bodies. Nevertheless, he was firmly convinced that the Commission could not give technical help to the General Assembly in the progressive development and codification of international law if it backed away from every problem involving the interpretation of the Charter. Moreover, it would be noted that the various speakers who maintained that the Commission was “not worthy” of such a task were the first to interpret the Charter in their own way and even to indicate in which direction the law of the Charter should develop.

43. Having said that, he wished to point out that it was not entirely correct to say that the subject-matter of paragraphs 1 and 2 of draft article 19 of part two belonged to Chapter VII of the Charter. Within the framework of his proposal, the General Assembly and the Security Council would not be operating in the area of “action with respect to threats to the peace, breaches of the peace, and acts of aggression” (the title of Chapter VII), but in that of the “peaceful settlement of disputes” covered by

Chapter VI. The reference to Chapter VI in paragraph 1 of draft article 19 had been included *ex abundanti cautela*. Likewise, it was not quite correct to say that, where a crime was likely to endanger international peace and security (or, in any case, where it represented, from the viewpoint of peace and security, one of the hypotheses or situations contemplated in Article 39 of the Charter), any decision with regard to that crime should be left to the Council. In view of the primary responsibility assigned to it by the Charter, the Council was competent to adopt any decision and, if necessary, take any action it deemed necessary “to maintain or restore international peace and security”. That was the text of the Charter, not an interpretation. Consequently, it would be incorrect to assert, even where a crime was also considered to represent a threat to the peace, that the performance by the Council of its “constitutional” functions exhaustively settled the problems of the determination of the infringed rights and obligations, the attribution of the violation, and the ordinary and special consequences deriving therefrom. Whatever their interaction or overlapping with collective security, such problems belonged to the surely distinct area of State responsibility. Mr. Tomuschat himself had stated at the preceding session<sup>11</sup> that “he was very much in favour of a broad interpretation of the powers of the Security Council under Chapter VII”, adding, however, that the “international peace and security” formula had certain limits and even that 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.

44. The distinction in question led to the problem of the alleged prejudice that the Security Council’s primary function might suffer from the fact that a State responsibility convention introduced a legal regime for the international crimes of States and, in particular, from any institutional mechanism that might be devised for the implementation of such a regime. Whatever the scope of the notion of a threat to the peace or the scope of the Council’s powers and whatever the doctrinal or other opinions on current trends in the Council’s practice, the regime proposed in draft articles 15 to 20 of part two did not represent any danger of such a prejudice. It was precisely in order to avert such a danger that article 20 had been devised, expressly to provide that the implementation of the consequences of international crimes of States through the proposed institutional mechanism did not hinder the decisions and actions by which the Council exercised the functions assigned to it by the Charter with regard to the maintenance of international peace and security.

45. He deemed it indispensable to reiterate that in the wording proposed by the previous Special Rapporteur and adopted by the Commission, article 4 of part two, referred to by Mr. Pellet, drastically subjected the articles on State responsibility, “as appropriate to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security”.

<sup>10</sup> See 2391st meeting, footnote 9.

<sup>11</sup> See *Yearbook* . . . 1994, vol. I, 2343rd meeting.



46. For the reasons he had already explained in part, he was unable to accept Mr. Pellet's view on article 4. As he had stated on previous occasions and then again in his seventh report, article 4, as adopted, amounted to a highly problematic and, in his view, unacceptable attempt against the integrity of the law of State responsibility, which would be practically set aside or otherwise deprived of legal force whenever the Security Council exercised its functions relating to the maintenance of international peace and security. Any rights or obligations deriving from the law of State responsibility would thus be subordinated to the discretionary power of the Security Council. In his view, on the contrary, the law of State responsibility, including any mechanism for which it might provide, should remain in force and fully operative even in the case of delinquencies that might, for the distinct purposes of Chapter VII of the Charter, fall within the scope of the collective security system. The law of collective security should prevail only in the event of absolute incompatibility between the two systems and only in the measure strictly indispensable for the maintenance of international peace and security.

47. That principle meant that only the law of State responsibility should govern such issues as: (a) whether the alleged facts constituted an internationally wrongful act of a State; (b) whether that wrongful act qualified as a crime; (c) what consequences, special or supplementary, derived therefrom; and (d) what mechanisms or procedures should be involved in order to settle any disputes that might arise between the law-breaking State and any other State with respect to the implementation of the said consequences. The answers to all those questions, in so far as the law was concerned, would have to be sought in the rules embodied in any future State responsibility convention, as well as in any rules of general international law or treaty law relating to the kinds of behaviour qualified as internationally wrongful acts of States—whether characterized as delicts or crimes within the meaning of article 19 of part one of the draft.

48. It should be noted that Mr. Pellet's current adherence to article 4 was in striking contrast with the position he had taken at the preceding session<sup>12</sup> on the subject of the relationship between the law of State responsibility and the system of collective security. At that time, Mr. Pellet had stated that it was not for the Security Council to determine whether a particular action was or was not a crime; that the Council could, under the Charter, determine the existence of at least one crime, the crime of aggression, but was not required to define it as a crime; that its jurisdiction as far as other crimes were concerned could, at best, be only derived; and that its 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. He had even added that the Charter regime should be set aside for the topic under consideration and had suggested that the Special Rapporteur might include a provision stating, in substance, that the draft articles were without prejudice to any powers that might 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.

49. Those concerns were, he believed, exactly met by draft article 20 as proposed in his seventh report. Under that draft article, the provisions relating to the consequences of international crimes of States, or, for that matter, of any internationally wrongful act—including the institutional provisions contained in draft article 19 of part two—are without prejudice to any measures decided upon by the Security Council in the exercise of its functions under the provisions of the Charter or to the inherent right of self-defence as provided in Article 51 of the Charter.

50. It should be noted that the necessity to preserve the integrity and effectiveness of the law of State responsibility from any undue interference on the part of political bodies did not arise merely in conjunction with the regime of crimes or, in particular, with any mechanism devised for its implementation. Even if article 19 of part one disappeared from the draft and even if the "monstrous" delinquencies were finally equated with threats to the peace or breaches of the peace under Article 39 of the Charter, the problem of State responsibility would not be eliminated. There would still remain, first, the applicability of the law of State responsibility to delicts, which also included *erga omnes* delicts, and, secondly, the need to preserve, side by side with the regime of collective security, the applicability of the law of State responsibility to the "monstrous" wrongful acts in question, whatever name they were given. Getting rid of draft article 19 of part one or draft article 19 proposed for part two and having the law of State responsibility dealt with or set aside by political bodies would not solve the problem. The law of State responsibility, whether codified or not, existed in general international law. Besides, in the face of such difficult problems, no perfect solution could be found. In such a situation, it was necessary to accept the relativity of things and weigh the advantages against the disadvantages of those necessarily imperfect solutions. In any case, it would be unacceptable for the law of State responsibility to be set aside, as draft article 4 seemed to suggest, where an international crime of State gave rise to problems relating to the maintenance of international peace and security. It would be ironic for such a major weakening of the law of State responsibility to be promoted by the Commission, a body entrusted by the General Assembly with developing and codifying the law of State responsibility. The community of scholars of international law would find such a result most awkward.

51. In conformity with his interpretation of the results of the debate, as well as with the result of the informal consultations held during the week, he suggested that the Commission should refer to the Drafting Committee his proposals—together with all other proposals, written or oral, and statements made—so that the Drafting Committee might work on the topic at the next session in time for the Commission to acquit itself of its task of completing the consideration on first reading of the whole of parts two and three of the draft.

*The meeting rose at 11.50 a.m.*

<sup>12</sup> Ibid.



## 2406th MEETING

Wednesday, 28 June 1995, at 10.30 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR  
(*concluded*)

1. The CHAIRMAN said that he would ask the Special Rapporteur to repeat his earlier proposal concerning the Commission's further work on the topic of State responsibility, following which he would invite the Commission to take a decision in the matter.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, as he had repeatedly stated with respect to the question of how to deal with the consequences of international crimes of States as defined in article 19 of part one of the draft,<sup>2</sup> he was open to all suggestions, including those put forward in writing, for instance, by Mr. Bowett. He had also mentioned the proposals made by Mr. Pellet (2397th meeting), as those by Mr. Mahiou (2395th meeting), which included the possibility not only of exploring solutions other than those suggested in the seventh report (A/CN.4/469 and Add.1 and 2) but also, if necessary, of submitting alternative solutions to the General Assembly in 1996, once the work of the Drafting Committee had been completed. He believed he had made that very clear at the close of the debate on the topic and also on two occasions in the course of the informal consultations held under the Chairman's guidance.

3. It had therefore been his understanding that the matter had been settled, at least in substance, since he believed—and he was not the only one so to believe—that during the informal consultations a very substantial number of persons had agreed that, subject to the conditions he had mentioned, the articles could be referred to

the Drafting Committee. Should the Drafting Committee fail to reach an agreement at the next session, in 1996, the obvious inference to be drawn was that there could be no follow-up to article 19 of part one in parts two and three of the draft and that, when the time came to examine draft article 19 on second reading, it would be reconsidered and eventually reviewed. That would, however, take place only after the Drafting Committee had concluded a serious effort to find solutions, if necessary, alternative ones, relating to the consequences of crimes. It had been suggested by some members during the informal consultations that the Drafting Committee should consider not only solutions with regard to the consequences of crimes in parts two and three but also the question of deleting article 19 of part one. In his view, it would be improper to follow such a course, because the fate of that article should be decided only after the Commission had done its best with regard to crimes in parts two and three and in any event only at the stage of the second reading.

4. The CHAIRMAN asked whether the Commission could agree, in the light of the Special Rapporteur's explanations, that the draft articles proposed in the seventh report should be referred to the Drafting Committee for consideration along with any comments or proposals made during the debate.

5. Mr. ROSENSTOCK said that he could not in all conscience agree to referring the draft articles to the Drafting Committee and would like to explain his vote against any proposal for such referral.

6. Mr. LUKASHUK said that the problem with which the Commission was confronted involved a key concept of State responsibility, namely, that of international crime. Many convincing arguments had been advanced in the Commission in support of a provision on international crime, the main one perhaps being that the concept of crime now formed part of *lex lata* and positive law. One had only to call to mind the proceedings of international military tribunals, the practice of ICJ, and various conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide. There was a certain logic, too, in the argument of those who opposed such a concept, the most persuasive being that the effect of including in the future convention a provision in that connection would be to reduce the number of parties to the convention. Indeed, the fact that several States would not be prepared to accept the concept of international crime seemed to be the crux of the issue. It was therefore a matter of politics, not jurisprudence, in other words, the theory of law. Thus, if it was in its political interest to do so, a State would not stop short of calling for sanctions against a State responsible for an international crime, such as aggression. The case of Iraq was very indicative in that respect. Such facts, though fairly obvious, were interpreted in different ways inasmuch as an element of subjectivity was involved. He therefore wished to draw attention to certain objective facts that were undeniable.

7. The concept of international crime had been embodied in the draft articles on State responsibility at the initiative of a previous Special Rapporteur, Mr. Roberto Ago, and had been discussed in detail, and unanimously

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> See 2391st meeting, footnote 8.

adopted, by the Commission in 1976.<sup>3</sup> It had also been stated in one report of the Commission that it would be undesirable to cast doubt on the concept in the future.<sup>4</sup> Subsequent Special Rapporteurs, though representing different schools of law, had firmly supported the concept of international crime, the same position having been taken in the Commission as a whole. A positive response to the concept of international crime was also to be found in world literature and, specifically, in a book by Cassese, according to whom the concept of international crime was a basic feature of the new world legal order.<sup>5</sup> Cassese was not alone in that assessment.

8. He asked what revolutionary changes had prompted members of the Commission to raise the question of revising a position already adopted and whether the end of the era of confrontation could really be grounds for reducing the effectiveness of international law. The example of Iraq pointed to the contrary; and such an approach could be dangerous, not only for the concept of international crime.

9. It had been suggested that the draft on State responsibility should be revised from the very beginning, starting with article 1, but to do so would take many years. It should not be forgotten that as far back as 1949 the topic of State responsibility had been included among the areas of law requiring codification and that, since 1961, the General Assembly had regularly recommended that work on the draft articles on responsibility should be speeded up. Moreover, recent Assembly resolutions spoke of finishing the work before the Commission's mandate expired in 1996. He asked whether 50 years was not enough. Many would find a decision to start all over again hard to understand.

10. One point made by supporters and opponents alike of the concept of international crime was that it would have meaning only if there was some appropriate mechanism to implement it. In support of their view, they referred to the history of the concept of *jus cogens*, which was conditioned by the adoption of the corresponding procedures for the settlement of disputes. Whereas those procedures had not received wide recognition, *jus cogens* had none the less become a generally recognized part of international law. Accordingly, the concept of international crime should be enshrined in a future convention notwithstanding any doubts and even if the establishment of an appropriate mechanism proved impossible.

11. It was now for the Commission to take a decision that would determine whether or not a particularly important branch of international law would come into being. To that end, it should make recommendations to the Special Rapporteur so that the work on the topic could be completed by 1996, as required by the General Assembly. Consensus in the matter was particularly impor-

tant and would be a fitting prologue to the next 50 years in the life of the Commission.

12. Mr. TOMUSCHAT said that, before the draft articles were referred to the Drafting Committee, there should be general agreement on two points. First, the term "crime" should be understood as not having any criminal connotation. Secondly, the Drafting Committee should have a wide measure of discretion in dealing with the draft articles of part two and, in particular, with draft article 19. It would perhaps have to devise an entirely new approach and should therefore be authorized not only to consider the minutiae of drafting but also to reshape the articles. On that understanding, he could agree that the draft articles should be referred to the Drafting Committee.

13. Mr. de SARAM said he regretted that he was unable to concur in the proposal to refer the draft articles to the Drafting Committee. In particular, if it were to be decided that the draft articles should be so referred only if there was understanding on certain points, the focus of attention would be enlarged to such a point that no agreement at all would be reached. Furthermore, while every attempt should be made to arrive at a consensus, he was prepared, if really necessary, to agree, albeit reluctantly, to a vote.

14. Mr. PELLET, disagreeing with Mr. de Saram, said that all possibilities for achieving a consensus had been exhausted and much time had been wasted in that connection. The only sensible thing to do now was for the Commission to take a decision on the matter, though it would be useful for members to explain their positions briefly.

15. For his part, he was very much in favour of referring the articles to the Drafting Committee. The real problem was whether or not to retain the concept of crime in the draft on State responsibility; all the delaying tactics deployed by those opposed to that concept were aimed at the deletion not of the articles drafted by the Special Rapporteur but of article 19 of part one. He was resolutely opposed to such deletion, for article 19 was an excellent article and had been adopted by the Commission on first reading. The Commission should refer the articles to the General Assembly, and await the General Assembly's reaction. If the Assembly was not satisfied with the articles, they would be referred back to the Commission. But it was certainly not for the Commission to seek to take over the role of the Assembly.

16. He had reservations about the position of Mr. Tomuschat, who favoured referral to the Drafting Committee but with provisos that could only lead to endless discussion: he had no doubt that those opposed to referral would engage in filibustering in an attempt to ensure that the Drafting Committee did not deal properly with the articles on the consequences of crimes. The Drafting Committee should feel free to recast those articles to a considerable extent, subject only to the limitation that it should not divest them of all substance, something to which he would be absolutely opposed.

17. Mr. GÜNEY said it was clear from the statements by members that the Commission was divided on what was both a procedural and a substantive question. In that

<sup>3</sup> For the text of the articles adopted by the Commission at its twenty-eighth session, see *Yearbook . . . 1976*, vol. II (Part Two), pp. 73 *et seq.*

<sup>4</sup> *Yearbook . . . 1994*, vol. II (Part Two), para. 234.

<sup>5</sup> A. Cassese, *International Law in a Divided World* (Clarendon Press, Oxford, 1988), p. 399.

respect, he shared Mr. de Saram's concern and agreed that the possibility of informal consultations had not been sufficiently explored. It was always possible to settle matters without a vote.

18. Mr. VILLAGRÁN KRAMER said that the Drafting Committee and the Commission, in their present composition, would no doubt deal with the matter with the same sense of responsibility and objectivity as had been displayed by the Commission and Drafting Committee when they had adopted article 19 of part one in 1976. In particular, the Drafting Committee would consider the terminological problem in a creative spirit. Its task would consist, basically, of determining whether or not the word "crime" should be retained and of deciding on the method of regulation that it would propose to the Commission for the purposes of the consequences of such acts, however the acts in question were called.

19. He respected the right of all members to ask for a vote, although he himself would not have thought it strictly necessary in the present case.

20. Mr. THIAM said that he was in favour of referring the draft articles to the Drafting Committee, but that did not mean he had abandoned his formal reservations on them. He was, however, surprised that some members of the Commission wanted to revert to article 19 of part one, which had already been adopted. The Commission should follow its usual procedure: wait for the articles to be referred back to the plenary, at which time it would have the opportunity, after examining the observations of Governments, to state its position a second time.

21. Mr. IDRIS said that he was seeking a way to break the deadlock, and asked whether the members would agree to allowing the Drafting Committee to deal exclusively with the matters raised by Mr. Tomuschat before considering the substance of article 19. If the Drafting Committee divided the matter into two parts, first handling the legitimate concerns mentioned by Mr. Tomuschat, a solution might be found before going into the substance of article 19 itself.

22. Mr. ARANGIO-RUIZ (Special Rapporteur) said he appreciated Mr. Tomuschat's suggestion for the Drafting Committee to have broad discretion. But surely that meant it was free, but also duty-bound, to explore solutions coming under parts two and three of the draft.

23. It was high time to realize that the Drafting Committee was a strange animal that worked as best it could, but not always with the participation of all, and that it was not always as representative as it had been meant to be when originally created at the beginning of each session.

24. If, at the meetings of the Drafting Committee at the next session, he had to face not only all the proposals that differed from his own—which he welcomed and wished to be explored—but also the question of whether article 19 of part one should be retained, it would be far too heavy a burden.

25. Consequently, although he would support Mr. Tomuschat's proposal, he thought that the Commission should take care not to turn the Drafting Committee, too

frequently attended by only a few of its members, into a surrogate plenary for discussing whether or not to retain article 19 of part one. If, at the next session, the Drafting Committee could not reach agreement, the obvious conclusion was that article 19 should remain where it was, namely, in part one as adopted on first reading, pending a second reading of the whole draft. That did not mean the Drafting Committee should debate the point, because it would inevitably be argued at great length, and the Drafting Committee then would be unable to give serious consideration to the important question of legal consequences.

26. The CHAIRMAN asked Mr. Tomuschat whether his earlier statement tallied with the Special Rapporteur's understanding, namely that the existence of article 19 was not challenged, but that the Drafting Committee could look into any permutations thereof. Was that what Mr. Tomuschat meant by "reshaping"?

27. Mr. TOMUSCHAT said that he had no objection of principle against article 19 in part one, apart from the fact that he thought another term should be sought for "international crimes", which was inadequate. He objected to draft article 19 of part two, for it was inappropriate. An entirely different system was needed from the one proposed by the Special Rapporteur in his seventh report. Draft article 19 should be recast. He did not want to delete article 19 of part one; however, he thought that internationally wrongful acts were in a continuum ranging from not very serious violations to very serious ones. The Commission must live with article 19 of part one and submit to the General Assembly a draft based on the existence of that article.

28. Mr. IDRIS said that he was not in favour of sending draft article 19 of part two to the Drafting Committee, because it was not ripe for discussion. Nor did he believe that voting would solve the problem: the substance of the question would recur, and it would be discussed again and again. In his view, the Commission must remain flexible and tolerant. Just because an opinion was held by the minority, that did not mean it should not be defended.

29. Mr. YANKOV said that, as he understood it, the Drafting Committee had never been subject to limitations in its work. Its duty had always consisted in conducting informal consultations and producing drafts that were subject to the Commission's approval in plenary. The Committee should continue to employ its well-established working methods, which were anchored in the statute of the Commission. It had always shown flexibility in its search for solutions to many different issues. Some articles had been submitted to the plenary in alternative versions, even at the stage of second reading. Hence, the Commission should not consider that a new situation had emerged and that the Committee's methods needed to be improved. In that regard, he was against the proposal made to establish a working group.

30. The status of article 19 of part one, which had been adopted by the Commission on first reading without any formal objections, must be clarified. As to Governments, some reservations had been formulated. For example, one Government had stressed the exceptional importance of article 19 and the favourable reaction which the

underlying ideas as a whole should evoke, in that they introduced a moral component into the topic of the State responsibility.<sup>6</sup> It stated further that article 19 should be properly considered in part two in relation to the consequences of internationally wrongful acts and that the significance should then be clarified. Referring to the same issue in its comments and observations, another Government had stated that the differentiation of international responsibility in certain categories was of great importance for adequate coverage of the nature and the effectiveness of responsibility and that such differentiation resulted from the particular importance of the object attacked and from the subjects (a single State, several States or all States), but that the regime of the legal consequences of international crimes should be thoroughly elaborated in part two; unfortunately, that had not yet been done in a consistent manner.<sup>7</sup> In resolutions of the General Assembly, reference had always been made to parts one, two and three. The structure had been approved, and he therefore concluded that article 19 was not taboo in part one. It could be reconsidered in the light of the consequences. The Commission was free to proceed in that fashion. Comments and observations by the Sixth Committee, Governments and the Commission would be taken into consideration by the Drafting Committee. In his opinion, the Commission should refer the articles to the Drafting Committee, drawing its attention to the implications of article 19 of part one for draft articles on international crimes, with special reference to the substantive consequences.

31. He hoped that it would be possible to reach an agreement without a vote, but if the Commission decided that it was impossible to reach a consensus, the sooner a vote was held the better.

32. Mr. THIAM said that many speakers had reverted to questions of substance. The Commission should confine itself to responding to the question at hand: whether or not to refer the draft articles to the Drafting Committee.

33. Mr. BARBOZA said that he agreed with Mr. Thiam and would confine himself to the procedural discussion.

34. At the forty-sixth session, the Special Rapporteur had been asked to draft articles on the legal consequences of crimes.<sup>8</sup> There had been a fruitful debate on those articles; proposals had been made and informal consultations had been held. An overwhelming majority had emerged in favour of referring the draft articles to the Drafting Committee, which, bearing in mind the opinions voiced and the proposals made, was to consider the articles in the usual fashion—in which connection he agreed entirely with the remarks of Mr. Yankov—and to propose texts.

35. Article 19 of part one was not under discussion at the present time, having been provisionally adopted on first reading. The Commission should not put the cart

before the horse. The Drafting Committee's conclusions and proposals would have a decisive impact during the consideration of that article on second reading. Therefore, the Drafting Committee should first examine the consequences of "crimes", or whatever term was eventually agreed on, and then review article 19 in the light of those consequences. Mr. Tomuschat, who had fortunately clarified that he was referring to article 19 proposed for part two, should rest assured that draft article 19 fell entirely within the competence of the Drafting Committee.

36. He was in favour of sending the articles proposed by the Special Rapporteur in his seventh report to the Drafting Committee without additional instructions.

37. Mr. AL-KHASAWNEH said that he fully agreed with Mr. Pellet, Mr. Yankov and Mr. Barboza. At issue was a vote on the concept of crimes of States. He did not favour such a step, but as the possibilities for reaching consensus had been exhausted, the sooner a vote was held, the better.

38. Mr. PELLET said that the Drafting Committee's role was to produce drafts on the basis of proposals made by the Special Rapporteur.

39. Mr. ELARABY said he endorsed the proposal to refer draft article 19 of part two to the Drafting Committee. However, if the Commission was split between a majority opinion and a minority opinion, that would not be helpful to the Drafting Committee, which he hoped would be able to take its decisions in the light of a consensus in the Commission, assuming that one could be reached.

40. Mr. ROSENSTOCK said that if the plenary decided to refer the articles and proposals to the Drafting Committee, it was not expressing a view one way or the other on article 19 of part one, and the concept of international crimes was not before it. While one might conceivably say that the assertion that States commit crimes was a statement of *de lege ferenda*, it was not *lex lata*, and Nürnberg was no basis for it. It had been expressly affirmed at Nürnberg that crimes were committed by individuals, not States. Hence, it would serve no purpose to look to the Nürnberg Tribunal for inspiration on crimes by States.

41. The Commission was missing an opportunity to decide that the controversial issues raised by article 19 of part one should be examined at the same time as the legal consequences to be drawn from them. At the forty-sixth session, the Special Rapporteur had bemoaned the fact that the consequences had not been considered at the same time as article 19 of part one a decade earlier. Yet at the present session, the Special Rapporteur was adamantly opposed to considering the question as a whole.

42. In his view, the proposals to be referred to the Drafting Committee were creative, but needlessly complex, seriously flawed, largely unworkable and unnecessary. He could not in good conscience vote to refer them to the Drafting Committee. The wisest course would have been to defer the entire question to the stage of second reading; the second wisest course would have been to be innovative in working methods, to see whether

<sup>6</sup> Yearbook... 1982, vol. II (Part One), p. 17, document A/CN.4/351 and Add.1-3.

<sup>7</sup> Yearbook... 1988, vol. II (Part One), p. 4, document A/CN.4/414.

<sup>8</sup> See 2392nd meeting, footnote 5.

problems and differences could be ameliorated and a coherent whole created. Elsewhere, the Commission had benefited from a new-found spirit of innovation. Noteworthy results had been achieved by the working groups on the draft statute for an international criminal court and on State succession and its impact on the nationality of natural and legal persons. In regard to international liability for injurious consequences arising out of acts not prohibited by international law, a working group was striving to solve one of the problems that had plagued that topic for a number of years. Yet when it came to State responsibility, the Special Rapporteur would not hear of innovation. It was puzzling to see that refusal to make every effort to find common ground. Presumably, some feared innovation or change, and others realized that recommendations made in 1976 were not as likely to be endorsed again if they were brought under rigorous examination.

43. Since he believed that the potential consequences for the topic—and beyond—of the majority decision to refuse a compromise proposal might be serious, the record should reflect the proposal to seek a compromise solution that had been rejected. Personally, he did not prefer the compromise, since it had not expressly called for a reconsideration of article 19 of part one. What the compromise proposal entailed was roughly the following: the proposals of the Special Rapporteur would be referred to the Drafting Committee along with other proposals made at the present session, and the Drafting Committee would be expressly authorized to elaborate alternatives, including those based on the present year's proposals, those based on the assumption that the notion of crime was deleted and those based on the use of a formulation such as "exceptionally serious wrongful acts affecting the international community as a whole".

44. Those who had declined that offer of compromise and variations thereof, such as the one suggested earlier by Mr. Tomuschat, had rejected an opportunity to establish a consensus and provide alternatives to the Members of the General Assembly so that they would be fully informed of the possibilities when they made their written comments on the draft completed on first reading.

45. State responsibility was probably the last great general topic for codification. If there was a genuine search for common ground, a basis for codification and progressive development could probably be found that States would be ready to accept. If, on the contrary, political groups or intellectual cliques insisted on riding their ideological hobby-horses, the prospects were dim. An opportunity had been missed at the present session; it was to be hoped that a more open-minded spirit would animate future work.

46. Mr. EIRIKSSON said that the question before the Commission seemed to be whether it should authorize the Drafting Committee to draft articles for part two on the consequences arising from article 19 of part one. The end result might or might not be based on the articles proposed by the Special Rapporteur. He could agree to referring the draft articles proposed in the seventh report to the Drafting Committee on that basis.

47. In his view, the Commission should dispense with further debate on the question of rediscussing the title of

article 19 of part one. It should proceed on the grounds that article 19 had been adopted and go on to consider the consequences arising from it.

48. Mr. RAZAFINDRALAMBO said that thus far no clear majority had emerged in favour of or against referral of the draft articles to the Drafting Committee. That might, paradoxically, lend support to the position of those advocating further informal consultations.

49. Three possibilities were under consideration. The first was to continue the process of informal consultations to arrive at a consensus. The second was to send the draft articles to the Drafting Committee, with certain conditions. The third, which represented the usual custom of the Commission, was to send the articles to the Drafting Committee without any conditions.

50. He agreed with Mr. Yankov that the plenary could not place a straitjacket on the Drafting Committee, which must be free to consider the draft articles without restrictions. Accordingly, he was in favour of the third solution, namely, referring the articles to the Drafting Committee without any conditions.

51. Mr. KABATSI said that, because sharp divisions of opinion had arisen on both the substance of the articles and the procedure to be followed, it was possible that the same dissension might reign in the Drafting Committee. It would thus be preferable to continue with informal consultations in the hope that a consensus might be reached.

52. Nevertheless, and without compromising in any way his position that the notion that States could be said to commit crimes was completely unacceptable, if the matter had to be settled by a vote, he would endorse the procedure whereby the articles were referred to the Drafting Committee in the usual way, it being understood that the Drafting Committee would, in its wisdom and flexibility, take into consideration all the options and views that had been discussed in plenary and in the informal consultations.

53. Mr. HE said that he was not in favour of a vote. The matter under consideration dealt with one of the most significant aspects of modern international law. Accordingly, the Commission should act cautiously but flexibly.

54. He shared the views of previous speakers that consensus could be reached through further consultations. The Drafting Committee, if and when it did consider the articles, should take a flexible approach, giving due regard to all the views that had been expressed. A substantial number within the Commission and within the Sixth Committee had strong reservations about the contents of article 19 of part one. Consequently, it was incumbent on the Commission to present several alternatives to the General Assembly.

55. Mr. VARGAS CARREÑO said that the basic question was whether an article referring to crimes committed by States should be among the proposed articles. The Commission had been unable to arrive at a consensus on that matter. One possibility was to hold further consultations.

56. In his opinion, the various solutions proposed would be better dealt with by the Drafting Committee. He was in favour of referring article 19 to the Committee, together with all the alternatives that had been discussed, and without any restrictions as to the outcome.

57. Mr. FOMBA said that the concept of State crime was problematic mainly because of the difficulty of distinguishing *in concreto* between the legal person of the "State" and the natural person who embodied it. Yet, the concept was not as puzzling as it might appear. The notion of "legal person" was in fact necessary and useful, its purpose being to establish a close link between individual responsibility and the official and public framework within which it was exercised. In carrying out his criminal act, the individual was thus considered as a direct representative of the State and, as such, free to use the enormous and varied resources available to it.

58. For those reasons, he endorsed the concept of State crime and was in favour of examining the substantive and instrumental consequences arising from it. He therefore considered that the draft articles should be referred to the Drafting Committee, on the understanding that, in the final analysis, it was for States to decide whether the Commission was correct in attributing to them the capacity to commit crimes.

59. Mr. SZEKELY said he agreed with Mr. Fomba that there was good reason to adopt the concept of State crime. The Commission had basically exhausted the possibilities of arriving at consensus and should proceed to a vote.

60. Mr. MIKULKA said that, while part one of the draft had not yet been approved by States, the Commission still had a clear mandate: the General Assembly had invited it to consider the consequences of internationally wrongful acts, in other words, the consequences of all the provisions of part one, including article 19.

61. If it chose to refer the draft articles to the Drafting Committee, the Commission should not simply hand over a blank check, but should ensure that the Drafting Committee took into account all other drafting suggestions that had been presented in plenary. The Commission's task for the moment was to consider the consequences arising from article 19 of part one. It had not reached the stage of deciding whether that article should or should not remain part of the draft. Further consultations could be useful only if they were meaningful and in that regard views on either side did not seem to have changed. The best solution was to proceed to a vote.

62. The CHAIRMAN said that, to sum up the very rich debate so far, it appeared that the work ahead of the Drafting Committee was not as difficult or controversial as first thought. The Committee's task would be to consider the draft articles proposed by the Special Rapporteur. However, nothing prevented it from also considering innovative suggestions within that framework.

63. He wished to suggest the following to the Commission: "The draft articles proposed by the Special Rapporteur in his seventh report are hereby referred to the Drafting Committee for its consideration in the light of the various proposals made and the views expressed on the subject". He reminded the members that, by tradi-

tion, the Commission preferred to make its decisions by consensus.

64. Mr. ROSENSTOCK said that he was perfectly prepared to join in informal consultations with a view to finding a basis for consensus.

65. The Chairman's suggestion to refer to the Drafting Committee the draft articles along with any other suggestions reflected the traditional procedure under which the Commission usually operated. However, he himself was among those who could not in all conscience support any of the solutions that had been proposed at the present session with regard to article 19, considering them to be wrong and ill-advised. He could not, therefore, simply endorse the proposal to refer the draft articles to the Drafting Committee.

66. At no time had he or anyone else suggested that the Drafting Committee should be placed in a straitjacket. It had been suggested that the Drafting Committee should be authorized to put forward alternatives, bearing in mind three factors: the Special Rapporteur's proposed draft; the idea that a term other than "crime" should be used; and the idea that there was no qualitative difference between wrongful acts. That view had garnered some support but not enough for a consensus to emerge. There was a serious difference of opinion. There had been a basis for common ground, but it had not been used. There was, then, no alternative but to take a vote.

67. Mr. PELLET moved that the Commission proceed to a vote on the Chairman's suggestion.

*The suggestion was adopted by 18 votes to 6.*

68. Mr. YAMADA said that he had voted in favour of the Chairman's suggestion because he wanted to expedite the Commission's work on the topic of State responsibility in order to complete the first reading in accordance with the undertaking given to the General Assembly. His affirmative vote should not be interpreted as an endorsement of the draft articles proposed by the Special Rapporteur, with regard to which he entertained serious doubts for the reasons he had explained in detail (2396th meeting).

69. Mr. THIAM said that his position was the same as Mr. Yamada's. He, too, had voted in favour of the Chairman's suggestion, but that did not mean he agreed with the substance of the draft articles.

**The law and practice relating to reservations to treaties (continued)\* (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>9</sup> A/CN.4/L.516)**

[Agenda item 6]

**FIRST REPORT OF THE SPECIAL RAPPORTEUR  
(continued)\***

70. Mr. THIAM said that the Special Rapporteur's brilliant first report (A/CN.4/470) raised so many ques-

\* Resumed from the 2404th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).



tions that it could best be described as a “questionnaire report”. He intended to answer the more technical questions listed in the report at a later stage, and would confine himself to the questions of substance relating to the title of the topic, the preservation of what had already been achieved and the form the Commission’s work on the topic should take in future.

71. He had no objection to changing the title of the topic. Precedents for such a course did exist. The example that came most readily to mind was that of the draft convention on succession of States in respect of matters other than treaties, which had eventually seen the light of day as the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. The proposed change should not, of course, alter the substance of the topic, and he was satisfied that such was not the Special Rapporteur’s intention.

72. As to the issue of preserving what had been achieved, the problem before the Special Rapporteur was not unlike that facing an architect using a site on which a building was already standing. The architect could choose to do one of three things: he could pull down the building and replace it by a new one, a radical solution which, in the case in point, was clearly not envisaged by the Special Rapporteur or by any member of the Commission. The architect could, if the foundations and walls were not sufficiently solid and if the structure was faulty, embark on structural work to strengthen the building. Lastly, if the building was solid enough, he might carry out internal improvements so as to make the building more functional and better suited to its purpose. The Special Rapporteur appeared to be somewhat undecided between the second and the third solutions, which he set out very clearly in the report. As for the arguments in favour of going back to the drawing board, he had some doubts about the view apparently held by the Special Rapporteur that, as a result of political developments in recent years, the precautions embodied in the reservations provisions in the Vienna Convention on the Law of Treaties (hereinafter referred to as the “1969 Vienna Convention”), the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the “1978 Vienna Convention”), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the “1986 Vienna Convention”), were perhaps no longer necessary. Political detente, however welcome, was not in his view a sufficient inducement to States to drop their guard where the safeguarding of their fundamental interests was concerned. The flexible system governing reservations established in 1969 was more than ever necessary, as the Special Rapporteur himself recognized in the report by admitting to being very much attracted by the second approach which preserves what has been achieved by existing provisions, adding that the representatives of States expressed their support for the existing provisions.

73. For his own part, he entirely shared the view set out in the report to the effect that the rules on reservations laid down in 1969 had over the years come to be seen as basically wise and as having introduced desirable certainty. In the case under consideration, the architect

should leave the structure of the existing building alone and should concentrate on making some internal improvements.

74. With regard to the form the Commission’s future work should take, he was not in favour of opting for only a detailed study of the problems involved or even an article-by-article commentary on existing provisions, a sort of guide to the practice of States and international organizations on reservations, as proposed in the report. Apart from the fact that embarking on the preparation of such a guide would be quite inconsistent with the proposed change of title for the topic, he could find no reference to preparing studies in the Commission’s statute, in which articles 16 and 20 spoke only of “drafts” or “final drafts” in connection with both the progressive development and the codification of international law. The idea of preparing draft protocols to the existing conventions was more acceptable, but it might prove difficult to supplement and refine the existing texts without disturbing the delicate balance of the whole edifice. Of the various possibilities suggested by the Special Rapporteur, he would favour the preparation of model clauses adapted to special categories of multilateral treaties, which States would be free to adopt if they so desired.

75. In conclusion, he wished to thank the Special Rapporteur and encourage him to continue on the path of wisdom and moderation in the same spirit of flexibility as that which had inspired the authors of the 1969 Vienna Convention.

76. Mr. MIKULKA said he joined with other members in congratulating the Special Rapporteur on an excellent first report, and particularly on the comprehensive way in which the problems of the topic were set out in chapter II and the interesting reflections on the scope and form of the Commission’s future work in chapter III. The report testified to the Special Rapporteur’s prudent approach towards the problems and to his no less praiseworthy respect for what had already been achieved. The survey of the Commission’s previous work on reservations contained in chapter I was a most useful guide to the history of the topic, and he agreed with the view expressed in the report that the regime of reservations as it had emerged from the 1969, 1978 and 1986 Vienna Conventions constituted a success, even if the flexible and pragmatic consensual system that the Conventions confirmed often rested on ambiguity or on carefully calculated silence.

77. The Special Rapporteur had classified the existing problems under two headings: that of ambiguities and that of gaps. Although the distinction was perhaps open to doubt, it could be maintained because the Special Rapporteur made it quite clear what was meant by each category. On the question whether the problems enumerated in the first report more or less covered the problem, he would be inclined to reply in the affirmative.

78. The questions relating to the permissibility of reservations and those relating to the problem of permissibility and opposability, went to the very heart of the problem. Assuming that the regime of reservations could vary depending on the specific object of certain treaties or provisions, differing answers might also be called for



in the case of some of the questions. As for the proposed systematic study of the practice of States and international organizations, such a study was necessary, even if it would not, perhaps, shed much additional light on the problem.

79. In the section on gaps in the reservations provisions in the Vienna Conventions, the Special Rapporteur raised the issue of reservations to bilateral treaties. Admittedly, in the 1969 Vienna Convention the point was left "in the dark", but the 1978 Vienna Convention was far clearer inasmuch as article 20, on reservations, was placed in the section relating exclusively to multilateral treaties.

80. With reference to the question of problems left unsolved by the 1978 Vienna Convention, the statement in one paragraph to the effect that article 20 of the Convention applied in the case of the decolonization or dissolution of States was no doubt due to a technical error, since article 20 applied only in the case of the emergence of a newly independent State resulting from the process of decolonization, including cases of newly independent States formed from two or more territories. It did not cover other categories of succession, such as cession of a part of the State territory or the uniting or separation of a State, the latter category including dissolution and secession. The fact that the 1978 Vienna Convention contained a provision on reservations for newly independent States but none for the other categories seemed to him to reflect a certain philosophy. The essential rule in the case of a newly independent State was the rule, often inaccurately described as the "*tabula rasa*" rule, set forth in article 16 of the Convention, under which "a newly independent State was not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty had been in force in respect of the territory to which the succession of States related". The act of notification of succession by which a newly independent State established its status as a party to any multilateral treaty therefore had at least some elements in common with an act whereby a State expressed its consent to be bound by a treaty. It therefore appeared entirely logical that the Convention should give a newly independent State the right to formulate its own reservations in respect of a treaty, while at the same time proceeding on the principle that reservations made by the predecessor State should be maintained except in the event of an indication of a contrary intention by the successor State (art. 20, para. 1).

81. The situation was not the same in cases of cession (transfer) of a part of a territory, where the principle of variability of the territorial limits of a treaty applied and, consequently, the problem of succession in respect of treaties did not arise (except in the case of treaties establishing frontiers and other territorial regimes). In such cases, however, the rule of continuity applied *ipso jure* and the treaty was maintained in the form in which it had existed at the date of the succession.

82. Similarly, in cases of the uniting or separation of States (including dissolution), articles 31 and 34 of the 1978 Vienna Convention confirmed the rule of continuity *ipso jure*. The situation was qualitatively different from that of newly independent States. No expression of

the will of the successor State was required in order to bring the continuity rule into operation, and therefore no new reservations were called for. As for the withdrawal of the reservations of the predecessor State, the relevant rules of the law of treaties codified in the 1969 Vienna Convention applied and, accordingly, there was no need for new rules in the context of the topic under consideration.

*The meeting rose at 1 p.m.*

## 2407th MEETING

*Thursday, 29 June 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

### **The law and practice relating to reservations to treaties (continued) (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>1</sup> A/CN.4/L.516)**

[Agenda item 6]

#### **FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. MIKULKA said that he had already explained (2406th meeting) why it was logical to include a provision in the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") with regard to reservations applicable to newly independent States, except for States that came into being as a result of uniting, dissolution or separation. The position of those two categories of States in the case of succession to multilateral treaties was based on different principles. In the first case, a notification of succession was necessary, whereas, in the second, the rule that applied was that of automatic continuity, in other words, the successor State maintained the reservations of the predecessor State. That was why it was pointless to include an express provision on the matter.

2. That did not, however, mean—and there he agreed fully with the Special Rapporteur—that there was no gap

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

in the 1978 Vienna Convention, particularly concerning the maintenance by a newly independent State of the objections formulated by the predecessor State or the possibility open to third States to object to the maintenance of a reservation by a newly independent State. One could also ask whether there was not a gap in articles 32 and 36 of the Convention applicable to States that came into being as a result of a unification or a separation, which provided for a notification of succession in respect of treaties that were not in force at the date of succession, and also in articles 33 and 37, which dealt with the succession of States that came into being as a result of a unification or a separation by treaties signed by the predecessor State, subject to ratification, acceptance or approval. In the case of treaties which had already been in force at the date of succession, the rule of automatic continuity applied. In the case of treaties which had still not entered into force at that date, however, the successor State had to make its wishes known. In principle, the successor State was entitled to make reservations at the time when it ratified, accepted or approved a treaty signed by the predecessor State, since that was what the law of treaties provided. He queried what the position was when reservations had already been formulated by the predecessor State at the actual time of signature, whether the successor State, when ratifying the treaty concerned, should maintain those reservations, and whether it could withdraw them or whether such reservations should even be deemed to be non-existent in that particular case, as it was supposedly for the successor State to settle the matter.

3. The Special Rapporteur's approach to the problems relating to the special object of certain treaties or certain provisions and the problems resulting from a few special treaty techniques was acceptable, in his view. A list of the main problems on which it was difficult to take a position without examining them in more detail was presented in the first report (A/CN.4/470).

4. As to the scope of the Commission's future work on the topic of reservations to treaties, he did not really have any objections to the proposal that the title of the topic should be amended by deleting the word "practice" so as not to give the impression that there might be a contradiction between law and practice. It was important not to suggest, by going into too much detail, that the Commission wanted to lay down a rigid framework for the study contemplated. At the same time, he wondered whether that amendment to the title was really necessary at the present stage of the work. The word "reservations" did not, perhaps, encompass objections and it might therefore be better not to take a decision with respect to the title and to keep the existing title for the time being. Also, he fully shared the concerns expressed by the Special Rapporteur in his report, with regard to the preservation of what had been achieved.

5. Lastly, as to the form that the results of the Commission's work might take, his own preference would be for protocols. In that connection, the Commission could learn from the experience it had acquired during its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Obviously, as the Special Rapporteur suggested, it was less risky for the Commission simply to fill in the gaps and remove

the ambiguities in the existing rules than for it to embark on a revision of those rules. But even a limited exercise of that kind could lead to different regimes of reservations. For that reason, the best solution would perhaps be to carry out a study of the problems that arose in order to lay down a kind of guide to practice in the matter of reservations. That would not preclude the possibility of drafting rules in the form of articles together with commentaries and the door to the two other options referred to by the Special Rapporteur in his report would be left open, namely, the preparation of protocols and even of a convention.

6. Mr. IDRIS said he congratulated the Special Rapporteur on an excellent report which was extremely rich in its legal content. With regard to the direction the draft should take, it would not be realistic, in his view, to embark on the preparation of a draft convention. At the present time, reservations were often used to remedy the lack of a common basis on which to make an interpretation, particularly when the associated States had not been fully involved in the preliminary negotiations or were not fully acquainted with the course of those negotiations. To try to draft protocols that would amend the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"), the 1978 Vienna Convention, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention") seemed to be as difficult as it was unrealistic. The Special Rapporteur's point in that connection, namely, that the parties to the main treaty and the parties to an additional protocol could differ, was well taken. The 1969 Vienna Convention was perhaps not perfect from the technical standpoint, but how could one be certain of drafting a text that was both technically perfect and in conformity with the wishes of States? The more heated the political and legal controversy the greater the need for reservations.

7. Under the circumstances, the Commission might wish to carry out its task in two stages. First of all, it could examine the inconsistencies and ambiguities in the 1969 Vienna Convention and endeavour to reach a consensus on ways of correcting them. Consensus was important, as the proposed study might reveal, in the light of the *travaux préparatoires*, that there were factors which justified the retention of some of those inconsistencies and ambiguities. Once that study had been carried out, the Commission could then decide, if necessary, to draft guidelines or clauses on which States could draw. For that purpose, the Commission should refer to the *travaux préparatoires* of the 1969 Vienna Convention and compile information on the practice by the main depositaries of multilateral treaties.

8. While he understood the Special Rapporteur's concern about the title of the topic, he considered that, inasmuch as it had been adopted as worded by the General Assembly, the Commission would have to have very good reasons for amending it. The existing title might turn out to be unsuitable if the Commission did not undertake a complete study of State practice. Also, the Commission should not, in his view, consider the separate question of reservations to bilateral treaties or to the

constituent instruments of international organizations. Lastly, the Commission should pay special attention later on to the problems connected with the object and specific nature of certain treaties, dealt with by the Special Rapporteur in his report, in which he had explained why, in his view, those treaties called for special treatment. He himself also considered that the existing regime of reservations did not apply to that category of treaties.

9. Mr. KABATSI expressed his congratulations to the Special Rapporteur on his first report. The Special Rapporteur dealt first with the historical development of the question so as to place it in its proper perspective and to identify all the problems that arose so that the parties to treaties wishing to make reservations would have a better understanding of the applicable legal regime. The Special Rapporteur rightly devoted part of the report to identifying the ambiguities and gaps in the provisions on reservations in the 1969, 1978 and 1986 Vienna Conventions and drew up a long list of the problems encountered in that connection, to which the Commission must reply. The Special Rapporteur had examined the subject in depth, as was demonstrated by the length of his report, which thus provided an extremely useful basis for work and would enable the Commission to map out its future work on the question more effectively.

10. The problems raised by the gaps and ambiguities in the provisions of the Vienna Conventions were not only numerous, but sometimes so vast that it seemed virtually impossible to solve them. Initially, therefore, it might be better for the Commission to deal with those that were readily identifiable in current practice. It would not of course be so easy to make a distinction between the problems that were self-evident and those that were less so, but the Commission should make an attempt to do so, so that the confusion caused by the ambiguities and gaps in the Vienna Conventions did not get worse as time went by.

11. Reservations sometimes had their uses. Having regard to the differences between States in terms of culture and political and economic development, inevitably some States could not always, in the short term, fulfil the obligations they had entered into on becoming parties to multilateral treaties, even though they might be ready to do so at a later stage. Consequently, so long as there was compliance with article 19 of the 1969 Vienna Convention, in other words, so long as the treaty did not expressly prohibit the reservation and that the reservation was not incompatible with the object and purpose of the treaty, States were at liberty to make reservations.

12. The Special Rapporteur correctly pointed out in his report that the determination of the validity of reservations was probably the point on which the ambiguity of the provisions of the relevant Vienna Conventions was most obvious and referred in that context to the notions of permissibility of a reservation, on the one hand, and opposability of a reservation, on the other. The more logical thesis argued by Mr. Bowett in 1977,<sup>2</sup> that is to say permissibility in contrast to opposability, cited by the Special Rapporteur in his report might help clear up

that ambiguity. The Special Rapporteur also rightly raised the problem of the determination of the compatibility of a reservation with the object and purpose of the treaty. It should be stated which authority was competent to make that determination and on the basis of which criteria.

13. Concerning gaps, the Special Rapporteur stressed the absence of indications in the Vienna Conventions concerning reservations to bilateral treaties. For his part, he thought that the Commission should confine itself to reservations to multilateral treaties. He also noted the difficulties that distinguishing between reservations and interpretative declarations posed, but considered that the latter could be treated as reservations if they were based on the same assumptions. In respect of reservations to human rights treaties, he believed that they could be necessary, especially when the implementation of certain economic, social and political rights proved difficult in the short term.

14. Turning to chapter III of the report, which dealt with the scope and form of the Commission's future work, he shared the Special Rapporteur's view that the provisions on reservations of the 1969, 1978 and 1986 Vienna Conventions had the great merit of being flexible and adaptable. Consequently, it was essential to preserve what had been achieved with those provisions, which must be improved and fleshed out. As to the title of the topic, he did not oppose retaining the shorter wording proposed by the Special Rapporteur. Lastly, he judged it premature to decide at present on the form that the results of the Commission's work might take. None of the solutions proposed by the Special Rapporteur was without interest; the most suitable one should be chosen.

15. Mr. YAMADA said that, as the Special Rapporteur had pointed out, there were two schools on the validity of reservations to treaties, the "permissibility school" and the "opposability school". The difference between the two was based on the way in which they interpreted the provisions of the 1969 Vienna Convention that related to reservations: one gave priority to article 19 on the permissibility of reservations and the other to articles 20 and 21 on acceptance of and objections to reservations and their effects. The interpretation in the "opposability school" that reservations incompatible with the object and purpose of the treaty would be valid after having been accepted by other States was not convincing, because there were no specific provisions in the 1969 Vienna Convention which made it possible to formulate such reservations notwithstanding article 19. Furthermore, based on the interpretation of the "opposability school", reservations prohibited in accordance with the treaty as referred to in subparagraphs (a) and (b) of the said article would be equally valid if they had been accepted by other parties. However, such an idea seemed apparently inappropriate. In his view, only permissible reservations could be formulated within the framework of the 1969 Vienna Convention, and impermissible reservations were not valid even if they had been accepted by other States.

16. Actually, in the implementation of multilateral treaties, the judgement whether a reservation was compatible with the object and purpose of the treaty was usu-

<sup>2</sup> See 2400th meeting, footnote 2.

ally left to each State because in many cases there were no institutions with authority to rule on such compatibility. Therefore, the assessment by each State played a decisive role in judging the object and purpose of the treaty, the content of the reservations formulated and the compatibility of such reservations with the object and purpose of the treaty. Owing to those large subjective elements, there was a case in which it looked as if an "impermissible" reservation became valid after having been accepted by other States. However, if a multilateral treaty stipulated that a given institution might decide on the validity of reservations and that institution judged that a reservation was incompatible with the object and purpose of the said treaty, such reservation became invalid as a matter of course, even though it had been accepted by the other contracting parties. In that regard, the judgement by the European Court of Human Rights in the *Belilos* case<sup>3</sup> showed that reservations which could have been regarded as valid under articles 20 and 21 of the 1969 Vienna Convention could nevertheless be invalid when they were considered impermissible by a competent authority. That judgement might be interpreted as confirming that article 19 on the permissibility of reservations took precedence over articles 20 and 21 on acceptance of and objection to reservations and their effects. However, as the Special Rapporteur had pointed out, the judgement in question had been made in the special context of human rights treaties and did not necessarily set a precedent for other multilateral treaties of a reciprocal nature.

17. In the case of multilateral treaties of a reciprocal nature, it must be assumed that the decision concerning the validity of reservations would in practice produce effects not only with regard to the reserving State, but also in respect of the other contracting parties. An institution, even ICJ, could hardly be expected to actively decide on the validity of a reservation in such a case, given the consequences that such a decision would have not only for the parties to the dispute, but also for all the parties to the treaty. Moreover, the reservations currently made by States were so numerous and varied that it was difficult to hear the positions of all the interested parties and to take all reservations into account in an appropriate manner. Accordingly, reservations which were considered to be impermissible from an objective point of view could continue to exist in practice with the implied acceptance of the other contracting States. In sum, the conflict between the "permissibility school" and the "opposability school" occurred because the former placed emphasis on the theoretical consistency of the rules of the 1969 Vienna Convention, while the latter attached importance to the satisfactory explanation of the practice stemming from the application of that Convention.

18. With regard to the legal effects of a decision to render a reservation invalid, some advocates of the "permissibility school" seemed to stress that the consent of a State to be bound by a treaty by ratification, acceptance, approval or accession became invalid when its reservation was declared invalid. In his view, such a position was not appropriate in the sense that it might well harm the stable present-day legal system. In an extreme case,

the entry into force of the treaty itself might be compromised by such a decision. In the *Belilos* case, the European Court of Human Rights had, on the contrary, judged that the State which had formulated an invalid reservation continued to be bound by the treaty even after the reservation had been decided to be invalid. That judgement deserved to be taken into consideration because of its practical interest. However, it posed a problem in that it was detrimental to the principle of consent, that is to say, in spite of the State having expressed its consent to be bound by the treaty on the premise of a certain reservation, it was required to be bound by the treaty even after its premise to its consent was denied. The matter should be examined further so that the principle of consent was to be brought into line with the requirement of a stable legal system.

19. The question of interpretative declarations likewise called for a number of comments. Some multilateral treaties, such as the United Nations Convention on the Law of the Sea, allowed States to make declarations or statements not purporting to exclude or modify the legal effect of the provisions thereof, while prohibiting reservations or exceptions. But, in signing or concluding such treaties, many States made "declarations" which in fact were reservations. It was therefore necessary to decide whether such declarations were genuine interpretative declarations or whether they were not in fact "disguised reservations". The question remained because, in the general framework of existing multilateral treaties, there was no authoritative party to take such a decision. Depositaries of multilateral treaties were not the appropriate body to make judgement on those issues. In general, they were not given such competence by the contracting States. Specifically, the Secretary-General of the United Nations had been instructed by the General Assembly not to pass judgement, in the exercise of his functions as depositary, on the legal effects of documents containing reservations or objections and to leave it to each State to draw the legal consequences from such communications.

20. In that regard, it was perhaps worth giving thought to the idea of introducing a system of "collegiate decision" by a majority of contracting States. At the United Nations Conference on the Law of Treaties<sup>4</sup> for the adoption of the 1969 Vienna Convention, the proposal of introducing the "collegiate decision" system on the admissibility of a reservation had not been accepted. However, the question whether a declaration corresponds to a reservation was a precursor to the question of the admissibility of a reservation. Therefore, such a "collegiate decision" system might play a useful role in establishing a stable legal system, provided that its purpose was limited to judging the legal character of a declaration.

21. Interpretative declarations also posed a number of technical problems. With regard to a multilateral treaty prohibiting the formulation of a reservation, a disguised reservation must of course be considered invalid. On the other hand, in the case of a multilateral treaty allowing the formulation of reservations, how would an interpretative declaration be treated if a competent authority declared that it actually constituted a permissible reservation? If no express objection had been made to such a

<sup>3</sup> Ibid., footnote 8.

<sup>4</sup> See 2402nd meeting, footnote 5.

declaration, did the silence of the other States mean acceptance of that reservation provided for in article 20, paragraph 5, of the 1969 Vienna Convention? In that case, the other contracting States might have remained silent either because they had regarded the declaration as a genuine interpretative declaration or because they had accepted it, even though they had regarded it as a reservation. It was very difficult to differentiate between the former and the latter cases and the question arose whether the provisions of article 20, paragraph 5, applied to the former case.

22. The treatment of interpretative declarations, which lacked express provisions in the 1969 Vienna Convention, was thus of great importance for the practical implementation of multilateral treaties.

23. Concerning the four methodological questions raised by the Special Rapporteur at the end of his report, he was in favour, first, with regard to the title of the topic, of adopting the wording—"Reservations to treaties"—proposed by the Special Rapporteur. However, he did not think that the Commission should deal with reservations to bilateral treaties, because even if they were to exist, they were, in fact, amendments to those treaties and did not require the formulation of general rules. The Commission should confine its efforts to reservations to multilateral treaties, giving preference to those that were open to universal participation. The title of the topic should precisely reflect the scope of the Commission's work on the topic.

24. On the second question whether to challenge the rules on reservations contained in the 1969 Vienna Convention, he said that although those rules had many gaps, their ambiguity and flexibility had served their purpose well and States had developed a broad practice based on those provisions. If the Commission challenged them, it might well create chaos and confusion. The Commission should preserve what had been achieved and build on the existing rules of the Vienna Convention.

25. As to the third question, which concerned what form the results of the Commission's work might take, he would state his position once the discussion of the topic had progressed.

26. With regard to the fourth question raised by the Special Rapporteur, he believed that the Commission should examine reservations by category of treaties, which might each require different rules.

27. Mr. ARANGIO-RUIZ said that he still remembered from his university days a particular problem on reservations with regard to which he had had to do a considerable amount of research. Since that time, however, he had continued to study, with regard to reservations, only what every professor of international law should know about that matter, strictly in order to perform his teaching duties: in particular the advisory opinion of ICJ on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide<sup>5</sup> and the corresponding doctrine. It had been without enthusi-

asm that he had greeted the Commission's decision to consider the topic.

28. Today, however, he was glad that the task had been entrusted to Mr. Pellet, whose original thinking and great capacity for work he appreciated. In his first report, the Special Rapporteur gave a lively and stimulating overview of the question, which had piqued his own interest and curiosity. He was eager to hear more of the Special Rapporteur's ideas on the inconsistencies and gaps in the 1969 Vienna Convention and his suggestions on how to solve the problems raised. He was particularly interested by the distinction made in the report between reservations and interpretative declarations. In terms of method, he agreed with the Special Rapporteur on the advisability of preserving, above all, what had already been achieved.

29. Mr. EIRIKSSON said that, for the time being, he did not wish to engage in a substantive debate. He would focus his remarks on the four questions raised by the Special Rapporteur in his oral introduction to the report.

30. First, he endorsed the Special Rapporteur's suggestion that the title of the topic should be shortened to "Reservations to treaties". In fact, studying State practice in disputed areas did not appear to be useful because such practice was, at the very least, confusing. A recent effort by European jurists, himself among them, to resolve the ambiguities in very recent practice had failed. What, then, could be expected from an analysis of even earlier precedents? In that field, States needed the Commission more than it needed them.

31. Secondly, as to the relationship between the topic under consideration and the Vienna Conventions, the Special Rapporteur had raised the question whether the relevant provisions should be considered as "sacro-sanct". While the term itself was probably too strong, he recognized that the Commission should clarify and complete the rules set forth in the Vienna Conventions only as necessary, seeking to resolve any ambiguities. As an illustration, he mentioned the question of reservations to constituent instruments of international organizations, to which the 1969 Vienna Convention devoted an entire paragraph with incomplete results, as in the case of the corresponding paragraph of the 1986 Vienna Convention.

32. Thirdly, with regard to the form that the Commission's work should take, he proposed that it should adopt "guidelines on certain issues relating to reservations to treaties", on the understanding that the number of those issues would be limited. First, bilateral treaties should be excluded. Secondly, without spending any more time discussing the legal nature of "interpretative declarations", it should simply be stated that the question whether or not a declaration constituted a reservation depended on its content rather than on what it was called. The guidelines should deal primarily with objections to reservations and the resulting consequences. The Commission might consider as lesser issues the effect of State succession on reservations and the question of reservations to constituent instruments of international organizations. At some point or other, it would probably be necessary to determine whether reservation regimes differed between specific fields of activity, such as

<sup>5</sup> See 2400th meeting, footnote 5.

human rights or the environment. His own prejudice was against having specific reservations regimes for different fields.

33. As to the method of work, he hoped that, for the areas which the Commission finally selected, the Special Rapporteur could prepare a comprehensive report indicating the difficulties encountered. The draft guidelines could, following the debate in plenary, be submitted to a working group created for that purpose. He hoped that the work could be finished within three sessions, submitted to Governments and fully completed by the end of the next quinquennium.

34. Fourthly, he did not think that the Commission should prepare draft model clauses.

### **Cooperation with other bodies (concluded)\***

[Agenda item 9]

#### **STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE**

35. The CHAIRMAN welcomed Mr. Eduardo Vío Grossi, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

36. Mr. VÍO GROSSI (Observer for the Inter-American Juridical Committee) said that he was honoured to take part, on behalf of the Inter-American Juridical Committee (IAJC), in the Commission's meeting. He would later have the privilege of submitting the Commission's conclusions to the next session of the Committee, to be held at its headquarters in Rio de Janeiro, Brazil, in August 1995.

37. There had always been close ties between the Commission and IAJC as a result, no doubt, of the similarity of the functions assigned to them. It thus seemed entirely natural that some members of IAJC should later become members of the Commission. That had been the case with Mr. Vargas Carreño and Mr. Villagrán Kramer, who were well acquainted with the work which IAJC, the oldest body in the inter-American system, had been doing since 1906 on the codification and progressive development of international law.

38. At its first regular session in 1995, held at Washington, D.C., headquarters of OAS, of which it was a principal organ, IAJC had adopted one decision and eight resolutions.

39. The decision related to the International Law Course held each year in August, at the same time as the Committee's session, at Rio de Janeiro in cooperation with the Getúlio Vargas Foundation, Rio de Janeiro. The decision established a working group to organize the course, with the participation of the OAS Secretariat for Legal Affairs. The importance of that decision, which was apparently administrative, lay in its implications. The international law course had been offered for just over 20 years. The persons participating as students were

foreign affairs officials from OAS member States and academics from various universities in the Americas. The course was taught not only by members of IAJC, but also by guest professors, as well as representatives of other international organizations. The course offered an update on various topics, rather than an in-depth study of particular subjects of international law. With experience, it had been considered necessary to appoint a working group to evaluate the situation and to take appropriate steps to improve the course so that it would be more relevant to the development of international law in the Americas. The cooperation which the Commission provided in that regard through the participation of Mr. Calero Rodrigues and Mr. Vargas Carreño in the next international law course was sincerely appreciated.

40. The resolutions could be divided into two groups, those relating to the follow-up of topics and those expressing views on those topics.

41. With regard to the first type of resolution, IAJC reviewed studies on the topics considered and indicated the direction that, in its view, those studies should take. The resolutions dealt with topics which were of great interest to the Americas and to general international law, such as the right to information, international cooperation to combat corruption, inter-American cooperation to combat international terrorism, legal aspects of foreign debt and improvements in the administration of justice in the Americas.

42. The resolutions in the second group reflected the views of IAJC and dealt with the prohibition of transboundary abduction, the legal dimension of integration and international trade, and democracy in the inter-American system.

43. In its resolution on the ban on transborder kidnapping, IAJC, taking note of the treaty signed on 23 November 1994 by the Governments of Mexico and the United States of America, which expressly bans that type of kidnapping, stressed the importance of that instrument, which clearly demonstrated the international law principle of international law which imposes respect and preservation of the inviolability of the territorial sovereignty of States, and which also accurately defined transboundary kidnapping as an internationally wrongful act.

44. In that connection, IAJC recalled in the same resolution—and that was extremely important—that it had ruled in a juridical opinion, of 15 August 1992, on the international juridical validity of a decision handed down by the Supreme Court of the United States of America. In its opinion, IAJC had held that transboundary kidnapping, even when not expressly banned in the extradition treaties in effect between the countries involved therein, was in violation of the norms of international law.

45. In its resolution on the juridical dimension of integration and international trade, IAJC, after studying various mechanisms for integration and free trade in the region, noted that everything seemed to be moving in the direction of continental integration based on converging and interlocking systems; in that framework, it concluded that dispute settlement methods in regional and subregional integration and free trade systems must

\* Resumed from the 2391st meeting.



reflect the needs and realities of each system, be clearly structured, give individuals access to local courts and tribunals, be in harmony with the mechanisms provided for within the framework of the GATT/WTO, be applicable to disputes between States parties to the mechanism and States which were not, and apply to the system of foreign investments.

46. In its resolution on democracy in the inter-American system, IAJC, after taking note of the reports issued on that question, Inter-American practice, the rules of the Charter of OAS<sup>6</sup> and the interpretation of those rules by the Organization itself, noted that the OAS and its member States respected a number of principles and norms relating to the effective exercise of representative democracy.

47. First, every State of the inter-American system was required to ensure the effective exercise of representative democracy as part of its political organization. It had the right to choose the forms and means it believed to be suitable for that purpose.

48. The principle of non-intervention and the right of every State of the inter-American system to choose its political, economic and social regime without outside interference and to organize itself in the manner best suited to it could not justify a breach of the obligation to ensure the effective exercise of representative democracy within the framework of that regime or that organization.

49. OAS was empowered to encourage and strengthen representative democracy within each of its member States. In particular, it was incumbent upon OAS, through ad hoc meetings of Ministers for Foreign Affairs or of its General Assembly convened in special session, to determine, within the framework of the resolution on representative democracy,<sup>7</sup> those cases in which one of the member States had breached its obligation to ensure the effective exercise of representative democracy or had failed in the fulfilment of that obligation.

50. The abrupt or irregular interruption of the democratic institutional political process or of the lawful exercise of power by a democratically elected Government or the overthrow by force of a democratically constituted Government was equivalent, in the inter-American system, to a breach of the obligation to ensure the effective exercise of representative democracy.

51. Any State of the inter-American system which failed in its obligation to ensure the effective exercise of representative democracy was required to remedy that failure. The resolutions which OAS adopted in such a case had to be aimed at achieving that objective.

52. It would be seen from his statement that IAJC had a highly topical agenda which corresponded to the concerns of the Americas as well as to the present state of general international law. In addition, it included two

other topics which formed the subject of additional studies and which related to the peaceful settlement of disputes and to environmental law.

53. The agenda and the way in which IAJC tackled it would seem to indicate that the Committee today was less concerned with trying to codify international law than with promoting and improving the progressive development of the legal system in the Americas. The explanation for that was perhaps to be found not so much in the absence of new customary rules between American States as in the novelty of the topics under consideration. The globalization of some social phenomena and scientific and technological development had given rise to pressing problems which made it necessary for legal standards to be created as a matter of urgency, without the slow process required in order to constitute a rule of customary law. In that sense, IAJC would seem to be an efficient and useful collaborator of international law-makers in the Americas—i.e., the American States acting within the framework of OAS—rather than a codification body. Its task was, more than ever, to provide and suggest innovative solutions to new and formidable problems.

54. In conclusion, he said he was convinced that the traditional ties between IAJC and the Commission would make for increasingly intensive and fruitful collaboration between the two bodies.

55. Mr. de SARAM, speaking on behalf of the members of the Commission from the Asian countries, thanked Mr. Vío Grossi for being present in the Commission and for his remarkably interesting statement. Hearing it had made him realize that IAJC had been in existence for almost a century and that it was closely integrated in OAS. He had also been very interested to learn how the Committee functioned. Its annual course in general international law, which provided an occasion for practitioners and academics of the Americas to study together topics of general interest and current importance was certainly a sophisticated model of cooperation in the field of international law which countries of the Asian region might usefully follow. Some of the subjects studied by IAJC, such as the peaceful settlement of disputes and certain matters relative to environmental law, were very close to those under consideration by the Commission. It was also interesting to learn how IAJC functioned virtually as a specialized international organization for the codification and progressive development of international law.

56. Mr. TOMUSCHAT, speaking on behalf of the members of the Commission from the Western European and other States, said that, while the work of IAJC could be said to run parallel to that of the Commission, its scope of action was broader, since, in addition to general international law, it also dealt with matters such as human rights and was sometimes even called upon to issue an opinion on a specific case. Its pronouncement on the abduction, by emissaries of one State, of individuals in the territory of another State, for example, was of particular interest in that it related to an act which clearly constituted a serious violation of the basic rules of international law. The Committee had also studied the question of democracy in the American States and had for-

<sup>6</sup> Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 325).

<sup>7</sup> Resolution AG/RES.1080 (XXI-0/91) adopted by the General Assembly of OAS on 5 June 1991 (*Proceedings, Volume I, Twenty-First Regular Session, Santiago, Chile, June 3-8 (OEA/Ser.P/XXI.0.2)*, pp. 4 *et seq.*).



mulated a number of proposals in that connection which clearly reflected the idea of the "right to democratic government". Its work on the subject had a bearing on questions of direct interest to the Commission's Special Rapporteur on State responsibility: was it an international crime within the meaning of article 19 of part one of the draft currently before the Commission to topple a democratically-elected Government? Was there an international obligation for States to practice democracy? Where precisely did the borderline between crimes and delicts run? In the human rights field, international law obviously had some specific features which distinguished it from the traditional law of State relations.

57. IAJC also focused on other, equally interesting subjects such as environmental law or the formulation of legal rules relating to the fight against corruption, terrorism and drug trafficking. The Committee's work on environmental law had a bearing on the international liability topic; its work in connection with action to combat terrorism could help the Commission in its search for a definition of that term and the Committee's analysis of reservations to multilateral treaties could be of use to the Commission in its consideration of that topic. It was desirable that the Commission should henceforth have better access to the Committee's documentation and studies on all those subjects.

58. Mr. VARGAS CARREÑO, speaking on behalf of the members of the Commission from Latin America, said that the extensive and important work of progressive development and codification of international law performed by IAJC—of which he had been a member—had earned it the right to be known as the "legal conscience of Latin America". The work of regional bodies could not be contrary to universal standards; rather, those standards had to be taken into account in the instruments which regional bodies proposed. Thus, the initiatives taken by OAS, with IAJC assistance, in order to establish judicial cooperation between countries of the region in action to combat terrorism, drug trafficking and corruption, for example, could be enriched by the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind, but the Commission, in its turn, could not overlook the contributions of the Committee and other regional juridical bodies to the elaboration of the Code. The Commission had to take account not only of the practice of States, but also of the contributions made by regional bodies, which were far from negligible. For example, the Convention on Treaties, the Convention regarding Diplomatic Officers, the Convention regarding Consular Agents and the Convention on Rights and Duties of States had served as important precedents for the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Vienna Convention on the Law of Treaties. The influence on inter-American standards was clearly apparent in the case of other instruments in whose drafting the Commission had not participated. The wording of the General Assembly resolutions on the principle of non-intervention was, for example, practically identical to that of the Charter of OAS. The United Nations Convention on the Law of the Sea itself embodied concepts, such as the exclusive economic zone, which had their origin in decisions adopted by the Committee. That reciprocal influence between the United

Nations system and regional bodies should be maintained and developed; that would require closer and more efficient cooperation between the international and regional levels.

59. Mr. YANKOV, speaking on behalf of the Eastern European members of the Commission, recalled that some years before he had represented the Commission at a meeting of IAJC. On that occasion, he had been greatly impressed by the informal and free nature of the discussion, which had covered a very wide range of subjects of topical interest, as well as by the Committee's flexible working methods and the importance it attached to the dissemination of international law, doctrine and jurisprudence through its courses and publications. He had also been struck by the volume and wealth of documentation which had been placed at the disposal of the members of the Committee, which bore comparison with that of The Hague Academy of International Law and which would be of great use to anyone interested in the development of the doctrine, jurisprudence and practice of international law, not only within the Latin American framework, but also in terms of the Latin American perception of world problems. The concise but very rich report just given by the observer for IAJC showed that the great legal tradition of the Americas was being maintained at a very high level. The Commission would do well to meditate on the example of efficiency which the Committee provided in dealing within relatively short time-limits with important and topical issues relating to human rights, finance and trade, improvements in the administration of justice and cooperation between member States in judicial matters. Cooperation between the Commission and IAJC therefore deserved to be improved, not only at the level of ritual exchanges of annual reports and observers, but through a richer, more efficient and pragmatic exchange of information and documents.

60. Mr. RAZAFINDRALAMBO, speaking on behalf of the African members of the Commission, said that American jurists, and especially those from Latin America, were seen by their opposite numbers in Africa as pioneers and models whose work had always been a valuable source of inspiration in the elaboration of principles and rules corresponding to the state of economic, social and political development of Africa in the throes of democratic change. The Committee's many and varied achievements could not but contribute to the Commission's current discussions and studies. African jurists therefore welcomed the traditional and fruitful cooperation between the two bodies.

61. The CHAIRMAN said that all those who had been privileged to be personally involved in the work of IAJC knew to what extent that work represented a source of pride for the American continent and the world at large, as well as a definite contribution to the establishment of a world legal system. In expressing the hope that the fruitful cooperation which had existed between the Commission and the Committee for so many years would not only grow still stronger and deeper, but also assume more practical forms, he wished the Inter-American Juridical Committee every success in its future endeavours.

*The meeting rose at 1 p.m.*

## 2408th MEETING

[CHAPTER 2. ...]

Friday, 30 June 1995, at 10.15 a.m.

[Article 2]

[Redrafted and appears as paragraph 2 to article 1.]

Chairman: Mr. Pemmaraju Sreenivasa RAO

Article 3<sup>4</sup>

[Article 4]

[Deleted]

## Article 5. Responsibility of States

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Article 5 bis.<sup>5</sup> Establishment of jurisdiction

Each State party shall take such measures as may be necessary to establish its jurisdiction over crimes against the peace and security of mankind.

## Article 6. Obligation to extradite or prosecute

The State in the territory of which an individual alleged to have committed a crime against the peace and security of mankind is found shall either extradite that individual or refer the case to its competent authorities for the purpose of prosecution.

## Article 6 bis. Extradition of alleged offenders

1. To the extent that the crimes set out in articles ... are not extraditable offences in any extradition treaty existing between States parties, they shall be deemed to be included as such therein. States parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States parties which have established their jurisdiction in accordance with article 5 bis.

# Draft Code of Crimes against the Peace and Security of Mankind (continued)\* (A/CN.4/464 and Add.1, sect. B, A/CN.4/466,<sup>1</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509)

[Agenda item 4]

## DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING<sup>2</sup>

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles adopted by the Drafting Committee on second reading, which read:

[Part one

CHAPTER 1. ...]

Article 1.<sup>3</sup> Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set forth in Part Two.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

\* Resumed from the 2387th meeting.

<sup>1</sup> Reproduced in *Yearbook* ... 1995, vol. II (Part One).

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook* ... 1991, vol. II (Part Two), pp. 94-97.

<sup>3</sup> The Drafting Committee agreed that the question of the characteristics of the crimes under the Code should be examined at a later stage.

<sup>4</sup> The Drafting Committee agreed to revert to article 3 at a later stage.

<sup>5</sup> The question of jurisdiction will be reviewed, once the substantive articles on crimes are finalized, with a view to examining the possibility of exclusive international jurisdiction in the case of specific crimes including aggression.

*Article 7<sup>6</sup>**Article 8. Judicial guarantees*

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(a) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried without undue delay;

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

*Article 9. Non bis in idem*

1. No one shall be tried for a crime against the peace and security of mankind for which he has already been finally convicted or acquitted by an international criminal court.

2. Subject to paragraphs 3, 4 and 5, no one shall be tried for a crime against the peace and security of mankind in respect of an act for which he has already been finally convicted or acquitted by a national court.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried by an international criminal court for a crime against the peace and security of mankind if:

(a) The act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in the present Code; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried by a national court of another State for a crime against the peace and security of mankind if:

(a) The act which was the subject of the previous judgement took place in the territory of that State; or

(b) That State has been the main victim of the crime.

5. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

*Article 10. Non-retroactivity*

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

<sup>6</sup> The Drafting Committee agreed to revert to article 7 at a later stage.

*Article 11. Order of a Government or a superior*

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 criminal responsibility, [but may be considered in mitigation of punishment if justice so requires].<sup>7</sup>

*Article 12. Responsibility of the superior*

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

*Article 13. Official position and responsibility*

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

*Article 14<sup>8</sup>*

[Part two

...]<sup>9</sup>

*Article 15. Aggression*

[1. An individual who, as leader or organizer, commits an act of aggression shall be punished under the present Code.]

2. Aggression is the use of armed force by a State against the territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

...]<sup>10</sup>

*Article 19. Genocide*

[1. An individual who commits an act of genocide shall be punished under the present Code.]<sup>11</sup>

<sup>7</sup> The issue addressed in the bracketed phrase will be examined in the context of an article to be drafted on mitigating or aggravating circumstances.

<sup>8</sup> The Drafting Committee agreed to revert to article 14 at a later stage.

<sup>9</sup> The Drafting Committee will re-examine paragraph 1 of each of the articles of part two with a view to determining the possibility of adopting uniform language and in the light of the decision it will reach in relation to article 3.

<sup>10</sup> Article 16 (Threat of aggression) was not referred to the Drafting Committee. Articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) were referred to the Drafting Committee on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and, at its discretion, deal with all or part of the elements of articles 17 (Intervention) and 18 (Colonial domination and other forms of alien domination), as well as 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism).

<sup>11</sup> See footnote 7 above.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

3. The following acts shall also be punishable:

- (a) Conspiracy to commit genocide;
- (b) Direct and public incitement to commit genocide;
- (c) Attempt to commit genocide;
- (d) Complicity in genocide.<sup>12</sup>

2. Mr. YANKOV (Chairman of the Drafting Committee) said that, before presenting the Drafting Committee's report (A/CN.4/L.506), he wished to draw attention to the French version of article 12, where the phrase "*ou avaient des raisons de savoir*" was not felicitous and would be replaced by a more appropriate wording.

3. The Drafting Committee had devoted 17 meetings from 3 May to 21 June to the topic. He wished first to express his wholehearted thanks to the members of the Drafting Committee for their hard work and spirit of cooperation, and to the Special Rapporteur, Mr. Thiam, for his support and constructive attitude. He was specially grateful to Mr. Villagrán Kramer for acting as Chairman of the Drafting Committee during his own short absence from Geneva and also wished to convey his appreciation to members of the secretariat for their valuable assistance and exemplary devotion.

4. The topic had a history almost as long as the Commission itself. At its thirty-sixth session, the General Assembly had, in resolution 36/106, invited the Commission to resume its work, which had been initiated 30 years earlier, in 1951. The topic as it stood now had been included in the agenda of the Commission's thirty-fourth session, in 1982, at which time the Commission had appointed Mr. Thiam as Special Rapporteur for the topic. In General Assembly resolution 42/151, the title had been altered to speak of "crimes" rather than "offences" against the peace and security of mankind. In recalling those facts, he wished to emphasize that the exercise on which the Commission was engaged was more than the second reading of a set of draft articles; it was an important stage in a process which had a long-standing presence on the active agenda of the Commission.

5. The Drafting Committee's report was of a tentative character, for the Committee had not had enough time to complete the whole set of draft articles. At the stage of second reading, the Committee's work was normally of a "fine-tuning" character. In the present instance, however, the Committee had been faced with a much more substantive task because of a variety of factors. First, it should be remembered that, when adopting the draft on first reading,<sup>13</sup> the Commission had deliberately deferred

some important issues to the stage of second reading. As indicated in the Commission's report on its forty-third session,<sup>14</sup> those issues had included the question of applicable penalties and the question of whether attempt should be punishable in the case of all crimes or only some of them. Secondly, the commentaries adopted at the forty-third session indicated that on a number of issues the views of members had been divided; those divergences had, of course, resurfaced at the stage of second reading. Thirdly, the mandate given to the Drafting Committee by the Commission in plenary at the present session had implied major changes in the scope of the draft and the structure of a number of articles. It would be recalled in that connection that at its 2387th meeting, the Commission had decided to refer to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report (A/CN.4/466) and of the comments and proposals made in the debate, on the understanding—and he wished to emphasize the point—that, in formulating those articles, the Drafting Committee would bear in mind, and at its discretion, deal with all or part of the elements of the following articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism). As a result of those three factors, the Drafting Committee had been faced with a burdensome task which could not be completed at the present session. Even those articles which the Committee had adopted and for which it was presenting a text to the plenary might have to be reviewed once the second reading of part two will have been completed. Some of the articles in question, such as the article on apartheid, could be considered under the heading of crimes against humanity. There were, of course, some other questions which remained open, particularly in connection with protection of the environment, but that was a different issue.

6. In the light of all those considerations, the Drafting Committee recommended that the plenary should consider the present report as an "interim document" and should defer adoption of the articles until its next session, when, in accordance with the timetable adopted for the remainder of the quinquennium, the second reading was to be completed and the draft Code finally adopted for submission to the General Assembly with the commentaries attached thereto. In his view, that should be one of the priority tasks of the next session.

7. Going on to introduce the text adopted by the Drafting Committee on article-by-article, he recalled that chapter I of part one of the draft Code as adopted on first reading had been entitled "Definition and characterization" and that it had consisted of articles 1 and 2, respectively entitled "Definition" and "Characterization". In the light of observations made in plenary and of the comments of Governments, and bearing in mind the Special Rapporteur's suggestions in his twelfth report,<sup>15</sup> the Committee had redrafted the two articles and

<sup>12</sup> The Drafting Committee will re-examine paragraph 3 of the article in the light of the decision it will reach in relation to article 3.

<sup>13</sup> *Yearbook* . . . 1991, vol. II (Part Two), pp. 93 *et seq.*

<sup>14</sup> *Ibid.*, paras. 171-172.

<sup>15</sup> *Yearbook* . . . 1994, vol. II (Part One), document A/CN.4/460.

had combined them in a single text now before the Commission as article 1.

8. Although entitled "Definition", article 1 as adopted on first reading had not provided a real definition but had, rather, purported to be a "scope" article. Accordingly, the Committee's reformulation, which appeared in paragraph 1 of article 1, did not alter the substance of the text adopted on first reading, except in one respect. While it restricted the scope of the draft to the crimes against the peace and security of mankind enumerated in part two, it did not exclude the possibility that there might be other crimes against the peace and security of mankind; it merely specified that only the crimes listed in part two were within the purview of the Code, a point that would be clearly explained in the commentary. The commentary would also indicate that the phrase "crimes against the peace and security of mankind", wherever it appeared in the draft, should be understood as referring to the crimes listed in part two. The Committee had considered the possibility of adding to paragraph 1 the words "hereinafter referred to as crimes against the peace and security of mankind" in order to dispel any possible misunderstanding, but had come to the conclusion that the shorter text was more appropriate and that the requisite explanation could be provided in the commentary. It would also be noted that the words "under international law", which had appeared in square brackets in the text adopted on first reading, had been deleted as they had at the present time become superfluous.

9. Article 2 as adopted on first reading had been entitled "Characterization". Some of the Governments which had commented on it had found it unnecessary and had suggested its deletion. The purpose of the article had been to establish the autonomy of the characterizations of international criminal law with regard to internal law. The Committee had seen merit in clarifying the relationship between domestic law and international law with respect to the crimes defined under the Code. Paragraph 2 of article 1 therefore established the supremacy of the characterizations of international law over those of internal law. Since that aspect was closely related to the issue of the scope of the draft Code, the Drafting Committee had agreed to cover it in paragraph 2 of article 1.

10. The title of the article had been changed to read "Scope and application of the present Code" so as to reflect the contents of the provision more closely and adequately.

11. The issue of the characteristics of crimes against the peace and security of mankind was one which deserved further attention and the Drafting Committee intended to revert to it once it had completed its work on the list of crimes to be covered and on the definition of those crimes. It would then have the requisite background material, based on the individual draft articles, for inferring, if necessary, the elements that might characterize crimes against the peace and security of mankind.

12. The title of chapter I of part one depended on the contents of the chapter and of the articles it would comprise, and had therefore been left in abeyance.

13. As to chapter II of part one (General principles), it would be remembered that the first article in that chapter had been article 3, entitled "Responsibility and punishment", which had, *inter alia*, addressed the problem of complicity and attempt, one which had not been finally settled on first reading. The Drafting Committee intended to revert to that problem and to article 3 as a whole at a later stage, on the basis of the definitions of the various crimes to be covered by the draft Code.

14. It would also be recalled that the draft adopted on first reading had contained an article 4 entitled "Motives", specifying that responsibility for a crime against the peace and security of mankind was not affected by any motives invoked by the accused. In his twelfth report the Special Rapporteur had noted that the provision had prompted reservations on the part of Governments, some of which had advocated its deletion. The Committee had taken the view that the article blurred the distinction between "motive" and "intent", and had felt that motive should be addressed in the context of extenuating or aggravating circumstances. It had therefore heeded the advice of the Special Rapporteur and it recommended that article 4 should be deleted.

15. In the view of the Drafting Committee, the function of article 5 (Responsibility of States) was that of a saving clause indicating that the criminal responsibility of an individual for a crime against the peace and security of mankind had no bearing on any question of State responsibility. The Committee had agreed that the wording adopted on first reading was problematic. Some members would have preferred to delete the article, which they regarded as an unnecessary reminder that questions of State responsibility were dealt with under another topic. Other members had thought it useful to make it clear that the criminal responsibility of an individual was without prejudice to any question of State responsibility under international law. The Committee had reformulated article 5 accordingly. The title remained unchanged. The Committee intended to consider later on the possibility of transferring the adopted text to article 1, where it would appear as paragraph 3. Turning to articles 5 *bis* and 6, and taking up article 6 first, he said that it embodied the fundamental *aut dedere aut judicare* principle underlying a large number of penal law conventions concluded over the past 25 years with a view to ensuring the punishment of a variety of crimes of international concern. The Drafting Committee had noted that the text adopted on first reading departed in several respects from the corresponding provisions of the penal law conventions in question. First, the word "try" was replaced by the words "refer the case to its competent authorities for the purpose of prosecution". The Committee had opted for the latter wording, which, aside from enjoying a wide measure of acceptance among States, had the advantage of preserving the required degree of prosecutorial discretion.

16. Secondly, the relevant provisions of the conventions in question explicitly ruled out the possibility of exceptions and specified that the obligation to extradite or prosecute was not conditional upon the offence having been committed in the territory of the State in whose territory the alleged offender was found. The Committee had examined the possibility of including parallel provi-

sions in article 6 and had come to the conclusion that, in the context of the draft Code, such clarifications would not serve any useful purpose and might in fact detract from the absolute character of the "prosecute or extradite" obligation. The commentary would make it clear, however, that the obligation in question did not admit of any exception, that it was binding on the State in whose territory the alleged offender was found, even in the absence of any request for extradition, and that it had to be complied with in good faith and, in particular, without undue delay.

17. It would be recalled that article 6 as adopted on first reading had contained two additional paragraphs. Paragraph 2 had dealt with the question of the order of priorities to be followed by a State faced with several requests for extradition. As indicated in paragraph (4) of the commentary,<sup>16</sup> the question was highly complex: should precedence be given to territoriality, the nationality of the victim, the freedom of action of the State which had received several requests for extradition, the requirement of the proper administration of justice, or some other criterion? On first reading, the Commission had found it impossible to reconcile the various positions on that issue. It had, however, highlighted the importance of the territoriality criterion by requiring that "special consideration shall be given to the request of the State in whose territory the crime was committed". As the commentary made clear, even that compromise formula had not been generally accepted and had given rise to express reservations.

18. The same doubts had resurfaced in the Drafting Committee at the present session. It had first been pointed out that paragraph 2 amounted to a political statement entailing no obligations on the part of the State which had received the requests, and was therefore of little legal value. As regards the possibility of establishing a clear-cut order of priority among extradition requests, the prevailing view had been that legal systems varied too much in that particular respect for any attempt at unification to be likely to succeed, and that upsetting well-established legal traditions would reduce the acceptability of the Code itself. The Drafting Committee therefore recommended that paragraph 2 should be deleted and the matter be left to the discretion of the States concerned, it being understood that appropriate explanations would be provided in the commentary.

19. The Committee had noted that paragraph 3 no longer corresponded to the factual situation on the international scene in that, subsequent to its adoption on first reading in 1991, the draft statute for an international criminal court had been completed by the Commission and was under consideration in the Ad Hoc Committee on the Establishment of an International Criminal Court.<sup>17</sup> It had therefore agreed to delete the paragraph. However, the Committee intended to review the question of the relationship between the Code and the future statute for an international criminal court once the list of crimes under the Code had been finalized, with a view to examining the possibility of exclusive international juris-

diction in the case of specific crimes, of which aggression was one.

20. If the "prosecute or extradite" option recognized in article 6 was to be effective, either alternative should be capable of implementation. The "prosecute" option required that the State where the alleged criminal was found should have jurisdiction over the crime. That requirement was addressed in new article 5 *bis*. The text proposed by the Drafting Committee was modelled on the corresponding provision which appeared in all the penal law conventions to which he had referred earlier and was self-explanatory. Inasmuch as article 6 now laid down an obligation to "refer the case to its competent authorities"—and not an obligation to try, as provided for in the text adopted on first reading—article 5 *bis* was of special importance, bearing in mind that the whole purpose of the "extradite or prosecute" principle would be frustrated if the courts of a State in whose territory an individual alleged to have committed a crime under the Code was found were to decide, once they had been seized of the case by the competent authorities, that they lacked jurisdiction.

21. The second alternative contemplated in article 6—extradition—required a legal basis for the extradition of alleged criminals in a variety of situations so that the State where an alleged criminal was found would have a real rather than an illusory choice. Accordingly, the Drafting Committee had agreed to include in the draft an article 6 *bis*, which was closely modelled on the corresponding provision in existing conventions. That article might have to be reviewed when the question of the relationship between the Code and the statute for an international criminal court had been examined more thoroughly.

22. The Drafting Committee, which was not recommending any text for article 7, on non-applicability of statutory limitations, noted that that article had been the subject of reservations on the part of a number of States, and that existing instruments on the matter dealt only with war crimes and crimes against humanity. The Committee would, if necessary, return to the issue once it had identified and defined all the crimes to be covered by the Code.

23. Article 8 had been supported by most Governments that had commented on it and was based to a large extent on article 14 of the International Covenant on Civil and Political Rights. The Drafting Committee had made only two changes to the text adopted on first reading. The first, of a purely drafting nature, related to paragraph 1 (e): the corresponding provision of article 14 of the Covenant, paragraph 3 (d), envisaged the provision of legal assistance "in any case where the interests of justice so require" and stated that "in any such case" no payment would have to be made by the person concerned. As the text adopted on first reading had not contained the words "in any case where the interests of justice so require", the words "in any such case", which had remained in the text due to an oversight, were meaningless and had thus been deleted. The second change was substantive and consisted of the addition of a paragraph 2, on the rights of appeal, which was closely modelled on article 14, paragraph 5, of the Covenant. A right

<sup>16</sup> See *Yearbook* . . . 1988, vol. II (Part Two), p. 68.

<sup>17</sup> Established by the General Assembly in resolution 49/53.

of appeal was also provided for under the statutes of the International Tribunal for the Former Yugoslavia,<sup>18</sup> and the International Tribunal for Rwanda,<sup>19</sup> as well as under the draft statute for an international criminal court adopted by the Commission.

24. The Drafting Committee had discussed article 9 (*Non bis in idem*) extensively, taking into account article 10 of the statute of the International Tribunal for the Former Yugoslavia and article 42 of the draft statute for an international criminal court, which dealt with the same issue. The text before the Commission was very similar to that adopted on first reading, but with some changes.

25. Paragraph 1 of article 9 dealt with the situation in which an accused person had already been tried by an international criminal court for a crime under the Code and had been either convicted or acquitted by that court. In such a case, the *non bis in idem* principle applied fully and without exception. Accordingly, an individual who had been tried by an international court could not be tried again for the same crime by another court, whether national or international. Paragraph 1 was identical to the text adopted on first reading except for one change: the words “under this Code” had been replaced by “under the present Code”, for the sake of consistency. The footnote to the paragraph which had appeared in the text adopted on first reading, and which stated that the reference to an international criminal court did not prejudice the question of the establishment of such a court, had been deleted since it was superfluous now that the Commission had finalized the draft statute for that court.

26. Paragraph 2, which applied the *non bis in idem* principle to the case where an individual had been tried by a national court, provided that a person could not be tried for a crime under the Code in respect of an act for which he had already been finally convicted or acquitted by a national court. The Drafting Committee had deleted the final clause of the paragraph adopted on first reading. That clause had made it a general condition for the application of the *non bis in idem* principle in the case of a final judgement by a national court that, in the event of conviction, the punishment must have been enforced or should be in the process of being enforced. Some members of the Drafting Committee had thought that the clause would be useful in covering situations of fraud, such as a mock trial, a light sentence or non-enforcement of the punishment, while others thought that it unduly narrowed the scope of the *non bis in idem* principle. The latter view had prevailed. The Committee considered that the *non bis in idem* principle should be preserved to the maximum extent possible, that the issue dealt with in the clause in question was in any event ancillary, and that, on the whole, the exceptions laid down in subsequent paragraphs met the concerns expressed in regard to possible fraud. For the sake of consistency, the words “under this Code”, in paragraph 2, had been replaced by “under the present Code”.

27. Paragraph 3, which dealt with the first of two exceptions to the general principle of *non bis in idem*, provided that a case could be reopened under specific

circumstances. The new text differed from that adopted on first reading in two major respects. First, it provided for the possibility of a retrial solely by an international criminal court and not by a national court, and secondly, in addition to the exception relating to inaccurate characterization of the act by the national court, it contemplated a further exception based on improper or unfair conduct of the initial proceedings. The wording of paragraph 3 (*b*), which dealt with the second aspect of that exception, was borrowed from article 10 of the statute of the International Tribunal for the Former Yugoslavia.

28. Paragraph 4, which laid down the second exception, permitted retrial by the national courts of specific States, namely, the State in whose territory the act which was the subject of the initial judgement had taken place, and the State which had been the main victim of the crime. The Committee realized that the reference, in paragraph 4 (*b*), to the State which “has been the main victim of the crime” was not altogether clear and called for some explanation in the commentary. The commentary should, for instance, indicate that a State was considered to be the main victim of the crime if its nationals had been the main victims of the crime or its interests had been otherwise affected in a major respect.

29. The Drafting Committee had also borne in mind that the exceptions laid down in paragraphs 3 and 4 were viewed by some as inconsistent with the *non bis in idem* principle and had also taken into account the concern of those who considered that the possibility of retrial by a national court of a person already tried by another national court was not consistent with the requirement of respect for State sovereignty. It was the Committee’s opinion that the present wording struck the right balance between the need to preserve to the maximum extent possible the integrity of the *non bis in idem* principle and the requirements of the proper administration of justice under the Code.

30. In paragraphs 2, 3 and 4, the words “tried and punished” had been replaced, on a tentative basis, by the word “tried”.

31. Paragraph 5 provided that, in the event of a retrial, account should be taken, when passing sentence, of previous penalties imposed and served as a result of a previous conviction. Under the text adopted on the first reading, the court was required, when passing sentence, to deduct any penalty imposed and implemented as a result of a previous conviction for the same act. The Drafting Committee considered that the more flexible wording of article 10, paragraph 3, of the statute of the International Tribunal for the Former Yugoslavia was preferable and had redrafted paragraph 5 accordingly.

32. The Drafting Committee wished to make it clear that the expression “an international criminal court” meant a court established by or with the support of the international community at large and not a court set up by some States without the support of the international community. The title of article 9 was unchanged.

33. Article 10 (Non-retroactivity) stated a basic principle of criminal law and of the law of human rights. It had not given rise to any reservations either by Governments or in the Commission. The Committee had there-

<sup>18</sup> See 2379th meeting, footnote 5.

<sup>19</sup> *Ibid.*, footnote 11.



fore retained the wording unchanged, except for the following minor points. In paragraph 1, the words "under this Code" had been replaced by "under the present Code". In the version of paragraph 2 adopted on first reading, the term "domestic law"—which, for the sake of consistency, had been replaced by "national law"—had been qualified by the words "applicable in conformity with international law". The Drafting Committee thought the qualification was unnecessary and that the commentary could explain how the reference to national law should be interpreted. The title of the article remained unchanged.

34. In regard to article 11 (Order of a Government or a superior), the Drafting Committee had noted that the concluding phrase of the version adopted on first reading—"if, in the circumstances at the time, it was possible for him not to comply with that order"—was open to unreasonable interpretation and that, in any event, the matter should be dealt with in the context of defences. Consequently, it had agreed to delete the phrase. The Committee had further noted that, under the statute of the International Tribunal for the Former Yugoslavia the fact that a crime had been committed pursuant to a higher order could be considered in mitigation of punishment if justice so required. The Drafting Committee had agreed that a similar clause should be included in the draft Code and, specifically, in the article on mitigating or aggravating circumstances. The square brackets placed around that phrase in article 11 therefore did not indicate that there was any substantive divergence of views in the Drafting Committee but merely that the place of the clause in question in the draft articles had not been definitively decided.

35. The principle of the responsibility of the superior, laid down in article 12, had its antecedents in the jurisprudence of the international military tribunals established after the Second World War and in the texts on international criminal law adopted at that time. The Drafting Committee had made two changes to the text adopted on first reading, which had provided for the responsibility of superiors when two conditions were met. The first condition had been that the superiors knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit a crime. That wording, taken from article 86, paragraph 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), was too loose in the context of the draft Code and would lend itself to a variety of interpretations that might allow superiors to evade responsibility. The Drafting Committee had therefore replaced the phrase "had information enabling them to conclude" by "had reason to know", which was borrowed from article 7, paragraph 3, of the statute of the International Tribunal for the Former Yugoslavia, and was not so open to subjective interpretation. The second condition had been that the superiors did not take all feasible measures within their power to prevent or repress the crime. There again, the Drafting Committee considered it important to eliminate subjective notions and had replaced the criterion of feasibility with the criterion of necessity, which it viewed as more objective. The title of the article remained unchanged.

36. The Drafting Committee noted that, while the text of article 13 (Official position and responsibility) adopted on first reading had not given rise to any objections, some States had raised the issue of the possible immunity of officials, including heads of State or Government, from judicial process. In the opinion of the Drafting Committee, the issue was a matter of implementation and should not be dealt with in the part of the Code on general principles. Procedural concerns should not affect the principle that, whenever a head of State or Government committed a crime against the peace and security of mankind, he should be prosecuted. Accordingly, the Committee recommended that article 13 should remain unchanged.

37. Article 14 (Defences and extenuating circumstances), as adopted on first reading, had given rise to many reservations on the part of Governments and therefore required careful study. As indicated in the report of the Drafting Committee, it intended to revert to that article at a later stage.

38. In regard to part two of the draft, entitled "Crimes against the peace and security of mankind" adopted on first reading, the Drafting Committee had had time to work out tentative drafts only for the article on aggression (former art. 15) and the article on genocide (former art. 19). The texts before the Commission were therefore highly provisional. The Committee had also achieved only partial results with regard to article 22 on war crimes, which would of course provide the point of departure for future work on the article.

39. On first reading, the Commission had included a paragraph at the beginning of each of the articles in part two which dealt with two questions, identification of the person or persons to whom responsibility for each crime could be ascribed, and penalties. The opening paragraphs prepared by the Drafting Committee on second reading, on a very preliminary basis, dealt only with the first of those questions, the Committee's intention being to deal separately with the question of penalties. At that stage, paragraph 1 of both articles 15 and 19, which appeared between square brackets, had been included merely as a tool to make it easier to understand subsequent paragraphs. As indicated in the report of the Drafting Committee, the Committee would at a later stage re-examine each of the articles in part two in the light of the decision it would take on article 3 and with a view to deciding whether it would be possible to adopt uniform language.

40. In the article on aggression (provisionally numbered article 15), paragraph 1, between square brackets, retained the expression "as leader or organizer", which appeared in the Charter of the Nürnberg Tribunal<sup>20</sup> and in the Charter of the Tokyo Tribunal,<sup>21</sup> and recognized the fact that aggression was always committed by individuals occupying the highest decision-making positions in the political or military apparatus of the State or in its financial and economic life. At the present stage, how-

<sup>20</sup> Ibid., footnote 12.

<sup>21</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.*

ever, the Drafting Committee had restricted the scope of the paragraph to the commission of an act of aggression, leaving aside the planning or ordering of such an act, two notions which might be covered by article 3. He would reiterate that it had been generally agreed that paragraph 1 of article 15 would be reviewed, and that its purpose was simply to indicate the problems that still awaited a solution. As the Special Rapporteur had pointed out in his thirteenth report, all the paragraphs in article 15, except paragraphs 1 and 2, had given rise to much criticism by Governments. The Drafting Committee had therefore followed the Special Rapporteur's advice and deleted paragraphs 3 to 7. Paragraph 2 of the article had given rise to divergent views, the positions in the Drafting Committee being almost equally divided on the desirability of establishing a threshold below which the use of armed force would not qualify as a crime against the peace and security of mankind. While some members considered it essential to establish such a threshold in order to limit the scope of the Code to sufficiently serious acts, others took the view—which had prevailed and was reflected in the text before the Commission—that the use of armed force “against the territorial integrity or political independence of another State” was by definition a serious matter and that no further qualification was required. The definition of aggression proposed in paragraph 2 reproduced the terms of Article 2, paragraph 4, of the Charter of the United Nations.

41. The brackets around paragraph 1 of article 19 indicated that the wording was to be reviewed at a later stage. As tentatively formulated, the paragraph referred only to the commission of an act of genocide, unlike the text adopted on first reading, which had also referred to the ordering of such an act. The latter concept would be reviewed in the context of article 3 of the draft. Paragraph 2 of article 19 reproduced article II of the Convention on the Prevention and Punishment of the Crime of Genocide, while paragraph 3 was closely modelled on article III of the Convention. As indicated in the report of the Drafting Committee, the Committee would re-examine paragraph 3 in the light of the decision it reached in relation to article 3.

42. Action by the Commission on the articles he had introduced would be premature at that point, since almost all of them might have to be re-examined when the articles in part two had been reviewed. At that stage, therefore, the Commission might wish simply to take note of the report. He apologized for the length of his statement, but felt that such detailed treatment was important for the future work of the Commission and for the purposes of the commentary to be prepared by the Special Rapporteur. He trusted that, at the Commission's next session, the Drafting Committee would be granted sufficient time to enable it to complete its task.

43. The CHAIRMAN thanked the Chairman of the Drafting Committee for his introduction. He congratulated the members of the Drafting Committee on their diligent work in preparing the improved version of articles on second reading and asked the members of the Commission whether they wished to comment.

44. Mr. BENNOUNA said that he was unclear on one point. As he understood it, the Chairman of the Drafting Committee was asking the Commission not to open the discussion, but simply to take note of the articles, which were not definitive. If, however, the articles were intended to be definitive, he would want to comment on the definition of aggression in article 15, paragraph 2, which in his view was at variance with all legal opinion on the subject. A distinction had always been made between minor acts of force and acts of such seriousness that they constituted aggression. Consequently, although any violation of the territorial integrity of another State was serious, it was essential to decide whether the violation was deliberate and wrongful and whether it was of some dimension. Reproducing the terms of Article 2, paragraph 4, of the Charter of the United Nations was not adequate in the present instance.

45. Mr. YANKOV (Chairman of the Drafting Committee), speaking on a point of clarification, said that the Drafting Committee had proceeded on the understanding that its report was preliminary. That did not mean the Committee had not adopted certain articles; some had, in fact, been adopted by consensus. The articles as a whole had not, however, been completed and were provisional. It should be placed on record that the report of the Drafting Committee reflected the work of that body and its adoption of certain articles, but that specific articles needed further consideration.

46. Mr. KUSUMA-ATMADJA commended the Chairman of the Drafting Committee on his meticulous, fair and helpful report.

47. In his opinion, it all depended on how the term “aggression” was defined. Draft article 15, paragraph 1, had been placed in square brackets, and rightly so, because aggression could be overt and official or it could be carried out through the invisible arm of a Government. For example, his own country, which was large, had been the victim of such adventures and they had only come to light many years later.

48. Mr. ARANGIO-RUIZ said that he wanted to make two points. First, the definition of aggression in article 15, paragraph 2, was rather too close to the wording of Article 2, paragraph 4, of the Charter. The provision under consideration dealt with crimes, and therefore a phrase might be inserted in the first line to indicate that the use of armed force by a State, in order to qualify as a crime under the Code, must be deliberately directed against the territorial integrity or political independence of another State. It must be possible to differentiate for cases in which force was used without aggressive intent, perhaps by mistake.

49. Second, and more important, the Code should state that its substantive provisions should become part and parcel of the domestic law of the signatory States. That idea could most readily be inserted as a new paragraph 3 in article 1.

50. Mr. MAHIOU said that he had not been a member of the Drafting Committee and therefore was all the more grateful for an informative report and for the many improvements made to the draft articles. The report had

helped to obviate many of the questions he had had, but some still persisted.

51. As to the presentation of the report of the Drafting Committee, he assumed that it was the Drafting Committee's intention to discuss articles 17, 18, 20 and 23 later. For his part, he would not be in favour of deleting all those articles.

52. Mr. EIRIKSSON, referring to Mr. Bennouna's remarks, stressed that the articles in the report had been adopted by the Drafting Committee. The preliminary nature of the report was reflected in the footnotes to certain articles and in the square brackets in others.

53. Concerning article 15, he drew attention to the Definition of Aggression adopted by the General Assembly<sup>22</sup> and pointed out that the Drafting Committee had discussed whether the Security Council should play a role in the determination of aggression. A decision had been taken in respect of the draft statute, but nothing comparable had been decided with regard to a definition of aggression for the draft Code.

54. In his view, there was a significant difference between the paragraph as adopted by the Drafting Committee and Article 2, paragraph 4, of the Charter. Lastly, article 15 was not meant to deal with cases of accidental aggression.

55. Mr. VILLAGRÁN KRAMER said that in the coming year, he would be submitting a written proposal to reflect the modifications to the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) with regard to aggression itself.

56. He sought clarification from the Chairman as to whether the report of the Chairman of the Drafting Committee would be incorporated in the Commission's report to the General Assembly with some mention of the articles as they stood.

57. The CHAIRMAN said that that would be clarified when the report was adopted; he saw no need to anticipate the matter.

58. Mr. ELARABY said that the implications of article 15, paragraph 2, needed to be considered in depth. Although the Definition of Aggression had been adopted, many were not happy with it.

59. As he saw it, there was a danger of confusion between the notion of prohibition of the use of force as set out in Article 2, paragraph 4, of the Charter, and which should be broadly interpreted, and the notion of armed force in article 15, paragraph 2, of the draft articles, or "armed attack", to use the term in Article 51 of the Charter, which should be restricted to prevent States from taking action and then claiming that they had done so in self-defence. The Commission seemed to be departing from the Charter, because a consequence of article 15, paragraph 2, was that if States used force, but not armed force, it would not be considered aggression.

60. Any legally binding provision on aggression must not in any way affect the prohibition of the use of force contained in the Charter.

61. Mr. THIAM (Special Rapporteur) said that the Commission had been working on a definition of aggression for years. Indeed, the complexity of the matter was illustrated by the fact that the draft had been adopted in the Committee by a very close vote: six in favour and five against.

62. Some members endorsed the definition of aggression as it currently appeared in article 15. Others were of the view that the definition was too broad and should somehow be qualified, in particular by introducing the notion of gravity. Mr. Arangio-Ruiz wanted to incorporate the element of intent in the definition. While not opposed to such a modification, he wished to point out that the notion of intent was already implicit in the definition of crime. Under international and national criminal law, there could be no crime without intent. The sole category where intent was not present was that of minor offences.

63. Mr. GÜNEY said that he shared fully the concerns expressed by Mr. Mahiou in respect of draft articles 17, 18, 20, 23 and, in particular, 24. What exactly was the future of those articles?

64. Mr. ROSENSTOCK said that the report of the Drafting Committee was simply the outline of "work in progress". When it resumed its work on draft article 3, the Drafting Committee should bear in mind that, as the Special Rapporteur had just pointed out, intent or *mens rea*, was an indispensable element of any activity which was considered as criminal.

65. While not agreeing with all the solutions they had offered, he shared the views of those who criticized, for various reasons, the inadequacy of the current definition of aggression, as contained in article 15. In terms of article 19 he hoped that the commentary would reflect that specific intent was an essential element of the crime of genocide and that the expression was understood to mean an intent to destroy a substantial part of the group in question.

66. He endorsed the decision to delete article 4 and the bracketed words at the end of article 11. That did not, however, imply that the deleted material might not be used elsewhere in the draft.

67. If the Commission broadened the scope of the matters before the Drafting Committee, it would not be able to achieve its goal of completing its work on the topic at the next session in 1996.

68. The Commission would be well-advised to recall the comment on the difficulty, if not the impossibility, of defining aggression.

69. Mr. LUKASHUK said that the report of the Drafting Committee was a very important document. Perhaps as in the glosses by manuscript copiers in the Middle Ages, the members of the Commission should make some reference somewhere to their own diligent efforts, in particular those of the Special Rapporteur and the Drafting Committee.

<sup>22</sup> General Assembly resolution 3314 (XXIX).

70. Mr. ARANGIO-RUIZ said that he agreed with Mr. Mahiou's comments about those articles which did not appear in the set of draft articles adopted by the Drafting Committee.

71. His suggestion with regard to the definition of aggression had been considered inappropriate by the Special Rapporteur, who held that every crime involved the element of intent. Yet, the notion of *culpa* ranged all the way from slight fault to wilful intent, with many degrees of fault in between. In paragraph 2 of article 19 of the draft Code, the word "intent" was used in reference to genocide. Why should the Commission not mention intent or deliberate purpose with regard to aggression?

72. Mr. AL-KHASAWNEH said that he agreed with the remarks made by Mr. Arangio-Ruiz.

73. Mr. THIAM (Special Rapporteur) said that his words had been misinterpreted: he had certainly not asserted that Mr. Arangio-Ruiz's suggestion was inappropriate. He had simply wanted to emphasize that there was an element of intentionality in all crimes.

74. Mr. YANKOV (Chairman of the Drafting Committee) said that he appreciated all the remarks and observations that had been made. It was clear that the definition of aggression needed further refinement.

75. With regard to the fate of the draft articles, he recalled that, at its 2387th meeting, the Commission had decided to refer to the Drafting Committee articles 15, 19, 21 and 22 for consideration on second reading on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and, at its discretion, deal with all or part of the elements of articles 17, 18, 20, 23 and 24, as adopted on first reading. Thus, it had not been up to the Drafting Committee to decide which articles it would consider—it had simply been operating under the mandate given to it by the Commission.

76. With regard to including the threat of aggression in the draft articles, the Special Rapporteur had, in his report, taken into consideration not only the views expressed within the Commission but also the views of Governments in that regard.

77. The question of intent and motive had been rightly raised by several members. As stated in the report of the Drafting Committee, the Committee had taken the view that motive should be addressed in the context of extenuating or aggravating circumstances and that, accordingly, article 4 should be deleted from the draft. That did not mean, however, that the question of intent and motive should not be given further consideration.

78. Article 15 was surely one of the major provisions of the draft Code and he appreciated the lively debate on the question. Nevertheless, it might take years to arrive at a generally accepted definition of aggression and, even then, the final version might not be the best.

79. Mr. AL-KHASAWNEH said that when the Commission had decided to refer articles 15, 19, 21 and 22 to the Drafting Committee, it had done so on the understanding that the Committee would deal first with the

crimes referred to in those articles and would then turn its attention to the crimes mentioned in the other articles.

80. Mr. ARANGIO-RUIZ said he agreed that it was very difficult to arrive at a definition of aggression. In his earlier remarks, he had been referring only to one aspect of that definition.

81. On the general issue he had raised with regard to the implementation of the Code as a whole, he had heard no reply to his suggestion that a third paragraph should be added to draft article 1 to the effect that States parties to the Code must ensure that its provisions were incorporated in their respective national laws.

82. Mr. THIAM (Special Rapporteur), speaking in his capacity as a member of the Commission, said that States could not be obliged to incorporate such provisions in their domestic law.

83. Mr. AL-KHASAWNEH said that he could not agree with Mr. Thiam. Indeed, by choosing to become party to the convention, a State would be undertaking that very obligation. There were a number of precedents in that regard. For instance, in many of the conventions on terrorism, the States parties undertook to recognize as crimes under domestic law the international crimes to which those conventions referred.

84. The CHAIRMAN said that all the suggestions and observations made by the members would be given due consideration by the Drafting Committee at its next meeting.

85. If he heard no objection, he would take it that the Commission wished to take note of the report of the Drafting Committee, but that it would not be adopting the draft articles at the present time.

86. Mr. EIRIKSSON said it was not clear why the Commission needed to take note formally of the report, which would mean that it would have to be incorporated in the report of the Commission to the General Assembly on the work of its forty-seventh session.

87. Ms. DAUCHY (Secretary to the Commission) said that it was not the Commission's practice to reproduce reports of the Drafting Committee in its report. The report of the Commission would simply state that, at a particular meeting, the Chairman of the Drafting Committee had presented the report of the Drafting Committee and that the Commission had taken note of it.

88. The CHAIRMAN said that the Commission would continue its discussion with regard to the report of the Drafting Committee at the next meeting.

*The meeting rose at 1.05 p.m.*

## 2409th MEETING

*Monday, 3 July 1995, at 3.15 p.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*later:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

### Statement by the Secretary-General

1. The CHAIRMAN said he wished to extend a warm welcome to the Secretary-General of the United Nations. As the Secretary-General was well aware, the Commission was composed of his former colleagues, friends, associates and admirers. On the occasion of the current celebrations of the fiftieth anniversary of the United Nations, his visit to the Commission was a timely and significant symbol of the close and deep bonds that existed between the objectives and purposes of that unique world organization, the United Nations, and the work of the Commission. With his present visit, the Secretary-General was not only honouring a Commission to which he had belonged with great distinction for so many years but also highlighting the value of its work for the concerns of the United Nations and the problems of the international community. The Secretary-General had referred to those concerns and problems and to the aspirations of the international community in his Agenda for Peace proposals<sup>1</sup> and in his address of 17 March 1995 to the United Nations Congress on Public International Law, held in New York from 13 to 17 March 1995, at which some members of the Commission had been privileged to be present. He wished to assure the Secretary-General that it was the earnest endeavour and hope of members of the Commission that the principles and concepts they codified and progressively developed would transcend technical parameters and address the broader concerns, problems and aspirations of the United Nations, the Organization which represented the peoples of the world. Their effort was thus to contribute to the continuous dialogue between law and politics and between law and diplomacy.

2. In conclusion, he paid tribute to the Secretary-General's outstanding contribution as a teacher, scholar, statesman, practitioner, policy-maker and first citizen of the world, all through the medium of international law, which—to borrow his own words—was truly the lan-

guage of "international communication". He wished the Secretary-General all success in his pursuit of peace.

3. The SECRETARY-GENERAL said that he was greatly moved to find himself among his former colleagues, the members of the Commission. In his days as a young student of international law, he had had two ambitions: to lecture at the Academy of International Law at The Hague and, one day, to become a member of the International Law Commission. The first of those ambitions had been fulfilled as far back as 1960, but by the time the second had been realized, he had already become Minister of State for Foreign Affairs and had therefore been unable to participate fully in the Commission's work. One of his great frustrations had been the fact that his dream of attending the Commission meetings for an entire session had never been achieved. Professional honesty ought, perhaps, to have led him to resign his membership for that reason, but every year he had been convinced that he would be able to find time to attend for more than a very short period. Alas, political events had always prevented him from doing so. He wished to assure the Commission that he followed its work with the closest interest; and within the limits of his possibilities—which were not so great as they might outwardly seem—sought to assist that work in every respect. As the Chairman had said, he took advantage of every opportunity to mention that work in his speeches and writings; and the documents he presented had always emphasized the importance of international law as one of the veritable foundations of United Nations action. In that connection, the United Nations Congress on Public International Law, held earlier in the year, had brought together hundreds of jurists from all parts of the world for several days to discuss various problems. The Congress had represented a "first" in the history of the United Nations.

4. He wished to thank the Commission for the important contribution it had made and was making, in particular, in connection with the establishment of an international criminal court and the elaboration of international criminal law. The subject was to be discussed by the General Assembly at its forthcoming session. He believed that the time had come when international public opinion and Member States might be more prepared to accept the new institution than had been the case during the past few decades. He was not saying, of course, that the task would prove easy. Lengthy negotiations might be needed, and that brought him to the point with which he wished to conclude his brief remarks. If the elaboration of international law and international politics had one thing in common, it was the length of time they took. Both called for many years of patient labour, perseverance and continuity. There, however, the resemblance ended, for while international public opinion accepted the fact that the codification of international law took a long time, it refused to accept any such fact in the case of diplomacy, insisting upon immediate results in resolving international problems and achieving the peaceful settlement of international conflicts. Yet those tasks were quite as difficult and laborious as the codification of international law, and those engaged in international diplomacy found themselves quite often obliged to return to the point of departure. Both activities invited comparison with the myth of Sisyphus.

<sup>1</sup> B. Boutros-Ghali, *An Agenda for Peace*, 1995, second edition (United Nations publication, Sales No. E.95.1.15).

5. In conclusion, he again thanked the members of the Commission for their signal contribution to solving problems of peace and development and expressed his pleasure in joining them again in a different capacity.

**Draft Code of Crimes against the Peace and Security of Mankind (*continued*) (A/CN.4/464 and Add.1, sect. B, A/CN.4/466,<sup>2</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509)**

[Agenda item 4]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING<sup>3</sup> (*continued*)**

6. Mr. FOMBA said that a proposal had been made to add to article 1 (Scope and application of the present Code), a third paragraph providing that States parties to the future convention must incorporate the substantive and procedural provisions of the Code of Crimes against the Peace and Security of Mankind in their internal law. That raised the question of the relationship between international law and domestic law, which had three major aspects to it. First, a State could not invoke the provisions of its internal law to justify its failure to apply international law, for international law only considered it as a mere fact, as could be seen from articles 27 and 46 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"). Secondly, the incorporation of international law in internal law was governed by the provisions of part II of the 1969 Vienna Convention, concerning the conclusion and entry into force of treaties and also by the final provisions of specific treaties. Any future convention containing the Code must also be governed by those same rules. Thirdly, the legal weight of a treaty in relation to internal law was determined by theory—dualist or monist—of each State regarding the relationship between international and internal law and the provisions of the country's constitution. For instance, in French-speaking African countries, a duly ratified treaty was considered to prevail over internal law.

7. Accordingly, the Special Rapporteur was correct in saying that States could not be obliged to incorporate the Code in their domestic law. That was contrary to the principles of State sovereignty and freedom to decide. At the same time, treaty practice was also relevant in that regard. For instance, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents expressly stipulated in article 2, paragraph 1, that the intentional commission of, threat to commit, or attempt to commit certain acts or to participate in them as an accomplice "shall be made by each State party a crime under its internal Law". Under paragraph 2 of the same article, each State party was bound to make those crimes punishable by appropriate penalties which took into account their grave nature.

8. A number of questions could be raised about the definition of aggression contained in article 15 of the draft Code. Was that definition adequate for the basic requirements of criminal law? Should the definition expressly state the constituent elements of a crime, in particular intent and gravity? The solution should be sought in both legal theory and practice. From the viewpoint of theory, two choices had to be made: first, between a strict or relative analogy between national and international criminal law and secondly, between an explicit or implicit definition of "crime". From the viewpoint of practice, existing agreements should be evaluated with regard to the place and role accorded to the element of intent, and the necessary conclusions should be drawn. As to the draft Code itself, the Commission must decide how to deal with the question of intention in the Code and whether intent should be stressed only in the case of some or of all crimes.

9. He did not, for the moment, have definitive answers to all those questions. He agreed with the Special Rapporteur that, with regard to odious and serious crimes, there could be no crime without intent. That remained true whether or not intent was expressly stated in the definition of the crime.

10. Lastly, he agreed with the other members who had called for clarification of the fate of the articles which did not currently appear in the draft Code.

*Mr. Pambou-Tchivounda took the Chair.*

11. In reply to comments by Mr. ROSENSTOCK and Mr. THIAM (Special Rapporteur), Mr. YANKOV (Chairman of the Drafting Committee) confirmed that the Drafting Committee had decided to delete the words "or by treaty" from paragraph 1 (a) of article 8. The words "by law" in themselves covered all legal means, including international treaties.

12. Mr. VILLAGRÁN KRAMER said that, during the discussion on the issue, reference had been made to human rights instruments under which tribunals had been set up. However, since not all States were parties to those particular treaties, the Drafting Committee had considered it preferable to limit article 8 to the notion of tribunals duly established by law.

13. Mr. RAZAFINDRALAMBO asked whether, in formulating article 19, the Drafting Committee had indeed borne in mind and, at its discretion, dealt with all or part of the elements of articles 17 and 18. The fact that the Commission was invited to take note of the report of the Drafting Committee rather than to approve the draft articles adopted by it on second reading seemed to suggest that the Committee intended to revert to those and, possibly, other issues, but the Commission had received no indication to that effect.

14. Mr. YANKOV (Chairman of the Drafting Committee) said that, in reply to the very important question raised by Mr. Razafindralambo and other members, he wished to stress that the Drafting Committee had considered draft articles 15, 19, 21 and 22 in compliance with the decision taken by the Commission at its 2387th meeting to refer those articles to the Drafting Committee on the understanding that, in formulating them, the Com-

<sup>2</sup> Reproduced in *Yearbook* ... 1995, vol. II (Part One).

<sup>3</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook* ... 1991, vol. II (Part Two), pp. 94-97.

mittee would bear in mind and, at its discretion, deal with all or part of the elements of draft articles 17, 18, 20, 23 and 24 as adopted on first reading. In presenting the report of the Drafting Committee (A/CN.4/L.506 and Corr.1) to the Commission (2408th meeting), he had explained that, as a result of various factors, the Drafting Committee had been faced with a burdensome task which could not be completed at the present session. Even those articles which the Committee had adopted and for which it was presenting a text to the plenary might have to be reviewed once the second reading of part two had been completed. Having said that, he wished to reiterate his understanding that the referral to the Drafting Committee of articles 15, 19, 21 and 22 did not in itself rule out the possibility of the Committee's considering, when formulating those four draft articles, any of the other articles he had listed. Reference had been made to the words "at its discretion", which appeared in the report of the Drafting Committee. It had always been a fact that the Drafting Committee was a responsible body which, while remaining a subsidiary body of the Commission, was required to act in full independence when considering the draft articles before it. Accordingly, the Committee would take into consideration the discussion which had taken place at the present session, the discussion within the Drafting Committee itself and the discussion that would take place in the Sixth Committee at the next session of the General Assembly. Nothing would be lost or neglected, but consideration would have to be given to the issue of whether, in view of present-day realities, all the remaining articles deserved to be included as separate articles in the draft Code or whether some of them, such as the article on apartheid, could perhaps be included under crimes against humanity or some other heading. He hoped that his explanation would clarify the matter sufficiently to obviate further debate on that point, and he appealed to members of the Commission not to single out that point when commenting on the Drafting Committee's proposals. The Committee still had a great deal of work before it, and the time to finalize that work would come at the next session.

*The meeting rose at 4.20 p.m.*

## 2410th MEETING

*Tuesday, 4 July 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind (*concluded*)** (A/CN.4/464 and Add.1, sect. B, A/CN.4/466,<sup>1</sup> A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
ON SECOND READING<sup>2</sup> (*concluded*)

1. Mr. YAMADA said he wished to make several preliminary comments which he hoped the Drafting Committee would take into account when it resumed its consideration of the draft articles at the next session. He suggested that article 6 should begin with the words "The State party" rather than simply "The State". In article 6 *bis*, paragraphs 2 and 3 ended with a clause which made extradition subject to "the conditions provided in the law of the requested State", but, in his view, the wording of article 8 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, was better because it made extradition subject to "the procedural provisions and the other conditions of the law of the requested State" and the present case involved procedural rules on extradition. With regard to article 8, the expression "In the determination of any charge against him", as contained in paragraph 1 (a) and in article 14 of the International Covenant on Civil and Political Rights and in article 41, paragraph 1, of the draft statute for an international criminal court,<sup>3</sup> also applied to paragraphs 1 (b) and 1 (g) and therefore belonged in the introductory part of that paragraph. In article 9, the idea covered in paragraph 3 (a) could be expressed in a less complicated way. Paragraph 3 (b), which was taken word for word from the statute of the International Tribunal for the Former Yugoslavia,<sup>4</sup> referred to three cases, the first two of which were grammatically related to the same subject and the third of which had a different subject. The comma following the word "independent" should therefore be replaced by the word "or".

2. It had been suggested that a third paragraph should be added to article 1 stipulating that States parties must adopt legislation making crimes against the peace and security of mankind punishable under national law, but article 5 *bis* seemed to serve the same purpose by requiring each State party to establish its jurisdiction over such crimes. Depending on their constitutional requirements, States parties could therefore amend their criminal law or apply the provisions of the Code directly. In general, the Drafting Committee had made great progress in preparing the draft Code, but some basic provisions had still not been formulated and the harmonization of the various systems of criminal justice in the world would not be easy. It was to be hoped that, at its next session, the Commission would set aside enough meetings of the

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 94-97.

<sup>3</sup> *Yearbook* . . . 1994, vol. II (Part Two), para. 91. See 2379th meeting, footnote 10.

<sup>4</sup> *Ibid.*, footnote 5.



Drafting Committee during the first half of the session and enough plenary meetings during the second half.

3. Mr. MAHIU, speaking on a point of order, asked why the Commission had departed from its usual practice, which was that, when the Chairman of the Drafting Committee had introduced the report on the Committee's work and submitted the draft articles it had adopted, action was taken on the draft articles, but the debate on them was not reopened. The Drafting Committee did, of course, wish to have observations and comments on some articles to which it would come back at the next session, but there were other articles, particularly those of part one, which could be submitted to the Sixth Committee. His concern was to avoid a situation in which the Commission simply decided to take note of the progress made on all topics and thus give the impression of having held an "empty" session.

4. The CHAIRMAN said that, in his introduction, the Chairman of the Drafting Committee had indicated (2408th meeting) that, after examining various issues, the Committee had reached a number of preliminary decisions and had requested that, instead of immediately adopting the proposed draft articles, the Commission should simply take note of them so that they could be reviewed later. Before taking a decision on that recommendation, the members of the Commission might offer some ideas to be taken into consideration by the Committee at the next session, without necessarily reopening the debate. In any event, the Drafting Committee had not tried to distinguish from among all the draft articles proposed those for which the Commission could do more than "take note" because the Committee wished to review the entire set of articles.

5. Mr. YANKOV (Chairman of the Drafting Committee) said that the draft articles of part one had indeed been adopted by the Drafting Committee, with the usual observations and reservations. With regard to part two, it would obviously be premature to adopt one or two articles which would have to be reviewed once all the articles of that part had been drafted. The Commission had also been criticized at times by the Sixth Committee for having submitted piecemeal drafts. In addition, parts one and two were interrelated and some provisions of part two might have effects on part one. Since it would be unfortunate if the time and effort the Drafting Committee had spent on producing concrete results on the topic were not brought to the attention of the Sixth Committee, the best way should be found of indicating clearly in the Commission's report to the General Assembly that, with regard to certain draft articles, there had been general agreement, but that the Drafting Committee was nevertheless unanimous in considering that the entire set of articles should be reviewed. The Commission could, for instance, include the draft articles of part one in its report, either in a footnote or in another form, while stating clearly that, with regard to part two, it was doing so because it first wanted to have an overall idea as part of an integrated approach. In the Drafting Committee, the Special Rapporteur had seemed to agree that the proposed draft was provisional.

6. Mr. THIAM (Special Rapporteur) recalled that he had already told the Chairman of the Drafting Committee

that he was surprised to see the draft articles presented as if none of them had been adopted by the Drafting Committee, which was not the case, as shown by the very title of the report of the Drafting Committee (A/CN.4/L.506 and Corr. 1). In his view, the Commission must say clearly to the General Assembly that specific draft articles had been adopted by the Drafting Committee, but others had to be re-examined, especially because, if the Drafting Committee had to review the entire set of draft articles at the next session, it might not have time to do anything else.

7. The CHAIRMAN said that it might be better if the members who wished to speak on the draft articles as such did so before the Commission resumed the discussion that had begun a bit too soon, on the decision to be taken on the report of the Drafting Committee.

8. Mr. BOWETT said that a code of crimes should define as clearly as possible what it was talking about, at least in the commentary. For example, article 6 spoke of "an individual alleged to have committed a crime", but it was inconceivable that any presumption would entail the obligation referred to in the article. Accordingly, it should be specified that presumptions should be sufficiently well founded. Article 15 also referred to "an individual who, as leader or organizer, commits an act of aggression" and added, in its paragraph 2, that aggression was "the use of armed force by a State". Paragraph 2 therefore seemed to refer to military leaders. Yet article 13 spoke of "head of State or Government", which was a political function. The question was therefore whether the draft referred to the military or to politicians or to both at once, the latter being what it should refer to. Lastly, the actual definition of aggression (art. 15, para. 2) was simple enough but not sufficient, and there was a risk that, because of the words "in any other manner inconsistent with the Charter of the United Nations", it would give rise to countless controversies, if only with regard to the use of force for a humanitarian intervention or in order to ensure the implementation of a decision of ICJ or an arbitral award.

9. Mr. ROSENSTOCK said that paragraph 2 of the corrigendum to the report of the Drafting Committee should be deleted because it gave the impression that the Drafting Committee had considered articles 16, 17 and 18, something it had not done for the reasons given in footnotes 8 and 9 of the same document.

10. Mr. PELLET said that, while he had doubts about the usefulness of lengthy definitions in part two of the draft Code, he was convinced that definitions should be a basic element of part one, from which the whole interest of the Code was derived. He was therefore disappointed by some of the proposed provisions and, in particular, by article 1. The lack of a definition of a crime against the peace and security of mankind was surprising. What was the point of the Commission's work if not to guide States and the international community on how they should deal with such crimes? In order to do that, however, it had to give them an idea of the basic characteristics of that type of crime.

11. The definitions given in part two were of little interest and would serve no useful purpose because, in any event, international courts had their own statutes which

defined the crimes they are called on to punish. On the other hand, it would be extremely useful for courts and States to be able to refer to a general definition of crimes against the peace and security of mankind in taking the decisions incumbent on them. He therefore protested against the Drafting Committee's decision not to include a definition of such crimes in part one of the draft. In order to fill that gap, it might be stated somewhere in the draft that a crime against mankind was a particularly odious crime which affected all of mankind, shook the very foundations of the international community and had as its main characteristic the fact that it led to the transparency of the State or the legal person on whose behalf it had been committed, since the responsibility of individuals could be directly engaged.

12. The fact that the Drafting Committee's text defined the crimes only by reference to part two had the serious disadvantage that only the crimes listed in part two would be considered to constitute crimes against the peace and security of mankind. That gave too much importance to part two, whose role could be illustrative only, inasmuch as there would never be a consensus on an exhaustive list that was satisfactory to everyone. He therefore regretted having to disagree with the Chairman of the Drafting Committee, who had expected that article 1 would be the one the Commission would certainly be able to adopt. He totally failed to share that view and considered that the Committee should give the matter more thought. One solution might be to insert an article 1 *bis* that would propose a decent definition of crimes against the peace and security of mankind.

13. With regard to article 15, he shared Mr. Bowett's view that there was some inconsistency between paragraphs 1 and 2 in so far as the former referred to an individual who committed an aggression and the latter spoke of aggression committed by a State. He was, moreover, totally opposed to paragraph 2 because aggression was not the use of armed force by a State, but a particular form of the use of armed force which needed to be defined. As it now stood, the paragraph was dangerous because it extended the concept of aggression *ad infinitum* and that was entirely unacceptable. He was therefore convinced that the Drafting Committee was on the wrong track, as was the Commission in wanting to define aggression as part of the present exercise.

14. Mr. de SARAM noted that some of the articles in part one of the draft Code corresponded to articles in the draft statute for an international criminal court. He therefore hoped that the Drafting Committee had carefully considered whether the provisions it was submitting to the Commission for adoption differed from those it had adopted in connection with the draft statute; if so, the reasons should be indicated in the commentary.

15. The discussion of article 15 on aggression had made it clear that, in its work on the draft Code, the Commission would have to deal with questions on which consensus was impossible. It would therefore be wiser to ensure that the present draft Code was regarded as a first stage, for example by saying so in the preamble, and also to have a review clause which would make it possible to amend the Code or include new crimes. In that case, it might be possible to envisage an additional protocol

which would be adopted when agreement had been reached on new crimes. He was not sure that the Commission would succeed in completing its work on the draft Code if it kept reopening the discussion on vast subjects such as aggression. It would be a pity if aggression did not appear in the draft, but the Commission could no more than indicate those forms of aggression which everyone agreed should appear in the Code, it being understood that the list would not be exhaustive.

16. The CHAIRMAN noted that, as Mr. Mahiou had pointed out, the members of the Commission had in fact reopened the debate on the draft articles. It was true that draft article 15 and those following it had given rise to more comments on substance than the articles in part one of the draft. The question raised by Mr. Bowett and Mr. Pellet in connection with article 15 showed that part two of the draft raised important problems which were not simply technical. Yet the Commission could not, in a few minutes, redo the work on which the Drafting Committee had spent weeks. Mr. Mahiou's proposal that part of the draft articles should be referred to the General Assembly in order to show that concrete progress had been made in the work on the draft Code therefore remained valid. The Drafting Committee could still review the whole matter at the Commission's next session on the basis of the comments made and then rapidly adopt the draft articles in question.

17. Mr. THIAM (Special Rapporteur) said he agreed that the Commission must decide on Mr. Mahiou's proposal. It would have ample time later to return to the definition of the various offences to be included in the draft Code. For the time being, the question was whether the Commission had or had not been asked to consider a text already adopted by the Drafting Committee.

18. Mr. BENNOUNA, referring to the question of aggression, said that he shared Mr. Pellet's opinion on the substance, but that in any case the problem was how to settle the question of the definition of aggression that had been coming up for over 10 years without being answered. Perhaps the Commission should simply decide not to define aggression and leave it at that. In the absence of a definition, answers were usually found in case law and practice. That was precisely the case of *jus cogens*, which had never been defined. But there was no reason not to give full explanations in the commentary or to cite those aspects of practice that might later serve as a guide to the courts, whether national or international. That was certainly an admission of helplessness, but, in his view, it was time for the Drafting Committee to put an end to that exercise.

19. On the whole, he agreed with Mr. Mahiou. The examination of the draft articles proposed by the Drafting Committee was an intermediate exercise between the general debate and the final adoption of the articles. It was clear that the general debate should not be reopened and that consideration would again need to be given to certain points that gave rise to problems, such as the one raised by Mr. Pellet and Mr. Bowett with regard to article 15. He wondered whether the Commission should not draw up a general definition of crime and, instead of constantly repeating the phrase that began with the words "An individual who ...", find a wording that

covered all crimes and highlighted the connection existing between the individual and the State, that is to say between the individual and the crime, and show that some of the crimes targeted by the Commission could be committed only by States, such as aggression, but that some degree of responsibility could be borne by individuals. That was essentially a drafting question and the Drafting Committee would thus need to find the appropriate wording, but it was pointless to devote too much attention to the problem of aggression, which could never be solved.

20. The CHAIRMAN said he agreed that the Commission should focus on Mr. Mahiou's proposal. Two questions arose, the first relating to the status of part one compared to part two of the draft and the second to the status of the draft articles of part two, which must be examined in the light of the decision that would be taken on the other articles. The most logical solution, the one recommended by the Drafting Committee itself, would be for the Commission to take note of the progress made without adopting the proposed draft articles, even those that appeared in part one because they still posed a number of technical problems, although that did not mean that the draft articles would not be referred to the General Assembly. That would be a way to settle both questions. The other solution was the one proposed by Mr. Mahiou and the Commission would therefore have to choose.

21. Mr. EIRIKSSON said that the draft articles were obviously not ready to be referred to the General Assembly because the commentaries to the articles of part one could not be drafted as long as the Commission did not have a clear idea of what those articles would finally look like. Moreover, the articles of part two contained major gaps which had an effect on the other articles. He was thinking in particular of article 3, which should serve as a basis for considering the articles of part two. The proposal that exclusive international jurisdiction should be established in the case of specific crimes, such as aggression, would also have consequences for all the draft articles. He therefore thought that part two was likewise not ready to be submitted to the Commission and certainly not to be referred to the General Assembly. The most logical approach would be for the Commission to take note of the work completed by the Drafting Committee without adopting the proposed draft articles.

22. Mr. VILLAGRÁN KRAMER noted that the Drafting Committee had submitted to the Commission only those draft articles on which progress had been made, that is to say articles that would constitute the general part of the Code and two of the articles which would be included in part two on crimes and which related to aggression and genocide. Because of the lack of time, the Drafting Committee had not taken a decision on the actual structure of those articles, and that meant that, even in the case of aggression and genocide, the Drafting Committee had not fully completed its work. It might be said that, with regard to part one, the general part of the Code, it had reached a number of conclusions, whereas, in part two, it had only begun to consider the topic.

23. The question that arose now was whether the Commission should take note of the result of the Drafting

Committee's work, thereby showing that it had been informed of it, or whether it should approve the draft articles in principle, provided that the work continued and was completed at the next session. In his view, the Commission should not confine itself to taking note of the Drafting Committee's report. As it had done in the case of the draft statute for an international criminal court, it should adopt the proposed draft articles in principle, clearly indicating in its report to the General Assembly that it would not do so definitively until the work on the draft Code had been fully completed.

24. Concerning the crimes themselves, it was clear that new articles might be proposed not only on aggression and genocide, but also on other crimes which were contained in the draft adopted on first reading or which were mentioned in the Special Rapporteur's report. Many opinions and reservations had been expressed during the general debate and the Commission had to remain open to any new ideas that might be formulated between now and the next session.

25. The CHAIRMAN said that Mr. Villagrán Kramer had departed somewhat from the main question, which was whether and to what extent the draft articles of part one might be referred to the General Assembly.

26. Mr. ROSENSTOCK said that, when the Drafting Committee's report had been submitted to the Commission, it had been quite clear that the Drafting Committee did not consider any of the proposed draft articles to be definitive. Three draft articles of part one (draft articles 1, 6 and 11) contained footnotes, which showed their provisional nature. It would serve no purpose to refer unfinished and incomplete texts to the Sixth Committee without some explanation or a summary of the debates to which they had given rise in the Commission. He therefore proposed that the Commission should confine itself at the current stage to taking note of the draft articles submitted to it while recognizing that it must submit a more complete report to the General Assembly at its fifty-first session in 1996.

27. Mr. MAHIOU said he thought that the Drafting Committee was perhaps being too modest in submitting the proposed texts as provisional. Leaving aside article 1, which could be controversial, it seemed to him that the draft articles of part one were sufficiently complete to be able to be referred to the Sixth Committee, even if they were still perfectible and were not accompanied by commentaries.

28. The CHAIRMAN wondered whether the Commission could refer draft articles not accompanied by commentaries to the General Assembly.

29. Mr. THIAM (Special Rapporteur) said that, although there were precedents for doing so, it had been agreed that he would not submit commentaries at the current session. However, Mr. Mahiou's point was well taken; he did not see why it was necessary to pass over in silence the fact that most of the articles of part one had been adopted by the Drafting Committee and submitted to the Commission.

30. Mr. KUSUMA-ATMADJA said that, in the absence of commentaries, the General Assembly might have difficulty understanding the draft articles.

31. Mr. EIRIKSSON, speaking on a point of order, said that the Commission could not refer draft articles to the Sixth Committee without commentaries. The articles must be adopted with the relevant commentaries.

32. The CHAIRMAN said that, in view of the apparent difficulty caused by the lack of commentaries to the draft articles, he would invite the members of the Commission, the Chairman of the Drafting Committee and Messrs. Mahiou and Rosenstock, in particular, to consider the way in which the result of the Commission's work on the topic at the current session could be presented to the General Assembly.

*The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.*

33. The CHAIRMAN invited the Commission to adopt the draft decision which had been prepared following informal consultations and which read:

“As some of the articles<sup>5</sup> are closely interrelated and might call for a review and should in any event be accompanied by commentaries, the Commission decides to defer the final adoption of the articles in question until after the completion of the remaining articles and to confine itself, at the present session, to taking note of the oral report of the Chairman of the Drafting Committee as reflected in the relevant summary record.

“In introducing the report of the Commission before the Sixth Committee at the forthcoming session of the General Assembly, the Chairman will indicate that the relevant extract from the summary record of the 2408th meeting of the Commission containing the texts of the articles adopted by the Drafting Committee and the introductory statement of the Chairman of the Drafting Committee is at the disposal of delegations in the six official languages.”

34. Mr. YANKOV (Chairman of the Drafting Committee) said that he wished to make two points further to the explanations given by the Chairman. First, the number and title of all the articles examined must of course figure in the body of the report. Secondly, rather than including the text of the articles in the report as footnotes, it had been agreed, as a compromise solution, to refer in the report to the summary record of his introductory statement, in plenary, of the Drafting Committee's report. That summary record should reflect the content of the latter report as faithfully as possible and should reproduce the texts of the draft articles.

35. Mr. KUSUMA-ATMADJA said that, while that was a very useful proposal, the Commission must be warned against two difficulties. In the first place, if the solution was adopted, it must not create a precedent. Secondly, since Governments might comment on it in any event to avoid any confusion, the Commission

should specify the form in which such comments could be submitted and to whom.

36. The CHAIRMAN said that the question of a precedent had been briefly considered during the informal consultations. According to information provided by the secretariat, the report of the Commission had already, on two occasions, contained a formula of the kind proposed. As to comments, a footnote explaining that the Commission had not completed its work might help to keep them in check.

37. Mr. PELLET said that he had very definite reservations about the proposed formula, which raised numerous problems. In particular, no matter what one said, it would create a precedent. Also, if the Commission followed such a course, it might well ultimately submit to the Sixth Committee an “empty” report, thus giving the impression that it had done very little work at its forty-seventh session. As the Special Rapporteur had mentioned, however, the draft proposed by the Drafting Committee contained articles, such as article 9 on the *non bis in idem* principle, which might not be called in question and which the Commission could therefore adopt. The real problem was that there were no commentaries. It was not certain, however, that the Special Rapporteur was absolutely against the idea of drafting commentaries to a few articles.

38. Mr. BENNOUNA said he too considered that the proposal was open to criticism. In his view, the formula adopted should be purely descriptive. The Chairman should explain that the Drafting Committee and the Commission had planned the work over two sessions and that progress had been achieved, but that, as there was still some disagreement on particularly delicate problems, the Commission did not consider it advisable to submit draft articles at the current stage. Also, the Chairman, together with several members of the Commission, should analyse the substance of the report.

39. Mr. ARANGIO-RUIZ said that he agreed with much of what had been said by Mr. Pellet and Mr. Bennouna and with the solution they recommended. The best thing would be for the Commission to say what had happened and nothing more. The fact that it was not submitting draft articles to the General Assembly did not mean it had done nothing. The General Assembly could see, on reading the report, that a lot of work had been done on important topics. It would suffice to make it clear that draft articles would be submitted at the end of the forty-eighth session.

40. He wished to revert to three points. First, he had reservations about article 1 of the draft, which, in his view, should include a paragraph 3 under which the States parties to the convention would be required to incorporate the Code into their legal systems. Secondly, along with other members, he did not like the definition of aggression. Thirdly, he would like to know what the Commission was going to do about articles that had “disappeared”, since he, as well as Mr. Mahiou, was attached to some of them.

<sup>5</sup> Articles 1, 5, 5 bis, 6, 6 bis, 8 to 13 of part one and articles 15 and 19 of part two.

## 2411th MEETING

Wednesday, 5 July 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

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

### Visit by a member of the International Court of Justice

1. The CHAIRMAN said he extended a warm welcome to Mr. Vereshchetin, a Judge of the International Court of Justice and a former member of the Commission, and thanked him for having taken time from his busy schedule at ICJ to spend time with the Commission. He wished in particular to place on record how greatly the Commission had valued his services as a member and as former Chairman of the Commission as well as his industry, scholarship and human qualities. He asked Mr. Vereshchetin to convey the best wishes of the Commission to two other former colleagues, Mr. Koroma and Mr. Shi, who had also made a significant contribution to the work of the Commission.

2. Mr. VERESHCHETIN, thanking the Chairman for his kind words, said that he would not fail to convey the good wishes of the Commission to Mr. Koroma and Mr. Shi. The close ties between the Court and the Commission were most gratifying and he trusted that they would continue. He wished the Commission every success in its future work which he followed with the greatest interest.

**State succession and its impact on the nationality of natural and legal persons (*continued*)\* (A/CN.4/464/Add.2, sect. F, A/CN.4/467,<sup>1</sup> A/CN.4/L.507, A/CN.4/L.514)**

[Agenda item 7]

### REPORT OF THE WORKING GROUP

3. Mr. MIKULKA (Chairman of the Working Group on State succession and its impact on the nationality of natural and legal persons), introducing the report of the Working Group (A/CN.4/L.507), said that he was particularly pleased to be doing so in the presence of

41. Mr. BARBOZA said that he shared many of the views expressed by Mr. Pellet and Mr. Bennouna. The ideal thing, of course, would be to send to the General Assembly the draft articles that had not given rise to any objection, together with the relevant commentaries. The problem was therefore to decide whether or not it was too late for the Special Rapporteur to prepare such commentaries, if necessary, with the assistance of the secretariat.

42. The CHAIRMAN said that it was unrealistic to try to impose on the Special Rapporteur the extraordinary burden of preparing commentaries when the Commission would not be in a position to adopt them in plenary. The idea of reporting fully to the General Assembly on what had taken place in the Commission was valid, but, in the case in point, it would be tantamount to reporting a lack of any agreement in plenary.

43. Mr. ROSENSTOCK said that he strongly supported the proposal, which was the only way of informing the General Assembly while avoiding either an endless row in the Commission or conveying a misleading impression. Also, he saw no reason for "cobbling together" in a rush commentaries on draft articles that might themselves appear to be incompatible with other draft articles on second reading. In that connection, a parallel could be drawn with the Commission's approach to the draft articles on the law of the non-navigational uses of international watercourses.

44. Mr. KUSUMA-ATMADJA said that he was reassured by the explanations the Chairman had given following the information provided by the secretariat. He therefore shared Mr. Rosenstock's opinion as to the usefulness of the proposed formula.

45. Mr. EIRIKSSON said that he too supported the proposal, which could be compared with the decision the Commission had taken at its forty-second session, in 1990, on the topic of the jurisdictional immunities of States and their property.<sup>6</sup>

46. Mr. TOMUSCHAT said that, while he supported the proposal, it was essential that commentaries to the draft articles should be placed before the Commission at the very beginning of the forty-eighth session so that it could examine them calmly.

47. Mr. RAZAFINDRALAMBO said that, since it was physically impossible to prepare commentaries to draft articles on which all members of the Commission were more or less in agreement, he was ready, albeit very reluctantly, to accept the proposed solution.

*The decision was adopted.*

*The meeting rose at 1.05 p.m.*

<sup>6</sup> *Yearbook* . . . 1990, vol. II (Part Two), para. 167.

\* Resumed from the 2391st meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

Mr. Vereshchetin, who, as a member of the Commission, had supported the inclusion of the topic on the Commission's agenda.

4. The Working Group, which had met five times between 12 and 20 June 1995, had focused attention on an idea that had received broad support during the discussion in plenary: the obligation of States concerned, whether predecessor and/or successor States, to negotiate and to resolve by agreement problems of nationality that arose in a case of State succession. That obligation on States had been considered a corollary of the right of the individual to a nationality as proclaimed in the Universal Declaration of Human Rights.<sup>2</sup> In formulating the principles by which the States concerned should be guided during their negotiations, the Working Group had proceeded from the obligation of the States concerned to prevent statelessness caused by territorial change. In the course of its work, the Working Group had reached a number of preliminary conclusions. The Working Group had agreed that States concerned should have, first of all, the obligation to consult in order to determine whether a change in the international status of a territory had any undesirable consequences with respect to nationality; only if the answer was in the affirmative should they have the obligation to negotiate in order to resolve such problems. Depending on the case, an agreement should be concluded between the predecessor State and the successor State or States, in cases where the predecessor State continued to exist, or between the various successor States in cases where the successor State ceased to exist.

5. Although statelessness had been considered to be one of the most serious problems, the Working Group believed that once negotiations had begun, the States concerned should also address questions of the separation of families, military obligations, pensions and other social security benefits and the right of residence, which were all consequences of the acquisition or loss of nationality. It was important, particularly where individuals exercised the right of option, for them to know in advance what the consequences of their choice would be.

6. Regarding its methods, the Working Group had considered the effects of various types of State succession, classifying them in three groups. The first concerned cases in which the predecessor State continued to exist, and where it was necessary to decide whether the predecessor State had the right, or in some cases the obligation, to withdraw its nationality from certain individuals, and whether the successor State had the obligation to grant its nationality to certain individuals. A second type of State succession was that of unification, including absorption, in which loss of the predecessor State's nationality was an inevitable result of the disappearance of that State. The question of nationality was not complicated in such a case, because there was only one successor State. Finally, in the third case examined by the Working Group, that of dissolution, the loss of a State's nationality was automatic, but the acquisition of nationality was made more complicated by the existence of several successor States.

7. The Working Group had distinguished between a number of categories of natural persons, enumerated in paragraph 10 of the report: persons born in what had become the territory of the successor State; persons born in what had remained as the territory of the predecessor State; persons born abroad but having acquired the nationality of the predecessor State prior to succession by the application of the principle of *jus sanguinis*; persons naturalized in the predecessor State prior to the succession and, in the special case of federal States, persons having the secondary nationality of an entity that remained part of the predecessor State; and persons having the secondary nationality of an entity that became part of a successor State. All those cases were examined on the assumption that the persons concerned could, at the moment of State succession, have their habitual place of residence in the territory of the predecessor State, the successor State or a third State. Although that did not cover all situations, the Working Group was of the view that the most frequent cases had been addressed.

8. Paragraphs 11 to 20 of the report contained the Working Group's conclusions on obligations and rights of predecessor and successor States. The Working Group had also dealt with the "right of option", a term that it used in a broad sense to cover options based on a treaty or domestic law, and the possibilities of "opting in", that is to say making a positive choice, and "opting out", that is to say renouncing a nationality acquired *ex lege*.

9. The Working Group agreed that a predecessor State should be prohibited from withdrawing its nationality on the basis of ethnic, linguistic, religious, cultural and other similar criteria and from refusing to grant its nationality on the basis of such criteria. On the other hand, it thought that, as a condition for enlarging the scope of individuals entitled to acquire its nationality, a successor State should be allowed to take into consideration additional criteria, including those mentioned.

10. As to the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality, the Working Group had not confined itself to identifying positive rules, but had also formulated rules to serve as guidelines for States in their negotiations, although it did not claim that those principles constituted positive law. The study of the consequences of non-compliance was complicated, and the Working Group had concluded that further efforts were needed. The findings set out in paragraph 29 should be understood as preliminary. It would be necessary to revert to the question of international responsibility for non-compliance with the above-mentioned principles.

11. Another area considered by the Working Group was that of continuity of nationality. Three situations had been pinpointed: *ex lege* change of nationality; change of nationality resulting from the exercise of the right of option between the nationalities of two or more successor States; and, a special case, change of nationality resulting from the exercise of the right of option between the nationalities of the predecessor and successor States. The assumption had been that the response might be different for the different situations. But ultimately, bearing in mind that the purpose of the rule of continuity

<sup>2</sup> General Assembly resolution 217 A (III).



was to prevent the abuse of diplomatic protection by individuals acquiring a new nationality in the hope of strengthening their claim thereby, the Working Group had agreed that the rule should not apply when the change of nationality was the result of State succession in any of those situations.

12. The Working Group was aware that it had not covered all of the elements mentioned in the report of the Special Rapporteur on the topic or carried out in full the mandate assigned to it by the Commission. If it continued to meet during the next session of the Commission, it would complete its work. The omission of the question of the nationality of legal persons, which had not been the subject of the report, did not mean the Working Group intended to discard it. In view of the time available, however, it had been thought best to concentrate on a set of problems that could give the Sixth Committee a better idea of the Working Group's work. Such a preliminary report could help States in making in-depth comments on the topic at the General Assembly. With that in mind, the report might be annexed to the Commission's report to the General Assembly.

13. Mr. MAHIOU thanked the Working Group for identifying problems that arose in connection with State succession. Its careful analysis had provided the Commission with a clear picture of the issue.

14. In a number of places in the report, the format caused some confusion. For example, in the enumeration in paragraph 10, subparagraph (f) appeared to be followed by (i), something which was a heading relating to another entirely different point. The confusion might be cleared up by adding a new heading after subparagraph (f) to read: "Obligations of the States concerned".

15. Concerning the substance, as the report had confined itself to natural persons, it should have stated that the Working Group would discuss legal persons at a later date. The nationality of legal persons was an area in much greater need of codification than was that of natural persons. Likewise, the calendar of action mentioned in paragraph 2 of the report should have been included, along with an indication of when the subject of legal persons would be taken up.

16. Paragraph 11 (d) spoke of persons having the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of habitual residence. Surely, such a case could only concern federal States, and perhaps the subparagraph should be changed accordingly. In any event, if a person lived in a new State B and had the secondary nationality of that State, he did not see why State A should be prevented from withdrawing nationality at the end of a given period. In his opinion, the obligations upon the predecessor State in the case of paragraph 11 (d) were perhaps too stringent.

17. In paragraph 14, the notion of a reasonable time-limit should be introduced in speaking of the right of option. Such a right should not be eternal. It was necessary to avoid maintaining both a primary and a secondary nationality, because that would eventually cause problems. Furthermore, a time-limit should be introduced in connection with the issues discussed in paragraphs 15 and 22. Lastly, he endorsed the main idea in paragraph 7,

namely, the obligation to negotiate in order to avoid cases of statelessness.

18. Mr. PELLET commended the Working Group on a very concise and stimulating report. As to questions of principle, he agreed with Mr. Mahiou that the idea of an obligation to negotiate for arriving at an equitable agreement in matters pertaining to State succession was a good starting-point. As he saw it, the subject under consideration was first a question of State succession, and then a question of nationality.

19. Further consideration needed to be given to the notion of secondary nationality. He was somewhat reluctant to say that there could be different degrees of nationality under international law or that the word "nationality" could relate to different concepts. He agreed with Mr. Mahiou that an effort should be made to find another term for secondary nationality, perhaps the "nationality of a federal State". The example of the former Yugoslavia showed that the idea of secondary nationality only complicated things.

20. His strongest reservation concerned the fact that the report seemed to pursue a double standard, depending on whether nationality stemmed from *jus soli* or *jus sanguinis*. In reading subparagraphs (a) to (d) of paragraph 10, one gained the impression that *jus soli* was a kind of peremptory norm of general international law. Pursuant to subparagraphs (a) and (b), a person in the territory of a State had and retained its nationality, whereas in subparagraph (c), the formulation for acquiring nationality on the basis of *jus sanguinis* was much more convoluted. That was a mistake and posed important questions of principle and method, since the Working Group seemed to have based itself on the idea that persons had a nationality by virtue of international law, that they had the nationality of the territory in which they were born and that they could acquire a nationality by virtue of *jus sanguinis*. He did not think that that was a rule of international law. Instead, nationality flowed from national law, within a general, flexible framework posed by international law. In other words, he was not sure that the Working Group was justified in distinguishing between the four categories of persons set out in paragraph 10. The problem was that people had the nationality of the predecessor State, and he did not believe that the Working Group should draw such firm distinctions about the way nationality was acquired, even though the report was, of course, of a preliminary nature.

21. Some details of the report were of less importance. Paragraph 14 (a) spoke of the right of option between the nationality of the predecessor State and the nationality of the successor State, for persons born in what had become the territory of the successor State and residing either in the predecessor State or a third State. He was somewhat sceptical and thought that residence in a third State was irrelevant in the case in point.

22. It was gratifying to hear that the members of the Working Group considered that the granting of a right of option was desirable, but one that did not necessarily reflect to *lex lata*. The Working Group took a broad view of the concept of right of option, something that in itself posed no particular problem, as long as it was clearly understood that the Working Group was, in that instance,



engaging in progressive development of international law rather than codifying established practice.

23. Accordingly, the title of section 2 (c) (ii)—“Obligation of the successor States to grant a right of option”—was not entirely consistent with paragraph 21, which immediately followed and which provided that successor States should grant a right of option. He preferred the formulation in paragraph 21, considering the title of the section in question to be slightly misleading. With regard to paragraph 23, the Working Group, by making the scope of the right of option very broad, had perhaps gone too far in its laudable efforts to ensure respect for human rights and provide freedom of choice to individuals. It was not entirely certain that the will of the individual could or must prevail, in all cases, over agreements between States if such agreements fulfilled a number of acceptable principles. The important thing was that individuals should not be deprived of a nationality.

24. The statement in paragraph 29 that a third State should be entitled to consider an individual as a national of a successor State with which he has effective links, though at first glance logical, could well give rise to undesirable consequences in regard to the protection of stateless persons and diplomatic protection. The matter called for further scrutiny and reflection. Paragraphs 31 and 32, on the rule of continuity of nationality, appeared unnecessary, since the Working Group's conclusion, set out in paragraph 32, was that the distinctions those paragraphs made did not apply in the context of State succession.

25. Lastly, the question of legal persons was definitely as interesting from the legal standpoint and was surely significant in practical terms.

26. Mr. VARGAS CARREÑO said that he very much appreciated the efforts of the Working Group, which, basing itself on international practice and, where necessary, engaging in progressive development, had provided realistic solutions to a difficult and complex topic.

27. It should be noted that the proposed rules were residual in character and that in the area of State succession the will of States as well as any agreements between them had to prevail. The obligation to negotiate was, consequently, very important not only as a means of preventing statelessness but also with regard to all matters pertaining to State succession.

28. The report of the Working Group, with a few technical corrections such as those suggested by Mr. Mahiou, could be included in the Commission's report to the General Assembly. Once the Sixth Committee had expressed its views, the Working Group would be able to complete its work in 1996. In that connection, he entirely agreed with Mr. Mahiou and Mr. Pellet that the issue of legal persons needed to be taken up. Plainly, the Special Rapporteur's excellent report (A/CN.4/467) and the Working Group's report afforded a sound basis on which to begin work on an important topic.

29. Mr. IDRIS expressed his thanks to the Working Group for its endeavours and for producing a report of very high calibre. Personally, he would have preferred the report to include a section covering applicable na-

tional legislation and State practice in the matter under consideration. Otherwise, the study would be too theoretical.

30. He agreed that States should necessarily be under an obligation to consult and negotiate in order to resolve any problems of nationality arising from State succession. In paragraph 7 of the report, the Working Group had recommended that, once embarked on negotiations to prevent statelessness, States should also address a number of other areas that might be affected by State succession, including dual nationality, military obligations and right of residence. However, all the areas listed in that regard were social concerns and had no direct bearing on legal provisions regarding nationality. They should not, therefore, be among the issues which States were supposed to negotiate between themselves.

31. He concurred with the comments by Mr. Pellet and Mr. Mahiou with regard to paragraph 10. It was overly theoretical and should be modified to reflect State practice and national legislation. According to paragraph 23, the term “right of option” was being used in a broad sense. He could not agree. In fact, the right of option dealt with a very precise matter: the possibility of making either a positive choice or, again, a negative one, in other words, of renouncing a nationality acquired *ex lege*. Paragraph 23 also implied that agreements between States might attribute nationality against the will of the individual. The Commission would be making recommendations to States rather than to individuals, and it should avoid giving the impression that its efforts were directed towards the latter.

32. Mr. VILLAGRÁN KRAMER said that the Working Group's report dealt with a subject of concern mainly to the countries of eastern Europe, which currently shared certain regional preoccupations. Yet, other countries might at some other time be affected by the consequences of State succession. In its future work, the Working Group should accordingly give consideration to the impact of State succession for all States.

33. The topic discussed by the Working Group included both the interests and rights of States with regard to individuals and the interests and rights of individuals. In his view, the interests of individuals should prevail over those of States. In that connection, it was important to clear up any differences which might arise within the Commission in terms of how to approach the question under consideration.

34. Previously, a State had been considered to have the right to grant nationality to individuals born on its territory or to individuals who were descendants of its nationals: the concepts of *jus soli* and *jus sanguinis*. More recently, the emphasis had shifted to individual rights: the right of individuals to a nationality, the right of individuals not to be deprived of their nationality or of the status and privileges accompanying nationality. Accordingly, it was regrettable that the Working Group had not placed enough emphasis on nationality as a fundamental human right. The importance of nationality in the context of human rights had to be affirmed and, in his view, the Commission had solid grounds on which to do so. Such a framework would do much more to advance the

work than would the formalistic concept of international law.

35. The Commission should bear in mind the difference between the legal situation of a person who possessed a particular nationality by virtue of *jus soli* or *jus sanguinis* and that of a person whose nationality could be affected by changes in the status of the State in which he was born or of which he was a national. The situations were different and the Working Group had placed too great an emphasis on the latter. Yet, the very roots—the fundamental basis—of nationality was found in the *règles de rattachement*, essentially *jus soli* and *jus sanguinis*. While he would not go so far as to characterize them as *jus cogens*, those rules were highly compelling and were certainly applicable in the new circumstances rightly identified by the Working Group.

36. It should be recalled that in the *Nottebohm* case,<sup>3</sup> ICJ had made reference not to nationality but to naturalization, an act whereby a State granted its nationality to an individual who was a national of another State. The Court had ruled that a link in fact and in law must exist between the person and the State in order for the State to grant nationality and to exercise its right to diplomatic protection. The Commission should use prudence in invoking that precedent and others which related to naturalization. The Working Group had rightly provided examples of situations that might arise in practice and the Commission must give further consideration to the various scenarios. He wished to stress, in particular, that the right of option should, in the context of State succession, be considered as a fundamental human right, similar to the right to freedom. The right of option could not be taken away from one moment to the next, for it was anchored in the structure of international law.

37. While the Working Group's report was valuable, it did not provide clear guidance for the future work of the Commission.

38. Mr. YANKOV said that he wished to express his gratitude to Mr. Mikulka for his work both as Special Rapporteur and as Chairman of the Working Group.

39. With regard to the report of the Working Group, he had to admit that he had been expecting more than a simple summary of the first report of the Special Rapporteur. He had hoped that the Working Group's report would provide guidelines so that the Commission could start to engage in practical work on the topic in 1996. He feared that if the debate remained in the realm of theory, the General Assembly might protest. The Special Rapporteur already had at his disposal all the requisite elements to provide the members with a solid framework for considering the topic at the next session.

40. In his view the "conclusions" in the Working Group's report were misnamed. A working group was supposed to add information to what had already been discussed. In the case at hand, the report provided a very good summary of the first report of the Special Rapporteur but added very little that could assist the Commission in its future endeavours.

41. Mr. BENNOUNA said that the Working Group's report was simply a summary of the issues raised either by the Special Rapporteur in his first report or during the discussion in plenary and that it did not do much to advance the Commission's work.

42. He had been somewhat concerned to see both the topic of the law and practice relating to reservations to treaties and that of State succession and its impact on the nationality of natural and legal persons on the Commission's agenda. They were secondary issues which had already been dealt with. The Commission's work on the law and practice relating to reservations to treaties would probably encounter enormous problems and add little to its prestige or the place the Commission held within the United Nations system.

43. He had serious doubts about section 5 of the Working Group's report, which dealt with the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality. He agreed with Mr. Pellet that a choice must be made between codification of issues relating to nationality and codification of issues pertaining to State succession and, like his colleague, he would opt for the latter. The Special Rapporteur, too, must be convinced of that point of view and should refrain from veering off into issues of nationality. Yet, section 5 of the Working Group's report went well beyond the limits of State succession and into the realm of nationality. In so doing it took considerable risks, in particular by according third States the right to judge the actions of predecessor or successor States which had failed to comply with the principles applicable to the withdrawal or granting of nationality. In other words, a third State would be entitled to consider an individual as a national of a State without the agreement of the latter State. Such a practice was contrary to the principles of international law. A problem between a predecessor State and a successor State was a problem of succession. However, once a third State was entitled to act as judge, the issue changed entirely to one of nationality. It was audacious in terms of international law to contend that a State could regard a person as having the nationality of a State, without the agreement of that State.

44. Unlike Mr. Yankov, he did not think that the time had come for the Working Group to draw up a plan of future work on the topic. What needed to be done at the present stage was to define the precise scope of the ground to be covered. As Mr. Pellet had pointed out, many uncertainties still persisted in that respect. The question of human rights in relation to the topic under consideration had been raised by Mr. Villagrán Kramer. As he saw it, in matters pertaining to *jus cogens*—which of course covered all fundamental human rights—the Commission's work would consist of codification, but in matters of succession of States it would come under the heading of progressive development. The question of relations with third States was of particular importance in that connection. The Commission must beware of creating new problems in that area. In short, before drawing up any plan of future work, the Commission needed to know precisely what it was talking about. He none the less wished to thank the Working Group for its efforts, which had provided a stimulus for an interesting discussion in plenary.

<sup>3</sup> See 2385th meeting, footnote 15.

45. Mr. KUSUMA-ATMADJA, after joining previous speakers in thanking the Special Rapporteur for his excellent first report, said that his remarks would be preliminary in nature. First of all, he wished to refer to the experience of his own country, Indonesia, as a successor State to a former colonial State, the Netherlands. With the help of the secretariat, he had taken the liberty of having copies of a document describing Indonesia's experience circulated to members of the Commission. It related to nationality issues arising from three separate types of succession: first, succession in respect of the major part of what was now Indonesia, where the relevant nationality issues had been settled by an agreement between Indonesia and the Netherlands signed in 1950;<sup>4</sup> secondly, succession in respect of the former territory of Western New Guinea, settled, with the help of the United Nations, in 1962;<sup>5</sup> and thirdly, succession in respect of East Timor which, as was known, Indonesia held to have been incorporated into Indonesian territory by integration rather than annexation.<sup>6</sup> While not agreeing with all of Mr. Yankov's strictures regarding the Working Group's work, he felt that a certain amount of structuring was called for, and hoped that his country's experience might prove useful in that connection.

46. As to the question of the right of option, he would point out that the right of the individual to exercise his human right to a nationality was different from, but not necessarily inconsistent with, the concerns of the State, which related primarily to nation-building. In its first Nationality Act, in 1946, which had reflected the desire of a newly emergent State to abolish the discriminatory practices of the former colonial regime, Indonesia had adopted the *jus soli* principle, whereby all persons living on Indonesian territory had become Indonesian citizens unless they opted otherwise. A decree issued at the time by the then Minister of Justice had expressly prohibited referring to Indonesian citizens of Chinese origin as "Chinese". A new Nationality Act combining *jus soli* with *jus sanguinis* had been passed in 1958, when Indonesian nationals had begun to travel abroad and to need a new basis for diplomatic protection. Experience had shown that the generously granted *jus soli* principle had been misused by an ethnic minority which, being strong in economic terms, wished also to gain special political rights. Thus, Indonesia had had good political reasons for changing the law, and it had succeeded in persuading the People's Republic of China to change its relevant domestic laws in the spirit of the Conference of Asian and African Nations (Bandung Conference).<sup>7</sup>

47. He believed he was justified in saying that Indonesia had applied the right of option in a liberal manner. Under a Sino-Indonesian treaty on prevention of dual nationality, for example, minors kept the father's nationality until the age of 18 but could then choose Chinese nationality if they so wished.<sup>8</sup> A foreign spouse of an Indonesian national was allowed a year in which to opt for one of the two nationalities; if the marriage was dis-

solved and the non-Indonesian spouse wished to revert to his or her former nationality, that too was permitted.

48. He did not agree with Mr. Pellet that concerns of the State should take precedence over individual rights in all cases. There was a point of convergence in the issue of diplomatic protection, where Indonesia's practice was to instruct its nationals to abide strictly by the laws of the foreign country in which they were present, while, of course, providing Indonesian nationals with consular protection.

49. Another example where the right of option had been granted liberally by Indonesia was an agreement reached in respect of Moluccan members of the former colonial army who had fought against the forces of independence in Indonesia and had chosen to move to the Netherlands with their families at the end of the conflict. Twenty years or so later, many of them, being dissatisfied with life in the Netherlands for a number of reasons, had asked to be granted Indonesian nationality. As his country's Minister of Justice at the time, he had been responsible for the so-called Moluccans Law which had enabled several thousands of such people to return to Indonesia as nationals, certain individuals even retaining their right to a generous Netherlands pension.

50. To sum up, he would say that the right of option of the individual should not be subject to the right of the State to determine nationality. The State's exercise of its rights in the interests of nation-building was, of course, very important, but it should be used judiciously, as had been the case in Indonesia, where very great importance was attached, for example, to the principle of the unity of the family. Without being as critical as Mr. Yankov of the Working Group's performance, he had the impression that it had been interested only in eastern Europe. More attention should be paid in future to the experience of former colonial States. If invited to do so, he would be pleased to make his services available to the Working Group in that connection.

51. Lastly, he did not think that the question of the nationality of legal persons needed to be dealt with by the Commission. Multinational corporations had the means to take care of their own interests. The Commission should focus its attention on the question of the nationality of individuals, especially in countries which had emerged from colonial rule.

52. Mr. LUKASHUK said that he had already commented favourably on the Special Rapporteur's first report and could therefore be brief. He believed that the Working Group was on the right track in linking the individual's right to a nationality, on the one hand, with the obligation of States to prevent statelessness, on the other. The question of legal persons was a separate and highly specific one, and it should be considered at some later stage. The principle of the individual's right to a nationality would undoubtedly come to be incorporated in many national legislations, in which connection he drew attention to an important provision contained in the new Russian Constitution stipulating that no organ of the

<sup>4</sup> See 2390th meeting, footnote 8.

<sup>5</sup> Agreement (with annex) concerning West New Guinea (West Irian) (United Nations, *Treaty Series*, vol. 437, p. 273).

<sup>6</sup> Indonesian law promulgated on 17 July 1976.

<sup>7</sup> Held at Bandung, Indonesia, from 18 to 24 April 1955.

<sup>8</sup> See 2390th meeting, footnote 9.

State had the right to deprive a person of Russian nationality.

53. In his next report, the Special Rapporteur might devote more attention to matters of a general nature, in particular a definition of the concept of nationality and of the different types of State—federation, confederation, and so on—of which a person could be a national. As other members had already pointed out, the question of the relationship between international law and national legislations in respects other than that of settling nationality issues also deserved attention. The report of the Special Rapporteur and that of the Working Group convincingly demonstrated that nationality was not only a matter of internal law.

54. He agreed with Mr. Bennouna that some of the Working Group's conclusions concerning the position of third States as set out in section 5 of the report might have rather dangerous repercussions in practice. For example, an individual who had been deprived of his or her nationality would still be liable to be extradited under an extradition agreement between the predecessor and successor States, a situation that would constitute a clear violation of the individual's human rights.

55. While entirely sharing Mr. Yankov's concern with productivity, he could not agree with his criticism of the Working Group's work, subscribing instead to the more positive assessment made by Mr. Kusuma-Atmadja. Indeed, he thought that the Working Group had achieved better results than might have been expected at such an early stage, and he wished to commend both the Working Group and the Special Rapporteur on the topic on the excellent work they had done in a previously unexplored area.

56. Mr. RAZAFINDRALAMBO said that, like previous speakers, and Mr. Mahiou in particular, he considered that the report of the Working Group should have been more explicit about its intention with regard to the question of legal persons and should have included at least a reference to the question. Specifically, it was his view that legal persons should not be allowed complete freedom to elect the nationality of the country in which they wished to carry out their activities.

57. The Working Group should pay particular attention to the important question of dual nationality, a question in regard to which the Special Rapporteur had remained virtually silent. It was a very important problem and one of particular interest to certain developing countries, because it was tied in with decolonization.

58. As to other criteria applicable to the withdrawal and granting of nationality, dealt with in section 4 of the report of the Working Group, paragraph 27 stated that "as a condition for enlarging the scope of individuals entitled to acquire its nationality" a successor State should be allowed to take additional criteria into consideration. Bearing in mind that the predecessor State was prohibited from adopting such criteria, he wondered whether the result would not be that they would be improperly used in order to turn down certain categories of persons, thus allowing the possibility of discrimination.

59. He agreed with the reservations voiced by Mr. Bennouna and Mr. Pellet about the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality. He failed to see which principle of international law enabled a third State to interfere in problems which, *a priori*, concerned the predecessor and successor States alone.

60. Although the principles governing international responsibility, referred to in paragraph 30, would apply automatically, they would not suffice since they concerned States. Actually, the problem of nationality and particularly of statelessness was primarily of concern to the individual, who might be left in a difficult situation for many years if the traditional method of recourse to ICJ was followed. The Working Group should therefore consider the possibility of provisions on settlement of disputes which would provide for specific procedures, including arbitration, with a view to reaching a decision within a reasonable period of time. Where appropriate, the possibility of having a protocol to provide for recourse to the Committee on Human Rights could also be considered.

61. Mr. PAMBOU-TCHIVOUNDA said that the Working Group had submitted a practical report on an abstract question. It might, however, seem to be lacking in that common sense approach without which the end result of any law-making endeavour was bound to be no more than mere fiction. Such, at any rate, was the impression that the report might create. The question therefore was what purpose it served and how it could be evaluated in concrete terms. His answer to that question centred on three points.

62. First, while he agreed that the basic principle should be the obligation to negotiate, common sense dictated that the objective of that obligation should be spelt out. The obligation went a little further than the statement in paragraph 5 of the report, according to which States should have an obligation to consult "in order to determine whether this change had any undesirable consequences with respect to nationality". States were not, after all, going to engage in negotiations to determine whether State succession had undesirable consequences. Rather, States involved in a State succession should be required to do everything possible, and indeed they had an obligation to do so, to stabilize the territories concerned by providing safeguards for the population. He used the term "safeguards" because, in the present day and age, it was unthinkable that there were still peoples who eked out their lives in tents in the desert. That was the kind of obligation to be borne in mind when imposing on States an obligation to resolve a case of State succession which had implications for the fate of populations. It was not just a word—"nationality"—that was at issue but the fate of populations, and that should be made quite clear.

63. Secondly, the part of the report which dealt with the right of option could lead to misunderstanding. In the context of State succession, such a right had to be placed within certain limits. He did not dispute the suggestion that it was also a human right, but would point out that it was important not to reverse the roles: State succession was a matter for the State, and individuals were not

responsible for regulating it. It was for States to make sure that, in such cases, chaos was avoided. State succession was sufficiently problematic already; to allow individuals a right of option would simply be adding to the problems. The exercise of such a right should therefore be made subject to very strict conditions. Its beneficiaries would have to be determined and it would have to be circumscribed in time; in so advocating, he had in mind the question of dual nationality. Also, the report, curiously, introduced the concept of secondary nationality—a concept that should be dropped. Nationality either existed or it did not. Any other elements would be added on account of dual or multiple nationality, not of main or secondary nationality.

64. Thirdly, some thought should be given to such higher considerations as whether it was rules or guidelines that international law should place at the service of States. There was also the question of the relationship between human rights and sovereignty. If it were possible for the matter to be settled by individuals themselves, international law—the law made by States for States—would probably not assume responsibility for it. Another consideration concerned emotional and even material ties; and it was in that respect, it seemed to him, that the two questions, namely, State succession in the case of natural persons and State succession in the case of legal persons, converged. He also wondered whether the title of the topic should perhaps not refer to the “fate” of natural and legal persons. Moreover, the report should have raised the question of the nationality of companies’ directors, which would have helped to define the limits of the topic and, in particular, it should have indicated more clearly what the prospects were, bearing in mind, on the one hand, the different categories of State succession, and, on the other, State practice.

*The meeting rose at 1.15 p.m.*

## 2412th MEETING

*Thursday, 6 July 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, 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. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

## Visit by a member of the International Court of Justice

1. The CHAIRMAN said he extended a warm welcome to Mr. Oda, a Judge of the International Court of Justice for some 20 years and, prior to that, an outstanding scholar and professor and a negotiator at the United Nations Conferences on the Law of the Sea. Mr. Oda symbolized the great Asian tradition that combined intelligence, wisdom and discipline. He invited Mr. Oda to address the Commission.

2. Mr. ODA recalled that the last time that he had attended a meeting of the Commission had been in 1960, as the assistant of Mr. Yokota, Japanese member of the Commission.

3. He drew two conclusions from his experience as a judge of ICJ. The first was of a personal nature. Although the spirit of contradiction was not one of his personality traits, it was a fact that, in the discharge of his tasks as judge, he often found himself in the minority, and that had led him to draft many dissenting or separate opinions. The second concerned the general list of the Court, one of whose characteristics was that, when international disputes arose, it could not exercise its jurisdiction unless the matter had been brought before it. As it happened, States seemed to be increasingly inclined to refer cases to the Court because its general list, which had contained only one entry in 1976, was today very long.

4. On 30 June 1995, the Court had delivered a judgment in the *East Timor (Portugal v. Australia)* case.<sup>1</sup> On 30 October, it would open oral proceedings on the question of the *Legality of the threat or use of nuclear weapons* (request for advisory opinion),<sup>2</sup> which might well be time-consuming, because more than 40 States had submitted statements and many of them had indicated their intention to invite experts or witnesses to testify. The Court would then have to decide in which order it would examine the other cases ready for hearing.

5. The CHAIRMAN expressed his thanks to Mr. Oda for his remarks and congratulated him on his eminent contribution to the case-law of ICJ and to the development and dissemination of international law.

## The law and practice relating to reservations to treaties (*continued*)\* (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>3</sup> A/CN.4/L.516)

[Agenda item 6]

### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)\*

6. Mr. AL-BAHARNA said that he would like to make a number of general observations before considering the proposals of the Special Rapporteur.

<sup>1</sup> *I.C.J. Reports* 1995, p. 90.

<sup>2</sup> *Order of 1 February 1995, I.C.J. Reports* 1995, p. 3.

\* Resumed from the 2407th meeting.

<sup>3</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

7. He began by stressing that reservations occupied a central place in the law of treaties. Indeed, they had become an important way, as Sir Humphrey Waldock had said, “to promote the widest possible acceptance” by States of multilateral treaties.<sup>4</sup> Without the facility of reservations, it was doubtful whether so many States would have become parties to the multilateral conventions adopted under the auspices of the United Nations. The rationale for reservations to multilateral treaties remained as true as ever; it would continue as long as the State system existed and multilateral treaties remained an instrument for enacting “international legislation”. Consequently, nothing should be done which would be detrimental to the present system of reservations to treaties.

8. Secondly, the regime of reservations contemplated by the Vienna Convention on the Law of Treaties (hereinafter referred to as the “1969 Vienna Convention”) had served the international community of States well, notwithstanding the ambiguities in the *lex scripta*, and it would be imprudent, to say the least, to change the basic rules contained in the regime of reservations. Short of that, the Commission could make improvements in the law and practice in that area.

9. His third comment pertained to the “trends” in reservations to treaties. Analysing the preparatory work on the provisions relating to reservations to treaties in the 1969 Vienna Convention, the Special Rapporteur had stated in his first report (A/CN.4/470) that, despite resistance and hesitation, the history of these provisions showed a definite trend towards an increasingly stronger assertion of the right of States to formulate reservations. Whether that “trend” could be arrested by clarifying the existing provisions in the 1969 Vienna Convention was difficult to say. However, there seemed to be a need to clarify the law governing reservations to treaties.

10. With those perspectives in view, he would refer to some of the Special Rapporteur’s ideas and recommendations for the future. The first issue that the Special Rapporteur considered in his report related to the doctrinal controversy as to whether reservations should be considered from the point of view of “permissibility” or “opposability” (that is to say whether a reservation could be invoked against another party). According to the former thesis, an impermissible reservation nullified a State’s acceptance of a treaty and, according to the latter, the validity of a reservation depended solely on the acceptance of the reservation by another contracting State. As the Special Rapporteur pointed out in his report, the so-called permissibility school on reservations would raise a number of questions, such as whether the impermissibility of the reservation affected the consent of the State to the treaty or merely affected its validity and, more importantly, whether the impermissibility of the reservation produced effects independently of objections by States. In his view, those questions might well revive some of the complex issues that had more or less been laid to rest by the pragmatic stance adopted in the 1969 Vienna Convention and he was therefore against

any approach or study that was inconsistent with that pragmatism.

11. The second issue examined by the Special Rapporteur concerned the regime for objections to reservations, on which the doctrinal controversy referred to earlier had a bearing. The “permissibility school” took it for granted that an impermissible reservation was not opposable to other contracting States, while those advocating the thesis of “opposability” argued that the validity of the reservation depended on whether the reservation was accepted and not on its compatibility with the object and purpose of the treaty. In that connection, the Special Rapporteur outlined a number of questions which were said to arise from the “gaps” and “ambiguities” in the regime of reservations. The Special Rapporteur posed four fundamental questions: What was the precise meaning of the expression “compatibility with the object and purpose of the treaty”? Was an impermissible reservation null and void regardless of the objections that might be made? Could the other contracting States or international organizations accept an impermissible reservation? What exactly were the effects of an objection to a permissible reservation, on the one hand, and an impermissible reservation, on the other? Given the primarily academic nature of those and other questions, he doubted whether the Commission would be able to arrive at a consensus, even on some of them, and he urged the Commission to be extremely circumspect in its approach to the topic.

12. The Special Rapporteur then considered the distinction between “reservations” and “interpretative declarations”, which once again was more of academic than of practical relevance. The definition of reservation in the 1969 Vienna Convention was sufficiently clear and, in any case, it would be pointless to assume that interpretative declarations could be prevented by streamlining the definition of “reservation”. As long as they facilitated wider acceptance of treaties, they could not be faulted.

13. The fourth important issue analysed by the Special Rapporteur related to reservations to human rights treaties, which, by definition, were of a special nature. As noted by the Special Rapporteur, who cited a general comment of the Human Rights Committee<sup>5</sup> in his report, “The principle of inter-State reciprocity has no place” and “the operation of the classic rules on reservations is inadequate”. Two questions arose in that connection: first, could an objecting State release itself from the obligation to respect the human rights of the citizens of the reserving State and, secondly, could the Human Rights Committee determine whether or not a specific reservation was compatible with the object and purpose of the International Covenant on Civil and Political Rights?

14. The Special Rapporteur raised a host of other issues, some of which were more of academic than of practical value, such as questions concerning “codification conventions”.

<sup>4</sup> Yearbook . . . 1962, vol. II, p. 65, paragraph (7) of the commentary to articles 17, 18 and 19.

<sup>5</sup> See 2400th meeting, footnote 9.



15. With regard to the Special Rapporteur's proposal in his report to change the title of the topic to "Reservations to treaties", he was not opposed to it.

16. As to the type of approach the Commission should adopt, he supported what the Special Rapporteur called the "modest approach", which would consist in filling in the gaps and removing the ambiguities in the regime of reservations embodied in the 1969 Vienna Convention.

17. Turning to the form of the Commission's recommendations, he would be prepared to support the third solution proposed by the Special Rapporteur, namely, to prepare a guide to the practice of States and international organizations on reservations which presented an article-by-article commentary on existing provisions. Notwithstanding its unorthodox nature, that solution appeared to be the most sensible. For one thing, it did not tinker with the regime on reservations, which had proved its worth, and, for another, it constituted, as it were, a restatement of the law of reservations to treaties.

18. Mr. PELLET (Special Rapporteur) thanked the members of the Commission not only for receiving his report favourably, but also for expressing their views on a number of difficult and controversial substantive questions and for making proposals which would be extremely useful to him in his later work. As he had not had any set ideas on most of those problems, the debate had enabled him to have a better picture of where the real difficulties lay, to order the questions according to their importance and to begin to discern the main trends within the Commission. He would thus devote his statement to the lessons he had learned from the debate and the conclusions that, as he saw it, could be drawn for the future.

19. With regard to substantive problems, he noted that a number of questions raised in the report had not attracted the attention of any of the speakers. He had in mind in particular the effects of reservations on the entry into force of a treaty and the effects of an objection when the objecting State was not opposed to the entry into force of the treaty between itself and the reserving State, as well as problems resulting from parallel, competing treaty techniques. His conclusion was not that the members of the Commission wanted those questions left out of the study, but that they did not deserve to be given high priority. He was personally tempted to add to that list the question of reservations to provisions codifying customary rules, which few speakers had touched on, and only incidentally. Otherwise, and leaving aside reservations to bilateral treaties, to which he would revert when he dealt with the title of the topic, the various speakers had focused on five main issues: the definition of reservations and the regime of interpretative declarations; the dichotomy between "permissibility" and "opposability"; dispute settlement and institutional mechanisms; State succession in respect of reservations; and whether or not provision should be made for a special regime for human rights treaties or even other specific areas.

20. The question of defining reservations had been discussed mainly, but not exclusively, in relation to, or in opposition to, that of defining interpretative declarations. Thus, for one member of the Commission, the definition

contained in article 2, paragraph 1 (d), of the 1969 Vienna Convention was inadequate because it did not expressly state that a reservation could not be for the State party which had formulated it as a means of according rights to itself which are not provided under the treaty. He himself had not looked at the question from that point of view, which was not irrelevant to the question of the relationship between reservations and customary general international law. It nevertheless seemed to him that there was good reason to examine that problem and he would do so in a forthcoming report, although the problem was perhaps less related to the question of the definition of reservations than to that of the legal regime of reservations, or more precisely the effects of reservations, and gave rise to another question: could a State, by means of a reservation, accord itself rights which were not provided for either by the treaty to which the reservation was made or by general international law? To put it more simply: was a reservation by which a State intended to accord itself certain rights permissible? At first glance, it would seem that the answer to such a question must be in the negative, but, as another member of the Commission had pointed out, matters were not that simple.

21. That being said, it was interpretative declarations, on which the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention") were silent, that had given rise to the most statements and discussions. The Commission was faced with a legal enigma: did interpretative declarations, whose practical reality was not open to question, come within the scope of the law and, if so, were they relevant only to the interpretation of a treaty or could they have effects on the scope and nature of the commitments of the declaring State? On that point, two theories which looked as though they would be difficult to reconcile had been put forward: some thought that what counted was the expressed intention of the declaring State which said that it was not formulating a reservation, while others maintained that it was necessary to be realistic and that, if, under the cover of a declaration, a State was in fact formulating a reservation, it should be treated as such. Those in favour of the first theory had the principle of good faith and a certain conception of international morality on their side. Advocates of the second theory could point to the recent jurisprudence of international human rights bodies, although that argument was not necessarily decisive. It could in fact be asked, first, whether those bodies were entirely correct and, secondly, whether their positions should not, in any case, be limited to the specific field of human rights. There as elsewhere, he still did not have any set ideas, but the discussion had definitely helped him get a clear idea of the details of that important problem, which he hoped to be able to deal with as fully as possible in his next report.

22. The most complete and detailed comments had naturally related to the difference between the "permissibility school" and the "opposability school". The issues in that debate were formidably complex, as every speaker had been well aware. It was not his intention to



elucidate every issue at the present preliminary stage, but, before summing up the situation as completely and objectively as possible in a later report, he wished to make three points in that regard. First, he would a priori be quite taken with the idea put forward by several members of the Commission that the tenets of the “permissibility” school were probably correct in theory, but those supported by the advocates of “opposability” reflected the practice of States, dominated by a rather strict spirit of consensus. He could not say with certainty at present what conclusions could be drawn from that finding.

23. Secondly, one member of the Commission had expressed the fear that attempts to look more closely at the concept of the object and purpose of a treaty would make the Commission stray too far from the topic. Despite the overall “neutrality” he was maintaining at the present stage, he considered it quite obvious that an elucidation of that concept would be particularly useful if the aim was to help States take legally correct positions in respect of reservations. To that end, there did not appear to be any reason not to rely on the provisions of the 1969 and 1986 Vienna Conventions, which did not relate directly to reservations, since those provisions and the corresponding practices of States and international organizations might prove useful. That usefulness had, of course, not been tested, but that was something else that required further thought.

24. There was also the question whether or not a presumption of the permissibility of reservations existed. The statement of that presumption in his report was endorsed by some members, but another member had expressed disagreement with it. He would be tempted a priori to maintain his position, it being understood, first, that that was a doctrinal analysis which was perhaps not of much practical importance, but which might be important in terms of the burden of proof, and, secondly, that the disagreement was perhaps not a real one in the sense that, whatever the outcome of a more in-depth examination of the question, it went without saying that, if such a presumption existed, it was certainly not irrefutable, and that was probably the meaning of article 19 of the 1969 and 1986 Vienna Conventions.

25. The third set of problems had to do with the settlement of disputes. Clearly, the ambiguities and uncertainties of the legal regime of reservations made recourse to third party settlement and, probably, to an arbitral tribunal or ICJ particularly desirable, although it was unusual for inter-State disputes on reservations to “degenerate”. In a field as important as that of human rights, moreover, there were judicial or quasi-judicial bodies which met the concerns of the members of the Commission who had stressed the problem of dispute settlement and experience in that regard was not entirely convincing. In general, he was not at all certain that it was necessary, in connection with any topic, to formulate an additional set of draft articles relating to dispute settlement. The alternative was to solve the problem once and for all by supplementing the Model Rules on Arbitral Procedure<sup>6</sup> and by preparing a set of draft articles on the settlement of disputes to which reference would systematically be

made. The “model clause” solution might prompt States to provide in a treaty for appropriate settlement mechanisms without necessarily calling into question the positive law principle of the free choice of settlement methods. The same would apply to the a priori monitoring of the permissibility of reservations by a panel, as suggested by one member of the Commission.

26. The fourth issue was succession of States in respect of reservations and objections to reservations. He had discussed the issue in his report solely for the purpose of providing an overall view and he generally agreed with the members of the Commission that it was far from urgent. The very insightful comments by the Special Rapporteur on State succession and its impact on the nationality of natural and legal persons had highlighted a whole set of interesting problems and unresolved difficulties and had made him think that it would be unfortunate to leave that aspect aside altogether, even though it was marginal in relation to the “basic” reservations regime and should therefore not be examined until the Commission had a comprehensive and clear picture of that regime.

27. The fifth set of issues related to the problem of the unity or diversity of the reservations regime or regimes. The problem might simply be a matter of the need to maintain the flexibility of the current reservations regime, a point with which he fully agreed, but it might also involve a difference between those who, on the basis of the Commission’s earlier work, were very much against a regime that would vary according to the field with which the treaty dealt and those who were, rather, in favour of diversified regimes, at least with regard to reservations to human rights treaties. He admitted that so many contradictory considerations prevented him from making definite proposals, which did not, moreover, seem necessary at the present stage.

28. A point in favour of a variable regime was the generally accepted view that human rights treaties were not based on the idea of reciprocity, which was, however, at the heart of the reservations regime. There was also the very widespread feeling that reservations in that field were often shocking and even intolerable. Lastly, there was the fact that those treaties usually established implementation and monitoring mechanisms which had, rightly or wrongly, assumed power to check or cancel out or at least “neutralize” which had led them to promote innovative solutions. It must, however, be acknowledged that such jurisprudence was strongly contested by States and that, while reservations were probably unfortunate in connection with human rights, a ratification with reservations was better than no ratification at all in that area as in others. A less clear-cut solution was certainly possible, at least for any human rights treaties to be concluded in the future and the Commission would be doing something useful if it proposed specific model clauses for those treaties.

29. In addition to human rights, mention had been made of environment and disarmament treaties, for which it might be necessary to consider the possibility of special clauses or even a special regime. The same was true of the other, very special category of the constituent instruments of international organizations, to which

<sup>6</sup> *Yearbook* ... 1958, vol. II, p. 83, document A/CN.4/113, para. 22.

some members of the Commission had referred. One member had nevertheless seemed to want to exclude that category from the scope of the topic, perhaps because it was simply too particular. As pointed out, however, article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions already made special provision for those instruments, just as article 20, paragraph 2, made special provision for treaties concluded among a limited number of States, a category which another member had suggested should also be excluded from the scope of the topic. All those instruments did, of course, give rise to special problems, but it would be difficult to exclude them if only because it was important to determine which criteria would enable them to be distinguished from other treaties. The outline of special regimes sketched out for them in the Vienna Conventions would have to be investigated and analysed.

30. Before going on to questions of method and form, he wished to make three comments on points which had been raised by some speakers. First, he had taken Mr. Barboza's very good point (2404th meeting) that he had not placed enough emphasis on the role played by the Latin American States in establishing the current reservations regime, which was undeniably based on their practice. He accepted that friendly reproach, but noted that the inadequacies of his presentation did not in any way imply that he underestimated the contribution of those States in that area.

31. He had also pointed out that the members of the Commission from third world countries had particularly emphasized the virtues of reservations, which were sometimes necessary and even valuable because they enabled those States, faced with the difficulties of which everyone was aware, to "give time a little time" or, as the Chairman himself had said, to "buy time" so that they might be able to be in full conformity with the treaty in question, a solution which was entirely relevant in the present case. Moreover, such reservations allowed countries to protect their traditional, religious and cultural values against what might be termed the "steamroller" of the dominant powers. Those precisions did indeed deserve to be taken into consideration and that was one more reason to maintain the current regime's "flexibility", about which he was not as mistrustful as Mr. Pambou-Tchivounda had said (*ibid.*).

32. His third comment was that several speakers had said that political considerations sometimes lay hidden behind highly technical debates. He entirely shared that view. He noted, however, that the same was true of all legal rules, even if political antagonisms had surfaced more strikingly in the area of reservations than in others in the 1960s, and he was also not sure that it was his role and, more generally, that of the Commission to emphasize that particular aspect. It was not certain that the debate would gain in serenity or even in clarity if such political considerations were stated explicitly.

33. Those were the comments he wished to make on the substance of the extremely rich discussion which had taken place in the Commission. He had not invited that discussion when introducing his preliminary report, but welcomed it because of the help it would give him in future and because it might have prevented boredom from

setting in. Mr. Arangio-Ruiz himself had admitted (2407th meeting) that the discussion had aroused his interest, although he had initially found the topic less than fascinating.

34. Turning to more specific points, he recalled that he had asked four questions when he had introduced his report. The first had related to the title of the topic, which he had proposed might be changed in view of the fact that, apart from its very academic nature, the present title implied a separation or even an opposition between law, on the one hand, and practice, on the other. He believed that all the members who had taken the floor had supported the suggestion as to its substance; some had even added additional arguments, like Mr. Barboza (2404th meeting), who had expressed his solidarity as the Special Rapporteur for a topic burdened by a title that was too long and complicated. True, other members had expressed fears of a procedural nature, pointing out that a proposal for an amendment of that kind might give rise to unpredictable discussions in the Sixth Committee. That risk nevertheless seemed minimal. He also did not think that the Commission should, as Mr. Yamada had suggested (2407th meeting), confine itself to dealing with reservations to multilateral treaties. He had already given his reasons, but he would add that reservations to bilateral treaties did not, properly speaking, exist. As Mr. Tomuschat (2401st meeting), supported by other members, had explained very well, a reservation to a bilateral treaty could in the last analysis be interpreted as a proposal for renegotiation. Furthermore, as Mr. Pambou-Tchivounda had said (2404th meeting), if the proposal was not accepted, the treaty simply did not enter into force. Subject to more in-depth consideration of the issue, he therefore did not think that it was possible to speak of "reservations" in connection with a bilateral treaty and feared that by entitling the topic "Reservations to multilateral treaties" the Commission would *a contrario* run the risk of creating the idea that reservations to bilateral treaties could exist. As Mr. Mikulka had pointed out (2406th and 2407th meetings), moreover, the fact that article 20 of the 1978 Vienna Convention appeared in the section relating to multilateral treaties clearly showed that the Commission, followed by the United Nations Conference on Succession of States in Respect of Treaties,<sup>7</sup> had considered that the problem of reservations arose only in connection with multilateral treaties. He therefore proposed on that point, first, that, in its report to the General Assembly, the Commission should very clearly indicate that it generally did not think it possible to speak of reservations *stricto sensu* in connection with the conditions to which a State might make the ratification of a bilateral treaty subject; secondly, that that hypothesis should be tested and verified in one of his future reports; and, thirdly, that the Commission should, above all, indicate in its report that it

<sup>7</sup> See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, First Session, Vienna, 4 April-6 May 1977*, vol. I (United Nations publication, Sales No. E.78.V.8); *ibid.*, *Resumed Session, Vienna, 31 July-23 August 1978*, vol. II (United Nations publication, Sales No. E.79.V.9); and *ibid.*, *1977 Session and Resumed Session of 1978, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10).

had decided, subject to the Assembly's approval, to adopt "Reservations to treaties" as the title of the topic.

35. The second and more important question he had asked had been whether the Commission agreed to consider that the rules contained in article 2, paragraph 1 (*d*), and articles 19 to 23 of the 1969 and 1986 Vienna Conventions and in article 20 of the 1978 Vienna Convention should not be called into question and that, in principle, it should regard those rules as unassailable and should confine itself to supplementing them and, if necessary, making them more explicit. There again, it would appear that the unanimous response of the members of the Commission had been affirmative, a fact which he noted with even greater satisfaction because he had taken a very firm position on that point in his first report. It would therefore have been very awkward for him if the Commission had adopted a contrary position, since, in his view, it would have been unreasonable and irresponsible to start all over again from scratch. He was prepared to be an "architect", as Mr. Thiam had put it (2406th meeting), but an interior architect who did not demolish what already existed, but fixed it up. It was thus agreed that the Commission would make improvements by small successive strokes with a view to enabling States to reach mutually accepted compromises, which, in the majority of cases, were constructive, it being understood that, just as freedom was not licence, so must flexibility not degenerate into anarchy. Some speakers, such as Mr. Mahiou (2403rd meeting) in particular, had, it was true, expressed doubts about the possibility of keeping strictly to that position, but, in his own view, the starting point should be the principle that the Commission would do everything in its power to preserve what already existed. That apparently unanimous position of the members of the Commission who had spoken would be reflected in the report of the Commission to the General Assembly and would be the general guideline he would try to follow. He personally believed that that was entirely possible, at any rate as far as the general regime of reservations was concerned.

36. The problem was whether "general regime" should be taken to mean one single legal regime applicable to reservations and it was that problem which had led him to ask a third question, namely, whether the Commission was in principle in favour of the idea of drafting model clauses that might be proposed to States for inclusion in future multilateral conventions, depending, in particular, on the area in which those conventions had been concluded. He believed that the Commission could be said to have replied almost unanimously in the affirmative. All speakers had in fact adopted a position to that effect, with the exception of Mr. Eiriksson (2407th meeting), who had given no explanation of the reasons for his opposition. For his own part, he considered that such a technique offered great advantages. The essential reason which would militate in its favour and which he had already mentioned in his first report was that, whatever the form of the Commission's future work, the rules that would be established would be merely residual in nature, and that meant that States would always be able, by mutual agreement, to derogate from them, as they could derogate from the present provisions of the three relevant Vienna Conventions.

37. In some fields, such as that of human rights, the general feeling in the Commission seemed to be that such derogation should be possible without prejudging the separate and more difficult question whether there was a special regime of reservations to treaties concluded in that field. It would be useful to draw the attention of States to the possibilities open to them for changing and varying the general regime of reservations through the inclusion in future treaties of certain provisions of which the Commission could and even should provide examples in the form of model clauses.

38. It was probably overambitious to impose on States compulsory methods for the settlement of disputes or a priori monitoring of the validity of reservations. On the other hand, it was by no means absurd or outside the Commission's mandate to try to encourage States voluntarily to establish suitable monitoring and dispute settlement mechanisms relating to reservations by including in conventions provisions to that effect based on model clauses. That would certainly have a definite pedagogical advantage and would enable the Commission gently to play its role as the international community's legal mentor without being abrupt and unrealistic. To his mind, however, the Commission would obviously only be opening up possibilities for States, but it could not stop at that and the model clauses should only supplement what ought to be the main result of its work.

39. What should the result of its work be? In other words, what form should the results of the Commission's work take—a draft convention, a protocol or protocols, a guide to practice or a systematic commentary? That had been the fourth question he had asked in introducing his report. The replies given had been rather disappointing and not at all clear. It seemed to him, however, that several speakers had taken refuge behind the Commission's usual practice and had said that the question was premature—and the answer even more so—and that there would be time to adopt a position once the work on the topic had been completed. Such an attitude was, however, not in keeping with General Assembly resolution 48/31, which clearly stated that a preliminary study should be presented to the General Assembly on, precisely, the form to be given to the work on the topic. Some members, particularly Mr. Mahiou (2403rd meeting), had fortunately recognized that the problem was of a very special nature because, unlike most topics, that of reservations was not a "first night", but a "repeat performance", and had agreed that he could not be left without guidelines, for which he was grateful to them. Unfortunately that was of little help because of the rather heterogeneous nature of the suggestions made. That was perhaps his own fault, as he had left the question completely open, not having any very decided idea about it, except that a decision ought to be taken forthwith.

40. The opinions expressed had unfortunately been rather diverse, although they had fortunately not been too categorical. A small number of members had not ruled out the possibility of a convention and had said that they were at any rate in favour of draft articles which might possibly lead to a convention, pointing out that such was the Commission's usual practice and that the status of the text could always be "lowered" at a later stage if a convention seemed unattainable. How-

ever, he was not entirely convinced by those arguments and also had doubts about the idea of preparing draft articles leading to protocols to each of the 1969, 1978 and 1986 Vienna Conventions. Contrary to what was true of most other topics, it was not at all certain that, in the case of the topic under consideration, it was desirable to draft univocal articles that would take the form of rigid rules or "commandments" to States, even if States would be bound by them only after expressing their consent. He feared that, if it did so, the Commission would be making the present system, which had its flexibility in its favour, far too rigid. He therefore greatly preferred guidelines to "commandments" and suggestions for conduct to compulsory rules. Consequently, he would rather join what he thought was, if not the majority opinion in absolute terms, then at least the opinion most frequently expressed, in favour of a guide to practice. While recognizing that he did not have a clear idea of exactly what such a guide to practice might be, he felt that, by giving the matter some thought and combining some of the suggestions made, he should be able to give that idea shape.

41. Mr. Barboza had mentioned (2404th meeting) the possibility of a restatement, as it were, of the law. That was indeed some of what would be involved, but, to "re-state" the law, one had to be sure that established rules existed and they did not, really, apart from the relevant provisions of the three Vienna Conventions. In terms of substance, therefore, it did not seem possible to follow the example of the restatements that found favour in the United States of America; in terms of form, however, it was indeed a rewarding area. Several speakers, and Mr. Thiam in particular (2406th meeting), had none the less pointed out that it would not be in accordance with the Commission's statute if articles were not drafted. That was a somewhat narrow and traditionalist interpretation of the Commission's mandate, nevertheless a restatement *de lege ferenda* could easily be presented as a set of draft articles. It would, however, be drafted in the form of recommendations, in terms that were persuasive rather than compulsory and binding, so as to guide State practice; but, if States so wished, there was no reason why it could not be transformed into a convention on reservations or into a set of protocols. He had to confess that that was not the clear-cut solution that he had been hoping for and that would simplify his task, but, as no consensus had emerged in favour of such a solution, as he had no definite preconceived idea on the matter and as his report had to take some form, that solution seemed to him to be, if not the best, at least not the worst. There was no reason why it could not be improved on and refined as work progressed. It should be noted, however, first, that the draft would be accompanied, where necessary, by model clauses, on which there was a virtual consensus and which could, depending on the case, be of either an illustrative or a derogatory nature, and, secondly, that there should be no misunderstanding about the expression "guide to practice": it was not a question of summarizing the past and present practice of States, but, rather, of directing and guiding their future practice.

42. Some members had touched only partially on the question of the method to be followed for the future work. Some had referred to the order of priority of the questions to be examined, others had raised the question

of the "material" to be used and still others had expressed their support for the establishment of a working group.

43. He was opposed to a working group, as he saw no point, at the present stage, in appointing one. So far as the form of the work was concerned, his proposals should be acceptable to most members as they safeguarded the future and left the door open to all possible developments. So far as substance was concerned, unless there was some unexpected difficulty requiring special treatment, there seemed no need to depart from the normal procedure whereby the Special Rapporteur introduced a report and his proposed draft articles were debated in plenary and amended, where necessary, by members and then referred to the Drafting Committee to be finalized.

44. As to the "material" to be used, no matter what several members had said, an examination of practice and doctrine was indispensable, in his view. To those who would object that practice was inconsistent, he would reply, first, that one should ensure that it was in fact inconsistent and, secondly, that it should be studied in sufficient detail to see how the problems arose for States in practical terms. That too was why he proposed to send a questionnaire to States and international organizations for their views on the problems encountered. None the less, while practice could not be entirely disregarded, it was certainly not the only element to be taken into consideration—and that, incidentally, was one of the reasons he had suggested that the reference to practice in the title should be deleted. It would be useful to give serious and detailed consideration to the system of rules laid down in the 1969 and 1986 Vienna Conventions and, to a lesser extent, in the 1978 Vienna Convention with a view to determining the logical consequences that flowed or should flow from them.

45. With regard to the order in which the various problems raised by the topic should be dealt with, the following points had been made during the debate. First, the Commission would not, in principle, deal with "reservations" to bilateral treaties; secondly, the problems of reservations and objections to reservations linked with State succession should not be left out of the topic, but should be the subject of a separate examination at the end of the exercise; thirdly, the starting point for any discussion was the provisions of the 1969 Vienna Convention, called "the matrix Convention" by Mr. Mahiou (2403rd meeting).

46. Although none of the members had raised the matter, he wished to make two further remarks concerning method. In his view, it would be better for the special questions that arose with regard to reservations to treaties concluded by international organizations to be studied as each of the problems was examined: their "specificity" was, after all, only relative and, if it were decided to deal with them separately, one might in the end have to return to all the problems already dealt with. Similarly, it seemed logical to him, in the case of each problem that arose—for instance, interpretive declarations, effects of reservations and regime of objections—to look at matters not only from a general viewpoint, but also from the angle of derogatory or special regimes.

47. In the light of the foregoing, he proposed to proceed in the following manner. He would first try to specify individual categories or groups of problems. For each of them, he would then attempt to pinpoint general guidelines which would be presented in the form of flexible draft articles, on the understanding that, in addition to the basic articles, there would be other articles relating more particularly to reservations to treaties concluded by international organizations or, otherwise, to treaties concluded in a particular field. Model clauses concerning each problem would accompany the draft articles to which they corresponded and would be included in, or at the end of, the commentary. It should be possible to complete the draft as a whole in four years' time unless any serious and unexpected problems arose.

48. As to the chapter of the Commission's report concerning reservations which was to be submitted to the Sixth Committee in the current year, he noted that General Assembly resolution 48/31 stated that "the final form to be given to the work on [this topic] shall be decided after a preliminary study is presented to the General Assembly". The Commission must respond to that expectation, and that was why he suggested that the part of the report devoted to reservations should be submitted as the preliminary study which had been requested in the hope that it would prompt interesting comments on the part of the Sixth Committee.

49. The CHAIRMAN, summing up the Special Rapporteur's proposals, suggested that, in the first place, the Commission should take note of the Special Rapporteur's intention to prepare a questionnaire addressed to States and, secondly, the chapter of the Commission's report that reflected the debate on the topic and the conclusions drawn by the Special Rapporteur should be submitted as "the preliminary study" requested by the General Assembly. That study would therefore not have to be submitted as a separate document. He asked the members of the Commission whether that procedure was acceptable to them.

50. Mr. BENNOUNA said that he had no objection to the debate in the Commission and the Special Rapporteur's conclusions being reflected in the report transmitted to the General Assembly. The suggestion that a questionnaire should be addressed to States also did not seem to pose any problem. It should, however, be made quite clear that, at the current stage, no decision had been taken on the final form to be given to the Commission's work on the topic.

51. Mr. ROSENSTOCK said he had a sense of where the Special Rapporteur would like to go, but considered that his suggestions had not been formulated clearly enough. It would be helpful if he could draft a conclusion that it might be useful to transmit to the General Assembly. There would be no need at the current preliminary stage in the work for unanimity on the conclusion. It would also be advisable if the questionnaire the Special Rapporteur was thinking of preparing could be approved by the members of the Commission already in the current year so that it could then be sent to States and the information received in return could be taken into account at the next session.

52. Mr. YANKOV said that, on the whole, he supported the remarks by Mr. Bennouna and Mr. Rosenstock, but would like to add two points. If the title of the topic was to be changed, that should be done straight away. Also, even if the members of the Commission were very open-minded about the question of form, the Special Rapporteur's conclusions should be expressed in terms of specific suggestions to provide the Sixth Committee with a basis for discussion.

53. Mr. EIRIKSSON said that it would be difficult for the Commission to continue its work on the topic at its next session if it did not take an immediate decision on four points: first, the possible change to the title of the topic; secondly, the final form to be given to its work—and he understood that the Special Rapporteur favoured guidelines; thirdly, the advisability of returning or not returning to the existing rules; and, fourthly, sending a questionnaire, though he had doubts about its effectiveness.

54. Mr. THIAM said that he had the same questions as the previous speakers. In particular, he would like to know in what form the Special Rapporteur expected to submit his next report: as draft articles, as a guide to practice or even as model clauses?

55. Mr. de SARAM said that he had proposed (2404th meeting) that a questionnaire should also be sent to the depositaries of the principal multilateral treaties with a view to ascertaining the nature of the difficulties they experienced. That seemed to be important since the topic under consideration concerned a very technical question which should be studied not from the standpoint of doctrine, but rather from a practical point of view. He would be pleased to discuss with the Special Rapporteur the kind of questions that should appear in the questionnaire.

56. Mr. PELLET (Special Rapporteur), agreeing that the Commission's report should be drafted with the utmost precision, said that he had not formulated more specific proposals, first, because the members of the Commission had not given him any guidelines and, secondly, because he had no definite ideas and remained open to all suggestions. For greater clarity, he would summarize his proposals in the following manner: he would suggest that the Commission's objective should be to formulate guidelines that should be drafted in a sufficiently flexible manner. Such guidelines would be presented in the form of draft articles together with commentaries. Model clauses could also be drafted where special problems so required. That form would not be definitive and there was no reason why it could not be modified as work progressed. All the options would remain open, including, where appropriate, the drafting of a convention, even if the members of the Commission and he himself were not, at the current stage, very much in favour of such a solution.

57. The CHAIRMAN said that, to allow the members of the Commission time to ponder the matter, he would suggest that a decision should be deferred until a later meeting.

*The meeting rose at 1.10 p.m.*

## 2413th MEETING

Friday, 7 July 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

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

### State succession and its impact on the nationality of natural and legal persons (*concluded*)\* (A/CN.4/464/Add.2, sect. F, A/CN.4/467,<sup>1</sup> A/CN.4/L.507, A/CN.4/L.514)

[Agenda item 7]

#### REPORT OF THE WORKING GROUP (*concluded*)\*

1. Mr. HE, said that he noted with appreciation the terms of the mandate of the Working Group on State succession and its impact on the nationality of natural and legal persons as set forth in paragraph 2 of its report (A/CN.4/L.507), namely to identify and categorize the issues arising out of the topic. He also agreed with the main finding of that report: that the concept of an obligation to negotiate should be incorporated in legal practice in order to solve questions of nationality, on the understanding that such questions would be determined primarily by internal law. The emergence of a number of new States in a rapidly changing world had, on a succession of States, brought the question of nationality to the fore, and the experience in that connection of certain Asian States after the Second World War could shed some light on the matter. A typical example was Indonesia, which, after attaining independence, had immediately enacted legislation and had endeavoured to solve the problem of dual nationality through negotiation both with the predecessor State—the Netherlands—and with the third State, China. Of major concern to both India and China had been the question of the nationality of the Chinese minority in Indonesia, a matter it had been important to settle in the interests of good relations between the two countries. Their mutual endeavour had culminated, satisfactorily, in the Treaty on Dual Nationality which had imposed an obligation on all persons having both Chinese and Indonesian nationality to opt for one of the two nationalities within two years of the entry into force of the Treaty and to make their choice by denouncing the other nationality.<sup>2</sup> Such a broad

provision—an innovation in international bilateral treaties on nationality—had made a significant contribution to solving the question of dual nationality.

2. In that particular case, Indonesia had been a successor State and China, not a predecessor or a successor State, but a third State. That raised the question whether the agreement referred to in paragraph 6 of the report should be entered into between the predecessor State and successor State alone or whether, as he believed, a third State closely concerned in a nationality problem in the successor State should also be party to such an agreement. If so, that prompted the further question of whether a reference to another category of persons should not be included in the report, perhaps under section 2 (a) (iii) (Obligation of the predecessor and the successor States to grant a right of option), and which could perhaps read: “persons having acquired the nationality of a third State on the basis of the principle of *jus sanguinis* and residing in the successor State”. At all events, the question of State practice in solving issues of dual nationality, as exemplified in the above-mentioned Treaty, might usefully be mentioned in the report.

3. Mr. de SARAM said that the large number of specific points listed in the Working Group’s report would need to be considered carefully at future sessions. He was acutely sensitive and sympathetic to the hardships suffered by persons, in the matter of nationality, where there was a change—whether by way of State succession or otherwise—in the State under whose law they had secured a nationality. At the same time, he wished to emphasize that his observations were not made in reference to any past, present or prospective international crisis or concern—all such crises or concerns having their own characteristics. He had, however, been much impressed by Mr. Kusuma-Atmadja’s account (2411th meeting) of Indonesia’s experience with State succession when the various problems had been resolved by arrangements—arrived at through consultation and diplomatic exchanges—that were humane yet entirely consonant with the national interest.

4. The report set out in paragraph 2 the Working Group’s terms of reference, which had been established after a number of statements had been made in plenary regarding the methodology to be followed by the Commission. While it contained an excellent categorization of the kinds of situations in which State succession affected the nationality of persons in inhumane ways, in view of the Working Group’s mandate the report should then have set forth “issues”, on which there might well have been different views, followed by recommendations concerning ways in which such “issues” could be resolved. On the other hand, the report did indicate a number of “obligations” which the Working Group appeared to have concluded should be assumed by the States concerned to avoid the problem of statelessness. However, in setting out such a system of “obligations” for acceptance by Governments, the sources and rules of law on which such a system was founded must be adequately clarified and, if the law currently applied was inadequate, an indication should be given of ways in which it could be progressively developed consistent

\* Resumed from the 2411th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> See 2390th meeting, footnote 9.



with realistic expectations. That was something the report of the Working Group did not seem to do.

5. Further, it would have been helpful if the report had contained notations indicating whether any of the “obligations” proposed for eventual adoption by Governments corresponded to provisions in treaties in force or in treaties prepared by the United Nations or other bodies but not yet in force. Again, the Working Group’s report did not refer to the way in which State practice on relevant points could be ascertained. That might be done, for instance, by means of a questionnaire, to which reference had in fact been made at the previous meeting during consideration of the topic of the law and practice relating to reservations to treaties. Nor did the report contain a calendar for future work, as apparently required by the terms of reference set out in paragraph 2. He none the less appreciated that, at the current session, the Commission’s various working groups had had to work under considerable pressure.

6. Mr. GÜNEY said that he agreed with the two basic propositions reflected in the Working Group’s report, first, that any person whose nationality could be affected by a change in the international status of a territory had, in principle, the right to a nationality and that States had an obligation to prevent statelessness, and secondly, that there should be an obligation to negotiate, incumbent on both parties, with a view to resolving problems by agreement.

7. As to the guideline for negotiations between States on the nationality of different categories of natural persons, care must be taken, within the framework of the topic, not to reverse the respective roles of the State and the individual. Also, the categories of persons to whom it was envisaged that the right of option would be accorded must be limited or at the very least should not be enlarged to such an extent that that right was granted to persons with a secondary nationality.

8. Although the general view which had emerged in the Commission during consideration of the Special Rapporteur’s first report (A/CN.4/467) was that the nationality of natural persons should be dealt with first, the question of legal persons was also important and interesting from the legal standpoint. In his view, therefore, that question should be appropriately dealt with in future to round off the framework of the topic.

9. He endorsed Mr. de Saram’s comments and in particular his reference to the possible inadequacy of the applicable law and the need to affirm State practice.

10. Mr. KABATSI said that, from a reading of the report, he took it that the Working Group had decided not to pursue the question of legal persons and to deal only with natural persons. In the circumstances, the title of the topic should perhaps be amended accordingly.

11. The Working Group had based its preliminary findings on two fundamental premises—that any person affected by State succession had a right to a nationality, and that, as a consequence, the States involved had an obligation to prevent statelessness. Thus, the focus was on the right of persons to a nationality and, in so far as reasonably possible, to a nationality of their choice. The report also discussed a number of important principles, including the obligation to negotiate and to determine under and in what circumstances nationality could be

granted or withdrawn; the obligation on the predecessor State not to withdraw its nationality from an individual to the detriment of that individual; the obligation on one State to grant nationality if the other State had a right to withdraw that nationality; and the obligation on States to grant a right of option.

12. In identifying the various types of succession and the treatment to be accorded to the persons affected, the Working Group seemed to concentrate on recent experience of the eastern European situation which was, of course, in many respects applicable universally. But very little mention was made of the colonial experience, presumably because, according to the statement made by the Special Rapporteur in his first report, that no longer appeared to be a problem. Yet a colonial situation was not necessarily a thing of the past. At all events, there had been very little negotiation between the colonial powers and the States that had succeeded them, which had led to complications and, in many instances, to statelessness. That applied in particular to non-indigenous peoples who did not belong to the colonial power or to the territory that had become independent. Quite often such people fell between two stools, as had occurred in some parts of Africa in the case of persons of Indian, Asian and Chinese origin.

13. Furthermore, because of the cut-off dates laid down under the constitutional arrangements passed on by the colonial Powers, many people had not known exactly where they belonged. For instance, under the Constitution of Uganda, which had become independent in 1962, any person whose parents had been born in the territory and who were in Uganda on the day before independence became citizens. Many people whose parents had not been born in that territory or who did not know about the cut-off date had thus lost their citizenship yet had not become citizens of any other country. That problem persisted in Uganda. The report made little, if any, attempt to address the problem. He trusted that it would be dealt with as work on the topic progressed.

14. The CHAIRMAN, speaking in his capacity as member of the Commission, congratulated the Special Rapporteur and the Working Group on the important work they had done. The Commission was aware that the Working Group’s report was only preliminary and that only limited time had been available. The report, which reflected a great intellectual effort, had neatly categorized the issues and policies involved and would serve as a good basis for formulating principles to serve as guidelines.

15. Paragraph 7 referred to a number of “effects” of State succession. In his view, those were consequences of nationality and it was not necessary to focus on them in the effort to identify the impact of State succession on nationality itself. They should not be the subject of long discussions in the study.

16. As to paragraph 10 (d), it was not clear how the concept of “secondary nationality” worked in connection with a federal State. His own country, which was a federal State, did not have two nationalities. In other countries in which two nationalities existed, he was not aware that a distinction was made between primary and secondary nationalities. To his mind, the latter category was confusing and should not be placed on the same



footing as the main issue of nationality. The point needed to be looked into further so as not to distract the General Assembly from the prime focus of concern.

17. He wondered whether it was appropriate to speak of rights and obligations in subsequent paragraphs, especially when guidelines were at issue and where situations under present-day law were not clear. To speak of obligations at such an early stage, before State practice or *lex lata* concerning obligations was clear, might cause confusion. If the Working Group was suggesting guidelines on the basis of which certain *lex lata* could be developed by States themselves, an effort should be made to try and explain why the Commission was talking about hard obligations and rights. He agreed in that connection with the point made by Mr. de Saram.

18. With reference to the right of option, mentioned in paragraphs 14 and 15, he endorsed Mr. Mahiou's comment (2411th meeting) on the need for a time-frame. The right of option could not be eternal, and some form of schedule must be judiciously set in a legal framework.

19. The last sentence of paragraph 23 required a careful analysis with regard to how States consulted individuals and whether they did so through plebiscites or through questionnaires. The matter should be addressed as a human rights issue. Persons had the right to choose in which State they wished to remain. In other words, renunciation was a fundamental right of individuals. The sentence in question was too stringent and he hoped that the Special Rapporteur would review it. Another important question concerned the consequences of non-compliance with regard to State responsibility. That had been dealt with in the report in a provisional fashion and would have to be looked into carefully at a later date.

20. If the main objective of the study was to consider the impact of State succession on nationality and to prevent statelessness, it was important to avoid dealing with questions of dual nationality, which were of a different nature. Some persons would always have more than one nationality, and Mr. He's point in that regard was well taken.

21. A study of practice was essential, particularly because nationality involved economic, social, cultural and political, including colonial, aspects, as Mr. Kusuma-Atmadja had correctly stressed (*ibid.*). In short, statelessness should be prevented at all costs, and other nationality problems to the greatest extent possible.

22. Mr. CRAWFORD said that he wanted to join other members in praising the work of the Special Rapporteur and the Working Group. He was surprised to hear it implied that their work had not represented progress in the field. Anyone reading the literature on nationality and State succession over the past 30 years, with its rather intractable dualism, would regard the Working Group's efforts as a refreshing breakthrough. The Special Rapporteur was himself fully aware that the topic needed to be addressed with discretion and care.

23. It seemed to him, however, that that area could not be approached simply on the premise that it concerned residual indications to States about policies they might or might not adopt. The various problems which arose would be dealt with case by case. The basic principle that States, including new States, were under an obligation to avoid statelessness in situations of State succes-

sion was none the less essential. If it was not at present a rule of international law, the Commission should aim to make it one. Yet having regard to developments both in the general field of statelessness and in the field of human rights, he was of the opinion that the ingredients for such a rule already existed. It was gratifying that that fundamental rule was the leitmotif of the Special Rapporteur's work. In other words, it was important to distinguish between the basic principle which it should project as a rule of international law and issues of modalities, options, dual nationality and the like, which must be adjusted to fit the circumstances. The balance struck so far was admirable.

24. Mr. MIKULKA (Special Rapporteur and Chairman of the Working Group on State succession and its impact on the nationality of natural and legal persons) said that, rather than sum up the debate, he would reply to a number of comments and suggestions made by members of the Commission.

25. He was very pleased that the debate had confirmed a degree of consensus in the Commission on the obligation to prevent statelessness in cases of State succession and the obligation on the States concerned to negotiate to that end. As he had already stressed in his introduction (*ibid.*), the report of the Working Group was preliminary. It was not always pleasant to look into the kitchen before the meal was ready, but the Working Group had taken the risk of showing the Commission something that was not yet ready to be served; the criticism thus came as no surprise. In fact, he had been looking forward to the reactions of the members of the Commission.

26. With reference first to comments on the Working Group's mandate, as pointed out earlier, if the Working Group was reappointed it would complete its mandate at the next session, in 1996. In order to satisfy those who had criticized the report for not mentioning that point, an appropriate footnote might be added to that effect. But he did not think it was a good idea to rewrite the report, because it would then be difficult to understand the debate: anyone reading the summary record would no longer find the elements criticized in the report. If the Commission did not agree with the suggestion to insert a footnote, in any case there would be several paragraphs on the debate in its own report and the matter could be clarified there.

27. The Working Group was aware that it had not touched upon the question of legal persons, as his own report had not contained enough material for a discussion. The Working Group had instead focused on problems on which he, as Special Rapporteur, had posed a sufficient number of questions, and it had attempted to produce concise, preliminary conclusions or hypotheses.

28. As to presenting the Commission with a calendar of action, the Working Group could not do so until it had examined the entire spectrum of issues. Only then could it propose a calendar and address matters of form. He understood Mr. Yankov's concern (*ibid.*), because the Commission had in fact had unfortunate experiences with certain topics in the past, one of which had even been dropped from the agenda several years previously because the Commission had concluded that it was not sufficiently clear what the final results should be. It was

therefore important to avoid any such situation; the Commission must know where it was heading when it took a decision on future work in the matter under consideration.

29. He said he would point out that the Commission had hesitated a while before deciding to create the Working Group, a decision which some had thought to be premature. Later, some of the meetings set aside for the Working Group had been given to the Drafting Committee and, in the end, the Working Group had only been able to hold five meetings. Its success, or lack of success, should therefore be appraised in the light of the time made available to it.

30. It was unfair to accuse the Working Group of not going beyond his report. He had raised a number of questions in his report, and the Working Group had proposed preliminary conclusions or hypotheses. Actually, the outcome of the Working Group's efforts would be useful when he came to preparing his second report.

31. He was pleased that there was a consensus on the obligation to negotiate, which should be based on certain principles or guidelines. As Mr. Vargas Carreño had pointed out (*ibid.*), those guidelines were of a subsidiary nature. The Working Group did not maintain that everything it had formulated was an interpretation of positive law, but certain principles should be regarded as already being part of it. That was where the problem arose. For example, to use the term "obligations" implied *lex lata*, whereas when speaking of guidelines, the term "obligations" was inappropriate. In that sense, the criticism was well taken. The Working Group had not engaged in drafting work, but all those elements could be borne in mind in the future. However, as Mr. Crawford observed, not all principles should be considered subsidiary, because the fundamental principle—preventing statelessness—could not be left to the discretion of States. In other words, it was unacceptable that the States concerned should be under an obligation to negotiate and, because the guidelines proposed to them were residual, they could as a result of their negotiations decide to leave a million persons stateless. The principle of preventing statelessness was fundamental and took precedence, whereas the other obligations were meant to assist States and were open to negotiation. If a State found a better solution to a particular situation, other States could not interfere. He did not think that there was any misunderstanding on that point, which could be taken up by the Working Group in the future. Mr. Mahiou was right to speak (*ibid.*) of the need to fix a reasonable time-frame for exercising the right of option, an idea that could easily be incorporated in the Working Group's next report.

32. As to dual nationality, it was clear that the same approach could not be used as in the case of statelessness. Dual nationality could not be prohibited. Some States did not accept that concept, while others found it to be a solution to certain problems. The Working Group had not addressed the question as yet. The guidelines, however, allowed States to choose their own policy. For example, by using the right of an exclusive option, a State could stress the importance of preventing dual nationality; the idea of a positive option, on the other hand, would endorse the concept of dual nationality. The

Working Group could look into that matter at the next session.

33. With regard to secondary nationality, he agreed that the term caused problems, but he did not have a better way to describe the situation. Even certain federal States used the same term to describe secondary nationality and nationality itself, for example, in the legislation of the former Czechoslovakia. The word "citizenship" might be used, but there was no substantive difference in meaning. He had added the adjective "secondary" simply to indicate that it was not the nationality that had international validity. It was a link between the federal unity of the State and the individual that was of relevance for domestic law. From the standpoint of international law, however, that link had virtually no importance before the date of State succession. Mr. Sreenivasa Rao had pointed out that, in his country, the concept was unknown or did not have the same meaning as had been the case in the Czechoslovak or Yugoslav federations. But the problem lay precisely in the different degrees of "federalization" of a State. He would be grateful for any suggestion to replace the term that would clear up any misunderstandings.

34. In Mr. Pellet's view (*ibid.*), the Working Group had placed too great an emphasis on the links of *jus soli*. He was not certain that the criticism was valid. The fact that, for the purposes of withdrawal and granting of nationality, the Working Group had distinguished, in paragraph 10 of its report, three categories of persons, depending on the place of birth, did not necessarily mean the Working Group had based its thinking on the principle of *jus soli*. While it was true that the criteria used by the Working Group to define those categories were those customarily accepted by the countries which enshrined the principle of *jus soli* in their legislation, the correspondence between legislative practice and the criteria applied in cases of State succession did not always hold. For instance, Czechoslovakia, the legislation of which had always been based on *jus sanguinis*, had had recourse to the criterion of *jus soli* for the purpose of granting nationality in the newly created States of the Czech Republic and Slovakia. Furthermore, each category of persons listed in paragraph 10 of the report had been further subdivided according to the place of habitual residence of the individual concerned. Thus, the Working Group had been influenced in its conclusions more by the place of habitual residence than by the place of birth.

35. In general, the emphasis given by the States concerned to either the criterion of residence or the criterion of birth would largely depend on which principle was set out in the legislation of the predecessor and successor States. It was undoubtedly true that States whose legislation was based on *jus soli* would have a tendency to accord greater importance to it.

36. The Working Group would be reviewing the paragraphs of the report pertaining to the right of option in the light of comments made during the debate in plenary. A number of members had felt that the Working Group had given too broad a scope to the concept of right of option. The last sentence in paragraph 23 had been in particular a source of dissatisfaction. In reality, that sentence did not accurately reflect the views of the Working Group. What the Working Group had actually meant was

that it was no longer possible to defend the absolute freedom of the State to decide the question of nationality, without any regard for the will of the individual concerned. That did not imply that the individual's will had to be taken into consideration in every instance. There were some situations in which the successor State should be presumed to have, *a priori*, the right to impose its nationality on certain persons, without regard for their wishes in the matter. In other circumstances, however, the will of the individual had to be taken into account. The Working Group would have to redraft paragraph 23 to make that clearer.

37. Section 4 (Other criteria applicable to the withdrawal and granting of nationality) dealt with a very delicate matter. Mr. Razafindralambo had raised doubts (*ibid.*) with regard to the conclusion that, as a condition for enlarging the scope of individuals entitled to acquire its nationality, a successor State should be allowed to take into consideration additional criteria, including ethnic, linguistic, religious, cultural or other similar criteria. In Mr. Razafindralambo's view, that might open the way to discrimination. It was true that the issue did require further study. In drawing the conclusion in question, the Working Group had based itself on Latin American jurisprudence under which the application of those criteria, in certain circumstances, could not be interpreted as discrimination. It was a matter to which the Working Group would revert later.

38. Section 5 (Consequences of non-compliance by States with the principles applicable to the withdrawal or granting of nationality) had given rise to a number of objections. In defence of the Working Group's thinking in that regard, he wished to draw attention to the first sentence of paragraph 29, which stated that "The Working Group concluded that a number of hypotheses merited further study". The Working Group had not even considered those views as preliminary conclusions; they were quite simply hypotheses and, if found to be inaccurate, would have to be modified.

39. With reference to section 6 (Continuity of nationality), Mr. Pellet had criticized the Working Group for distinguishing three situations in paragraph 31 in which the rule of continuity of nationality should apply and then going on, in paragraph 32, to conclude that there was no point in making such a distinction because the rule should not apply at all in the cases identified. In fact, paragraph 31 had been included to demonstrate that the Working Group had reviewed carefully all the issues arising from the rule of continuity and to show exactly how it had reached the conclusion set forth in paragraph 32.

40. Some members of the Commission had regretted the Working Group's failure to deal with certain questions, including the significance of nationality in the context of human rights and the problem of individuals born after the date of succession of a State. He had, however, made reference to those questions in his first report and the Working Group would certainly examine them at the Commission's next session.

41. In preparing his second report, he would be taking ample advantage of the work done by the Working Group, which he greatly appreciated. The second report would be divided into three sections. The first section, in

response to members who had found the work thus far too academic, would cover both practice and doctrine relating to the nationality of natural persons and would contain suggestions for maintaining or modifying the relevant preliminary conclusions of the Working Group. The second section would deal with the issue of legal persons. The third would cover the form which the outcome of the work on the topic might take. He would be proposing several possibilities in that regard. Certain ideas had already crystallized at the present session. The proposed guidelines could become part of a comprehensive report of which the General Assembly might simply take note, or the General Assembly might invite the Commission to draft a declaration on the topic. Another possibility was to amend the Convention on the Reduction of Statelessness in the form of an optional protocol. However, the fact that the Convention had not been widely ratified cast some doubt on the utility of amending it. The Commission might also elaborate a text that was broader in scope and would include the effects of State succession on a number of social matters. The Working Group had recommended that States should consult on such issues as separation of families, military obligations, pensions, and so on.

42. Whatever its final form, the Commissions's work would have to be applicable to both natural and legal persons. The Commission might choose to recommend more than one form in an order of priority or it might recommend that a combination of forms should be used. It was then up to the General Assembly to decide.

43. He wished to emphasize that the Working Group's report was preliminary and that his remarks should be considered as part of that report.

44. The CHAIRMAN thanked the Special Rapporteur for placing the various comments made by members in their proper context. It would be appropriate to include in the Commission's report the presentation made by the Special Rapporteur of the report of the Working Group, a summary of comments on the report in plenary, the reply of the Special Rapporteur to those comments and the Special Rapporteur's plans for future work.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)\*\* (A/CN.4/459,<sup>3</sup> A/CN.4/464/Add.2, sect. E, A/CN.4/468,<sup>4</sup> A/CN.4/471,<sup>5</sup> A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)**

[Agenda item 5]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED  
BY THE DRAFTING COMMITTEE AT  
THE FORTY-SEVENTH SESSION

45. Mr. YANKOV (Chairman of the Drafting Committee) said that because the Drafting Committee had been chaired by Mr. Villagrán Kramer at the time it had

\*\* Resumed from the 2399th meeting.

<sup>3</sup> See *Yearbook* . . . 1994, vol. II (Part One).

<sup>4</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>5</sup> *Ibid.*

adopted the four articles contained in document A/CN.4/L.508, he had invited Mr. Villagrán Kramer to present the Drafting Committee's second report.

46. The Drafting Committee had devoted a total of five meetings to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In that connection, he wished to thank the Special Rapporteur, Mr. Barboza, for his thoughtful guidance and cooperation, the members of the Drafting Committee and, in particular, Mr. Villagrán Kramer, acting Chairman, for their efforts.

47. Mr. VILLAGRÁN KRAMER (Vice-Chairman of the Drafting Committee), presenting the second report of the Drafting Committee, said that the Commission, at its forty-fourth session, in 1992, had decided to proceed with its work on the topic in stages.<sup>6</sup> During the first stage, it had completed the work on prevention relating to activities with a risk of transboundary harm and, at its forty-sixth session in 1994, the Commission had adopted a complete set of articles pertaining to prevention.<sup>7</sup> Still remaining before the Drafting Committee were four articles dealing with general principles applicable to both prevention and liability and five other articles addressing various issues, such as the relationship between the articles and other international agreements, the question of attribution, non-discrimination, and so on. Since the Commission had not yet considered the Special Rapporteur's tenth report (A/CN.4/459), and since no article on the subject had yet been referred to the Drafting Committee, the Committee had decided to address, at the present session, the articles dealing with general principles and to postpone consideration of the other articles for the time being.

48. The four articles on general principles dealt with issues both of prevention and of liability. They constituted the theoretical basis for the articles already adopted by the Commission on prevention and for those which would eventually be adopted on liability. They provided the general orientation and framework within which all the other articles on the topic had been or would be formulated.

49. It was customary for general provisions to be placed at the beginning of an instrument. The placement of the four articles currently before the Commission would have to be determined once all the articles on the topic had been adopted on first reading. To avoid confusion, the articles were designated in document A/CN.4/L.508 by consecutive letters of the alphabet. The numbers in square brackets were the original numbers given to those articles by the Special Rapporteur in his reports. In 1988 and 1989, the Commission had referred to the Drafting Committee two different versions of articles on general principles. The two numbers in square brackets for articles C and D corresponded to the two sets of articles which had been referred to the Drafting Committee.

50. As to the four articles themselves, article A [6] (Freedom of action and the limits thereto) was inspired by Principle 21 of the Declaration of the United Nations

Conference on the Human Environment (Stockholm Declaration),<sup>8</sup> and Principle 2 of the Rio Declaration on Environment and Development,<sup>9</sup> both of which affirmed the sovereign right of States to exploit their natural resources, subject to certain limitations prescribed by international law. Article A was based on the text for article 6 proposed by the Special Rapporteur.<sup>10</sup>

51. Article A had two parts. The first affirmed the freedom of action by States and the second part related to the limitations to that freedom. The first part provided that the freedom of States to conduct or permit activities in their territory or under their jurisdiction or control was not unlimited—another way of saying that the freedom of States in such matters was limited. The Drafting Committee had, however, felt that it was more appropriate to state that principle in a positive form, which presupposed the freedom of action of States, rather than in a negative form which would have emphasized the limitation of such freedom.

52. The second part of the article enumerated two limitations. First, such State freedom must be compatible with any specific legal obligations owed by a State to other States. Secondly, such freedom must be compatible with a State's general obligation with respect to preventing or minimizing the risk of causing significant transboundary harm.

53. The first limitation was intended to include obligations a State might have undertaken, in relation to another State or other States in respect of transboundary harm, which might be even more stringent than the obligations under the present articles. That, for example, applied to an agreement between two States, whereby States agreed to prevent or minimize any transboundary harm, a threshold which was higher than that of significant transboundary harm. Since the articles were intended to set the minimum standard of prevention, any other obligation raising that standard would take precedence over the obligations undertaken in those articles. Nevertheless, the Drafting Committee did not intend to resolve or even address the question of the effect of those articles on other treaties, an issue that would have to be handled by another provision at a later stage, once the Commission had a more complete picture of all the draft articles on the topic. The Drafting Committee might have to reconsider the issue covered in the first part of article A when it took up the relationship between the four articles under consideration and other international agreements.

54. The second limitation on the freedom of States to carry on or permit activities referred to in article A was set by the general obligation of States with respect to preventing or minimizing the risk of causing transboundary harm. The words "with respect to" were intended to distinguish between the situation in which there was an

<sup>8</sup> See 2398th meeting, footnote 8.

<sup>9</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 I.

<sup>10</sup> *Yearbook . . . 1989*, vol. II (Part One), p. 135, document A/CN.4/423, para. 16.

<sup>6</sup> *Yearbook . . . 1992*, vol. II (Part Two), p. 51, para. 344.

<sup>7</sup> *Yearbook . . . 1994*, vol. II (Part Two), paras. 360 and 380.

“obligation to prevent or minimize transboundary harm”, and the situation in which there was an “obligation with respect to preventing and minimizing transboundary harm”. The first formulation referred to obligations of result, while the second referred to obligations of conduct or due diligence. The article should be understood in the context of the latter. It did not require that a State should guarantee the absence of any transboundary harm, but that it should take all the measures required to prevent or minimize such harm. That understanding was also consistent with the specific obligations stipulated in various articles on prevention, in particular, articles 12 and 14, which had already been provisionally adopted.<sup>11</sup> One member of the Drafting Committee had objected to the inclusion in the second sentence of article A of the words “with respect to”, holding that the formulation unnecessarily narrowed the scope and weakened the obligations of States to prevent and minimize transboundary harm.

55. He would reiterate that the articles under consideration set the minimum standards of behaviour and were without prejudice to the right of States to agree *inter se* to much higher standards. The title of article A closely reflected its substance.

56. As to article B [7] (Cooperation), two different versions of the article had been proposed by the Special Rapporteur in 1988 and 1989 and both versions had been referred to the Drafting Committee. The text now before the Commission was based on the version proposed in the fourth report of the Special Rapporteur.<sup>12</sup> It laid down the general obligation of States to cooperate with each other in order to fulfil the obligation to prevent or minimize significant transboundary harm. Together with the article that followed, it established the foundations for the specific obligations set out in the articles addressing issues of prevention which the Commission had adopted at its preceding session.

57. Article B required States concerned to cooperate in good faith. Even though good faith was presumed in any obligation of cooperation, the express inclusion of those words indicated the additional emphasis given to that aspect of cooperation. The words “States concerned” meant the State of origin and the affected State. While other States in a position to contribute to the objectives of the articles were encouraged to cooperate, they were under no legal obligation to do so. The words “as necessary” meant that the article was not designed to place States under an obligation to seek the assistance of any international organization in performing their obligations of prevention as set out in the articles under consideration. States were to seek such assistance only when that was deemed appropriate. The words “as necessary” were designed to take account of a number of possible situations.

58. First, assistance from international organizations might not be appropriate or necessary in every case involving the prevention or minimization of transboundary harm. For example, the State of origin or the affected State might themselves be technologically advanced and have as much technical capability as international

organizations, or even more, to prevent or minimize significant transboundary harm. Obviously, in such cases there need be no obligation to seek assistance from international organizations. Secondly, the term “international organizations” was intended to refer to organizations that were relevant and in a position to assist in such matters. Despite the increasing number of international organizations, it could not be assumed that an international organization with the capabilities needed in a particular case would necessarily exist. Thirdly, even if relevant international organizations did exist, their constitutions might debar them from responding to such requests from States. For example, some organizations might be required or permitted to respond to requests for assistance only from their member States, or they might labour under other constitutional impediments. It should be stressed that the article did not purport to create any obligation for international organizations to respond to requests for assistance. Fourthly, requests for assistance from international organizations could be made by one or more of the States concerned. It was unquestionably preferable that such requests should be made by all States concerned, but any State concerned could request assistance. The response and type of involvement of an international organization in cases in which the request had been lodged by only one State would, of course, depend entirely on the nature of the request, the type of assistance involved, the place where the international organization would have to perform such assistance, and so on.

59. By referring in its latter part to “effects both in affected States and in States of origin”, article B anticipated situations in which, as a result of an accident, there was, in addition to significant transboundary harm, massive harm in the State of origin itself. The phrase was intended to introduce the idea that significant harm was likely to affect all the States concerned, including the State of origin, and that transboundary harm should, as far as possible, therefore be regarded as a problem requiring common endeavours and mutual cooperation towards minimizing its negative consequences. The phrase was not, of course, intended to place any financial costs on the affected State in connection with minimizing the harm or with clean-up operations in the State of origin. It should be noted that the article used the expression “affected State”, a new term which, although self-explanatory, would at a later stage be included in article 2 (Use of terms).

60. As already indicated, article C [8 and 9] (Prevention), based on two articles proposed by the Special Rapporteur in 1988 and 1989, provided, together with article B, the theoretical foundations for the articles adopted by the Commission at the preceding session by setting out specific and detailed obligations of States in connection with preventing or minimizing significant transboundary harm. The reference to “measures or action” related to those measures and actions that were specified in the articles on prevention and minimization of transboundary harm adopted in 1994. The article should be understood within the context of article A, on the “due diligence” obligation of prevention. States were not expected to guarantee that there would be no transboundary harm, but they must take all necessary measures to that effect. The obligation, it would be recalled, was the

<sup>11</sup> See footnote 7 above.

<sup>12</sup> *Yearbook* . . . 1988, vol. II (Part One), p. 251, document A/CN.4/413.

obligation of conduct and was compatible with the specific obligations set forth in articles 12 and 14.

61. The last of the articles adopted by the Drafting Committee was article D [9 and 10] (Liability and compensation). The three principles of “freedom of action and limits thereto”, “cooperation” and “prevention” he had introduced earlier dealt primarily with issues of prevention on which the Commission had already adopted articles. It had not yet worked out any provision on the issue of liability. For that reason, one member of the Drafting Committee had expressed serious reservations about adopting any article on liability at the present time. In the view of that member, it would be premature to formulate a general principle of liability and compensation at the present stage of the work because, first, the Commission had not yet clearly identified the types of activities covered by the topic, and, secondly, because it had not yet agreed on the description of harm that was liable to compensation. Other members of the Drafting Committee, however, had thought it useful to draft an article on liability and compensation at the present time, so as to set out the minimum requirement for establishing liability and the obligation to pay compensation. Article D formed the basis for future articles on issues of liability. The obligation set forth in the article should, of course, be understood in the context of whatever articles the Commission would adopt on liability in the future. That point was made abundantly clear by the reference to “the present articles” which appeared in both sentences of the article.

62. With regard to the title, it should be noted that both versions proposed by the Special Rapporteur had referred to an “obligation to pay compensation” in case of transboundary harm. However, in view of the fact that the title of the topic as a whole spoke of international liability, the Drafting Committee had considered that article D should first establish the principle of liability and then establish the requirement of compensation. Furthermore, as the Commission had not yet agreed on a specific regime of liability, the article on principles of liability should be without prejudice to the question of who should be liable and who should pay compensation. That explained the marked difference between the structure of article D and that of articles A, B and C. Unlike those articles, which clearly specified who bore the obligation in question, article D only established that there was liability and an obligation to pay compensation. It emphasized the rights of the victim.

63. Again, the Committee had felt that the article should not prejudge the question of forms of compensation, as the Commission had not yet taken a decision on that score. The article therefore spoke only of compensation, without indicating whether such compensation was monetary or took the form of restitution in kind or some other form. Nor did the article indicate that such compensation should be full, prompt, fair, and so on. Lastly, it had been felt that the article should not prejudge the question of what harm was to be compensated. With those factors in mind, the Drafting Committee had adopted the text of article D now before the Commission.

64. The words “subject to the present articles” in the first sentence and the words “in accordance with the present articles” at the end of the second sentence were

intended to convey the idea that the principles of liability and compensation were subject to the terms and conditions that were set forth and would be set forth in the articles on the topic.

65. In conclusion, with reference to the term “compensation”, he recalled that article 6 *bis* of part two of the draft on State responsibility was entitled “Reparation” and described different forms of reparation, which included restitution in kind, compensation, satisfaction and assurances and guarantees on non-repetition.<sup>13</sup> The Drafting Committee had decided to use the term “compensation” rather than “reparation” in article D in order to distinguish remedies under the present topic from those under the topic of State responsibility. The Drafting Committee did not necessarily intend, of course, to limit the meaning of compensation to the definition given in article 8, paragraph 2, of part two of the draft on State responsibility, which provided that the term “compensation” covered any economically assessable damage sustained by the injured State and could include interest and, where appropriate, loss of profits.<sup>14</sup> In the articles on international liability, the term “compensation” should be understood as taking its significance from what the eventual articles dealing with the issue would provide. The only purpose in using the term had been to draw a distinction between what might be available as a remedy under the topic now under consideration and the remedies provided under the articles on State responsibility. The Commission might, at a later stage, have to reconsider the use of the term “compensation” in the light of what the articles on international liability would provide.

66. Mr. BENNOUNA, speaking on a point of order, said that he was unable to discuss the texts proposed by the Drafting Committee because the French version of document A/CN.4/L.508 appeared in several respects to be a mistranslation of the English version. More particularly, the words “*un dommage transfrontière . . . engage la responsabilité*” in article C did not mean the same as “there is liability for significant transboundary harm”. Secondly, in article C, the word “*dispositions*” was not a correct translation of the English word “action”. Furthermore, the words “*raisonnables*” and “*nécessaires*”, in the same article, should be separated from one another, possibly by the insertion between them of the words “*qui sont*”.

67. The CHAIRMAN said that the secretariat would go into the matter in consultation with Mr. Bennouna, and, if necessary, reissue the document in time for the next meeting.

68. Mr. PELLET said that he wished to make three comments, the first being the most important. For reasons stated at length in the course of previous sessions, he wished to enter all possible reservations regarding the substance of the article now before the Commission as article D. To take a position on the crucial issue dealt with in the article without knowing the future contents of the relevant substantive provisions was entirely premature and inappropriate. It was not possible to speak of a principle of liability without knowing which principle

<sup>13</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 54.

<sup>14</sup> *Ibid.*



would be adopted, and he wished to place on record his refusal to discuss the article at the present stage. The second point, of far less importance, was that the order of articles B and C should be reversed, because article C set out the basic principle, while article B supplemented it. Lastly, while not raising any specific objection to the text of articles A, B and C, he would none the less draw attention to the fact that article A clearly posed the crucial problem of the relationship between liability for failing to observe due diligence and strict liability. When the freedom of States was not unlimited, any use of such freedom that went beyond the existing limits inevitably brought up the question of liability for failing to observe due diligence.

69. Mr. EIRIKSSON, referring to article B, said that the comma after the word "harm" was misplaced and should be transferred to appear between the words "and" and "if". In article C, the relationship between the adjectives "reasonable" and "necessary", to which Mr. Bennouna had referred in connection with the French text, was unclear in the English version as well. Did the word "reasonable" also qualify the word "action"? The meaning should be made more clear in the text of the article rather than in the commentary.

70. Mr. de SARAM said he wished to emphasize that the statement heard by the Commission was not a report of the Drafting Committee but a report of the Chairman or, as the case might be, Vice-Chairman of the Drafting Committee. As for article D, he tended to agree with Mr. Pellet, albeit for somewhat different reasons. Neither the Commission nor the Drafting Committee had given sufficient consideration, to the question whether, aside from specific obligations between States, there might lie at the basis of the obligation to compensate for harm, a criterion that went beyond "due diligence". The matter was of great importance and he believed that it could be resolved only on the basis of a list of certain activities of an ultra-hazardous nature.

71. Mr. PAMBOU-TCHIVOUNDA said that he agreed with Mr. Pellet's suggestion for reversing the order of articles B and C. The use of the word "or" between "measures" and "action" in article C weakened the impact of the provision and he would prefer it to be replaced by "and". The words "Subject to the present articles" and "in accordance with the present articles" in article D were somewhat perplexing and he would appreciate further clarification. He was also puzzled by the failure of article D to make it clear that liability for significant transboundary harm lay with the State in whose territory the activity which had caused the harm had taken place.

72. Mr. ROSENSTOCK said that he wished to identify himself as the member whose dissent on article D had been reported by the Vice-Chairman of the Drafting Committee. Associating himself with the comments made by Mr. Pellet, he said that he understood the words "Subject to the present articles" to represent an attempt to indicate that the formulations in question were not intended to have any independent value or meaning but had been adopted by the Drafting Committee merely to assist it in the preparation of the detailed provisions which, in due course, might constitute an instrument to which States could adhere or consent. Seen in that light, the article was perhaps helpful to some extent, but that

did not make the formulations it contained any less premature and unnecessary.

73. Mr. ARANGIO-RUIZ said that he needed to give more thought to the Drafting Committee's proposals and therefore wished it to be placed on record that he reserved his position.

74. Mr. THIAM said that he still failed to see the dividing line between the topic under consideration and that of State responsibility. Articles A and B brought the question to the fore in a particularly striking form. Which Special Rapporteur was responsible for what? He was concerned about the Commission's working methods in that respect.

*The meeting rose at 1.10 p.m.*

## 2414th MEETING

*Tuesday, 11 July 1995, at 10.10 a.m.*

*Chairman:* Mr. Mehmet GÜNEY

*later:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)** (A/CN.4/459,<sup>1</sup> A/CN.4/464/Add.2, sect. E, A/CN.4/468,<sup>2</sup> A/CN.4/471,<sup>3</sup> A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)

[Agenda item 5]

### CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-SEVENTH SESSION (*continued*)

1. The CHAIRMAN said that, for technical reasons, the French version of document A/CN.4/L.508 had been reissued and he would invite members to refer to the new version.

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

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



2. Mr. FOMBA said that, at the present stage of the debate, he would confine himself to general remarks on the articles under consideration. The title of the topic referred to three key concepts, all of which were problematic.

3. The concept of acts not prohibited by international law posed a problem in that it had to be given a definite content by specifying whether it covered all or only some of the activities likely to fall within the category.

4. The concept of injurious consequences should be defined in both quantitative and qualitative terms. It would also have to be decided whether such consequences should be determined in their "absolute" or only in their "relative" diversity.

5. The concept of international liability had to be specified clearly in that context, since it was not known, a priori, whether it covered responsibility for a wrongful act or some other form of responsibility, although the actual logic of the title, with its reference to "acts not prohibited by international law" seemed to favour the second solution. By analogy with internal law, that second form of responsibility could, in point of fact, be only what was termed liability without fault or strict liability.

6. In terms of methodology, it was essential to pinpoint those three concepts accurately so as to draw a clear boundary with the question of State responsibility and to give a definite direction to the topic under consideration, in either a positive or a negative sense.

*Mr. Sreenivasa Rao took the Chair.*

7. Mr. EIRIKSSON said that he would like to return to the comments he had made at the preceding meeting, when, following on a remark by Mr. Bennouna, he had questioned whether, in the wording of article C, the adjective "reasonable" qualified action and the adjective "necessary", qualified measures. He believed that they did.

8. However, he had re-examined the report of the Drafting Committee in which the mention of measures or action in article C, referred back to the articles adopted by the Commission at the preceding session<sup>4</sup> and, in particular, to article 14. He therefore wondered whether the words "or action", in article C, could not just be deleted, which would simplify matters. It would suffice to indicate in the commentary to the article that the word "measures" to which reference was made encompassed the concept of "action".

9. Mr. BENNOUNA, supported by Mr. RAZAFINDRALAMBO, said that, if reference was had to article 14, the words "or action" were in fact superfluous. But there could still be a problem of substance, since a distinction could be made between measures, which might be of a legal nature, and action, which was intervention on the spot. If the concept of action added something to the wording of the article, it should be retained. He would like to have the view of the Chairman of the Drafting Committee on that point.

10. Mr. VILLAGRÁN KRAMER said that Mr. Bennouna's point was well taken. In the Charter of the United Nations, the word "measures" was used to designate the course of action adopted or recommended by the Security Council, the object of which was to impose an obligation not to act. Personally, he would like the Commission to abide by that understanding of the term.

11. The CHAIRMAN said that, to clarify the debate, he would ask the Secretary to the Commission to read out the passage in the commentary to article 14 adopted on first reading by the Commission at the preceding session, which explained the meaning of the word "actions".

12. Ms. DAUCHY (Secretary to the Commission) said that the relevant passage read:

The words 'administrative and other actions' cover various forms of enforcement actions. Such actions may be taken by regulatory agencies monitoring the activities and courts and by administrative tribunals imposing sanctions on operators not complying with the rules and the standards or any other pertinent enforcement procedure a State has established.<sup>5</sup>

13. Mr. ROSENSTOCK said that there did not seem to be anything in that paragraph that would not be encompassed by the term "measures". To avoid the complexities referred to by Mr. Eiriksson, therefore, he would suggest that the words "or action" should be deleted.

14. Mr. YANKOV (Chairman of the Drafting Committee) said that, in his view, the word "action" covered any activity, whereas the word "measures" could apply to "remedies", in other words, to measures to prevent or mitigate and so on. Preventive measures could, however, themselves cause harm. For instance, in the event of oil spillage, excessive use might be made of detergents or dispersants. That was why, in conventions and instruments on environmental protection, the word "measures" referred basically to preventive measures or even to measures of control, while the word "action" could cover any kind of activity. On a more liberal interpretation, one could of course take the view that action was also a measure, but he would personally prefer to use both terms.

15. Mr. EIRIKSSON said that the purpose of the articles under consideration was to lay down general principles. There was no need to repeat, in article C, the list that already appeared in article 14. The main obligation in the case of prevention was to take measures even if that presupposed certain preliminary "actions".

16. Mr. PAMBOU-TCHIVOUNDA said he was pleased that Mr. Eiriksson had drawn attention to the wording of article C and had pointed out that the problem was not just one of semantics, but also one of substance. In his view, measures and action did not cover precisely the same concept and that was why he had suggested that the conjunction "or", which seemed to offer an alternative, should be replaced by the word "and". In light of the present debate, the latter seemed to be even more important. But, if it was not acceptable to the Commission, he would suggest another solution, namely, that the words "all reasonable measures or action" could be

<sup>4</sup> Yearbook . . . 1994, vol. II (Part Two), pp. 158 *et seq.*

<sup>5</sup> Ibid., p. 170, commentary to art. 14, para. (8).

replaced by the words "measures, including all appropriate action,".

17. Mr. TOMUSCHAT said that, having looked into the matter more closely, he was struck by the close relationship between article C and article 14 as adopted at the preceding session, the text of which was, incidentally, not very satisfactory, since the word "actions" was redundant. There again, it would suffice to speak of "measures". The problem of overlapping between the two articles would have to be resolved.

18. Mr. YANKOV (Chairman of the Drafting Committee) said that he had been persuaded by Mr. Eiriksson's new arguments and was now able to support his proposal. He would also like to include in article C a concept set forth in the United Nations Convention on the Law of the Sea and to add the word "control" between the words "prevent" and "or minimize".

19. Mr. BARBOZA (Special Rapporteur) said that the discussion was taking a somewhat Byzantine turn. After all, a State could not act in and of itself and it was the fire department, the army, and so on, that carried out the measures it adopted. Clearly, therefore, the Commission could delete the word "action" and explain in the commentary that that concept was covered by the word "measures". Article 14, as one speaker had pointed out, indicated as much. In his own view, it would be wrong to make categorical distinctions between concepts that were so closely related. In addition, drafting exercises in plenary should be kept to a minimum.

20. Turning to the case, mentioned by the Chairman of the Drafting Committee, of excessive prevention measures that in themselves could cause harm, he said that, in most of the relevant treaties, such a case would come under the category of damage for which compensation was owed, not under the category of prevention.

21. It was true that articles 14 and C dealt with fairly similar concepts. Article 14, however, referred to the specific measures that the State had to take and was responsible for in order to ensure that the operator applied preventive measures, which themselves were the responsibility of the operator. The State must "ensure" that, "act in such a way" so that, through legislative, administrative or other measures, the operator took steps to prevent or minimize the risk of harm, taking account of the technological complexity involved.

22. It was true that the two articles were similar, but article C had been included in the section on principles because the Drafting Committee and the Commission had thought a general article on prevention should be drafted. Article 14 was perhaps a bit too specific to state a general principle. Consequently, he believed that the reason for including article C should be explained in the commentary.

23. Mr. de SARAM said that he endorsed Mr. Eiriksson's proposal that the words "or action" in article C should be deleted. He had some reservations about article D and took it that matters relating to that article would be considered in greater depth at the Commission's next session.

24. Mr. IDRIS, noting that the discussion related not only to the form, but also to the substance of article C, said that he had three comments to make. First, he endorsed the idea that the tenor of articles 14 and C was the same and that they should not be kept as they stood. Secondly, the Arabic text of article C only added to the confusion, for it said that "States shall take all appropriate measures or actions to prevent or minimize the risk of significant transboundary harm". The Arabic word for "measures" had a purely preventive connotation, while the word for "actions" related solely to procedures. Accordingly, either the Arabic version did not accurately reflect the article's content or the article must be understood in a completely different way. Thirdly, he wholeheartedly supported the proposal that the word "action" should be deleted and an explanation should be included in the commentary.

25. The CHAIRMAN indicated that, once the content of article C had been decided, the translation services would bring the Arabic text into line with the original text.

26. Mr. EIRIKSSON suggested that the Commission should set up a small group to look into the link between articles 14 and C. His view was that the commentary to article 14 adopted at the preceding session actually applied to article C and that that commentary should therefore be transferred from article 14 to article C.

27. Mr. MAHIOU said that the discussion, and particularly the statement by the Special Rapporteur, provided a better understanding of the reason for having two articles, one of which—article C—stated a general principle of prevention, while the other—article 14—explained that principle in greater detail. The differences between the two articles should be clearer, however, and that was not the case as they now stood. He therefore supported the proposal that a small group should be set up to draft article C so that it would no longer appear to duplicate article 14. Article C should perhaps apply to all States, whereas article 14 would apply only to the States of origin of the risk or harm. The commentary should clearly define the scope of both articles.

28. Mr. de SARAM said he agreed that the discussion was bringing up matters of substance. The group proposed to be set up should take a position on the words "reasonable", "necessary" and "appropriate". The choice between those words would be of considerable practical importance and must be explained by the commentary.

29. The CHAIRMAN suggested that, because a number of positions had been taken during the discussion, a small group should be set up to draft a version of article C that would be acceptable to all members of the Commission. He suggested that the group should be composed, *inter alia*, of Mr. Barboza (Special Rapporteur), Mr. Eiriksson, Mr. Pambou-Tchivounda, Mr. Tomuschat, Mr. Villagrán Kramer and Mr. Yankov.

30. Mr. BENNOUNA recalled that the consideration of the draft articles as a whole on first reading had to be completed at the next session; that articles 14 and C had been considered by the Drafting Committee and by the Commission in plenary; that the Special Rapporteur had

clearly explained the justification for having two articles; and that it would therefore not be advisable to request a small group to redraft the two articles. At the current session, the Commission simply had to endorse what all members agreed on, namely, that only the term “measures” should be retained in article C, with an explanation in the commentary of what that word meant. The Drafting Committee would have ample time to harmonize the two articles after it had reviewed the articles as a whole at the forty-eighth session.

31. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the suggestion he had made.

*It was so decided.*

32. Mr. RAZAFINDRALAMBO said that the principles embodied in the draft articles submitted by the Drafting Committee did not give rise to any particular problem. Article A only repeated, in virtually the same words, the principles which had been contained in the former article 6<sup>6</sup> and on which most representatives of Governments in the Sixth Committee had agreed. There was thus no need to reopen a substantive debate on the freedom of action of States and the limits thereto, and still less to call into question the specificity of the topic of international liability. The other articles also contained principles on which there had been a broad consensus within the Commission and he had no substantive comments to make on them. He simply wanted to make some drafting or structural suggestions. It seemed to him, although he was far from adamant on that point, that article C might come immediately after article A, since prevention was one of the obligations that could restrict the freedom of action referred to in article A. In article D, the words “*Sous réserve des présents articles*” were not an exact translation of the words “Subject to the present articles”, since what was involved was not a safeguard clause, but, rather, the implementation of the draft articles in the event of significant transboundary harm. It would be better to use the words “In the framework of the present articles” or the words “Pursuant to the present articles”. Alternatively, since article D ended with the words “in accordance with the present articles”, those words could be retained and placed at the beginning of the article so that they would cover the entire text. The words “there is liability for” were certainly acceptable, but much too vague. Perhaps they should be replaced by the words “the liability of the State of origin arises from”. Lastly, since the term *indemnité* in French was always “financial”, the words *à indemnité, financière ou autre* (by compensation, financial or otherwise) should be replaced by the words *à une indemnisation financière ou à toute autre forme de réparation équivalente* (to financial compensation or any other equivalent form of reparation), which were similar to the wording used in article 8 of the draft on State responsibility.

<sup>6</sup> For the text, see *Yearbook . . . 1989*, vol. II (Part Two), para. 311. Further changes to some of those articles were proposed by the Special Rapporteur in the annex to his sixth report (*Yearbook . . . 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1); see also *Yearbook . . . 1990*, vol. II (Part Two), para. 471.

<sup>7</sup> See 2391st meeting, footnote 9.

33. Mr. VILLAGRÁN KRAMER said that article D set out a principle, and principles were supposed to apply to all cases and situations. That principle should not be limited to the point of being set by the “present articles”, especially if that restrictive language was repeated twice in the text. The word “compensation” was perhaps appropriate in English, but the words *compensation* and *indemnisation* in French, and their Spanish equivalents, did not have the same connotation. If the word was retained in English, a different translation than *indemnisation* in French and its Spanish equivalent should be found. It would be much better, in fact, simply to state the principle that any harm gave rise to an obligation to “compensate”. That principle applied whether or not the liability involved fault, such a distinction being unknown in the civil codes and legal systems of Latin America. Any harm called for compensation, although the form that it would take was a separate problem. The Commission should consider deleting the words “Subject to the present articles” and “in accordance with the present articles” in article D or placing them in square brackets.

34. Mr. IDRIS said that, for future articles on liability, article D established a principle which was sound and progressive and which included a very important obligation. At present, the Commission might not agree on the obligation itself or on the establishment of an obligation of “compensation”. It was not yet completely sure about the types of activities covered by the topic and it had not really defined what was meant by “harm”. Under those circumstances, adopting article D might affect the important work already done on the chapter on prevention. The Commission might therefore take note of article D without adopting it as it stood in order to consider it in depth at the next session as it related to all aspects of liability.

35. Mr. BARBOZA (Special Rapporteur) recalled that he had submitted 11 reports on the topic and his predecessor 5. If, after 16 years of work, the Commission was not in a position to agree on the principle of liability, which was the title of the topic, then it might just as well stop working on the topic. Article D simply stated that significant transboundary harm gave rise to liability, as determined by the draft articles. While the legal effects might be significant, the harm done to another country was equally important. In the case of activities involving risk, how could the suggestion that no mention at all should be made of liability be taken seriously?

36. Mr. FOMBA said that the question of the legal limits on the freedom of action of States, as dealt with in article A, related to two other questions: did international law govern State sovereignty on the basis of “lawful” or “wrongful” activities and to what extent was that concept itself recognized? For the category of activities involving risk, were there clear-cut legal limits on the action of States? Article A identified two categories of limits: general obligations of a customary nature (prevention or reduction of the risk) and specific obligations of a conventional nature (with respect to transboundary harm). What, then, was the nature of the liability in question? In the case of customary or conventional obligations, any failure of a State to meet those obligations could give rise only to responsibility for a wrongful act

and thus related to the topic of State responsibility. Was there any place then for possible objective liability?

37. Article D stated the principle of liability and reparation, and that was natural in view of the title of the topic. Its wording was fairly neutral considering the current lack of specific ideas on the topic. Yet, as long as the basic premises of the topic remained unclear, in particular with regard to the type of activity in question and the type of liability arising from it, it would be unwise to take action on the substance of that provision.

38. Mr. MAHIOU said that the reference to the principle of liability in article D was entirely normal, since such liability had to be circumscribed by an expression such as "in accordance with the present articles". However, the wording of the principle must not prejudice the conditions under which such liability was implemented, for example, by giving preference from the outset to compensation as opposed to other forms of reparation. If restrictions were needed, they should be included not in the article stating the principle, but in subsequent provisions. In the second sentence, liability should therefore no longer be linked solely to compensation. In addition, it would be better to retain only one of the two expressions "Subject to the present articles" or "in accordance with the present articles" in order to avoid what seemed to be a redundancy. Even if a general principle was being stated in the first sentence, it might be better to specify who was liable. The principle embodied in article D was thus satisfactory, but its wording had to be fine-tuned.

39. Mr. TOMUSCHAT said that the Drafting Committee had been correct in making a distinction in article A between specific legal obligations and a general obligation, but the wording of that distinction was rather awkward. The words "specific legal obligations . . . with respect to transboundary harm" gave the impression that such specific obligations were not of the same nature as the general obligation to prevent or minimize the risk of causing transboundary harm. However, the former obligations were simply more detailed than the latter obligation. Treaties relating to activities being carried out near a border, for example, focused mainly on the specific measures the State must take to avoid transboundary harm before it occurred. With regard to article D, his view was that it was simply not ready for adoption by the Commission because there was no commentary on its main characteristics. It was certainly unwise to establish a general principle before examining in detail the specific aspects of the issue. Thus, as to the expression "significant transboundary harm", as used in connection with the law of the non-navigational uses of international watercourses, the Commission might be more demanding with regard to the topic under consideration and decide, for instance, that, in such a case, liability arose only where the activity in question caused devastating harm.

40. As Mr. Mahiou had rightly pointed out, the word "compensation" was too restrictive. Without first studying the matter, it could not be stated that compensation was the sole form of reparation possible in the case of harm caused by a State. Like Mr. Mahiou, he was also surprised that no mention had been made in the article of who was liable for the harm caused. Perhaps that omis-

sion had been deliberate in order to give the impression that, in some cases it was not only the State that was liable, but also the private operator. Clarifications on that point were needed.

41. Considering all the complex issues raised by article D, it would, in his view, be premature to adopt it without being certain of what it meant, since it did not simply enunciate a general principle, but also contained a number of criteria which might limit the Commission's freedom of action in future. The proposed text also gave rise to a few small problems of form. Drawing attention to the presence of two nearly equivalent expressions in English—"Subject to the present articles", at the beginning of the first sentence, and "in accordance with the present articles", at the end of the second sentence, he noted that in French, the words "*Sous réserve de*" were incorrect in that context. For all those reasons, the Commission should, for the time being, set aside that article, which was simply not ready.

42. Mr. VARGAS CARREÑO said that he had no problem with articles A and B because they stated rules of international law and the Commission had, moreover, referred them to the Drafting Committee as articles 6 and 7.<sup>8</sup> Article C stated a general rule which it was important to formulate and which could be applied to all States, while article 14 might be more directly applicable to States likely to cause harm. He was convinced that the working group on that topic would be able to find wording that was acceptable to all. In that connection, he noted that the Spanish version of article C differed slightly from the English and French versions because the word "action" in English and "action" in French had been rendered in Spanish as *disposiciones*. He therefore proposed that that word should be replaced by the word *acción* so that the three versions would be harmonized.

43. Article D simply stated a fundamental rule which was present in all legal systems and which was a principle of international law, namely, the "polluter pays" principle, which had already been known in Plato's time. The text of the article could certainly be improved and, in that connection, he endorsed the amendment Mr. Razafindralambo had proposed for the second sentence so it would be specified that the liability in question would give rise to financial compensation or "any other equivalent form of reparation". The main point was, however, to give expression to the principle of liability and that of the compensation to which it gave rise because, as the Special Rapporteur had said, the draft articles would be meaningless without a provision of that kind.

44. Mr. BARBOZA (Special Rapporteur), referring to the comments by Mr. Mahiou and Mr. Tomuschat on article D, said that there was no doubt that the obligation to make reparation for transboundary harm was a nearly banal principle, but it was still worth stating it expressly. He also thought that the expressions "Subject to the present articles" and "in accordance with the present articles" were a duplication. One would be enough to indicate that a particular type of liability was involved. He

<sup>8</sup> See footnote 6 above.

also agreed that the word “compensation” in English could be replaced by the word “reparation” and its equivalent in French and Spanish. In fact, that term had been used in order to avoid any confusion with the idea of responsibility for a wrongful act. The word “reparation”, which was more general, was quite acceptable. The important point was to link the concept of liability to that of reparation. Lastly, the reason that the liable party had not been expressly designated in article D was that the article enunciated a general principle, namely, that harm gave rise to liability. It would be seen later whether the liable party might be the State, if it had not fulfilled its obligation of prevention, or the operator himself. There were several possibilities in that regard, but they were not endless.

45. Summing up, he said he supported the proposal that the expression “Subject to the present articles” should be deleted at the beginning of article D, that the word “compensation” in the title of the article should be replaced by the word “reparation” and that that word should be translated into French and in Spanish by a term which corresponded more to the general idea contained in the English word “compensation”. He nevertheless insisted that the idea that the liability in question was liability arising from significant harm should be maintained. It was in fact from that type of harm that liability arose and he did not clearly understand why objections had been raised in that case.

46. Mr. EIRIKSSON said that he would confine his comments to articles A and D. As to the former, he agreed with Mr. Tomuschat that the reference to specific legal obligations owed by States to other States with respect to transboundary harm was inappropriate and that those specific obligations should be linked to the general obligation, stated at the end of the sentence, of “preventing or minimizing the risk of causing significant transboundary harm”. He therefore proposed that the second sentence should be reworded in the following way: “It must be compatible with the general obligation, as well as with any specific legal obligation owed to other States, with respect to preventing or minimizing the risk of causing significant transboundary harm”. That wording also had the merit of dealing first with the general obligation.

47. As far as article D was concerned, he, unlike Mr. Tomuschat, thought that an article stating the general principle of liability was necessary; on that point, he fully agreed with Mr. Vargas Carreño and the Special Rapporteur. The general obligation should be stated first, in the most general way possible, and the specific obligations spelled out afterwards. As to the actual wording of the article, it would be judicious to replace the word “compensation” by the word “reparation” because the words “or otherwise” appearing after the words “compensation, financial” in the third line of article D were suggestive of *restitutio in integrum* rather than of compensation. On the other hand, he saw no objection to maintaining both expressions “Subject to the present articles” and “in accordance with the present articles”. The former indicated that the liability that arose was only that established in the articles, while the latter specified how that liability was to be met. To settle the problem and also to meet Mr. Mahiou’s concern about

who was liable, he proposed that the current text should be replaced by the following:

“Liability arises from significant transboundary harm caused by an activity referred to in article 1 which shall be met by reparation in accordance with the present articles.”

48. Mr. ROSENSTOCK said that he had the impression that the many problems arising in connection with the articles were due to the attempt being made to take action on the articles without dealing with the more specific articles that would appear in the draft convention. The four articles under consideration represented only a fragment of the draft as a whole. It made no sense to try to take action on them at the present stage before working out the precise meaning which they were eventually to have. Furthermore, the obligation enunciated in article D arose from specific treaty obligations and could not be generalized. That was why language such as “Subject to the present articles” was absolutely indispensable. Article D was already open to challenge in itself, but, without those words, it would be unacceptable. He did not believe that the changes proposed by Mr. Eiriksson would solve all the problems arising in connection with the articles; in his view, the most reasonable course would be for the Commission to take note of the articles on the understanding that they formed part of a larger whole and could serve as guidelines to the Drafting Committee, bearing in mind the comments made, when drawing up the relevant provisions in detail.

49. Mr. BENNOUNA said that the four articles under consideration gave rise to problems of both form and substance. Whereas an agreement appeared to be taking shape on articles A, B and C, the same was not true of article D, which obviously could not be adopted as it stood. The most sensible course might be for all those members of the Commission who had spoken on that particular article, whether to propose changes of form or to raise problems of substance, to get together and report their conclusions to the Commission at a later stage. Such a group should either propose a solution that was meaningful and could be adopted by the Commission or recognize that the time was not yet ripe for a decision and that it would be best to defer the decision on article D until the next session.

50. Mr. VILLAGRÁN KRAMER, referring specifically to article D, recalled, first, that, in the general theory of legal obligations and of means of fulfilling those obligations, reparation was a principle common to all legal systems. The term “reparation” proposed by several members of the Commission would therefore be wiser and more appropriate than the term “compensation”. Secondly, it was a general principle of law that all harm caused had to be made good. Exceptions did, of course, exist and those exceptions were dealt with by international law, but what the Commission had to do in the present case was to state the applicable rule or general principle in the clearest manner possible.

51. Thirdly, as Mr. Fomba had said, the Commission had been speaking of “strict liability” for years, having previously taken a long time to grasp the difference between the concepts of “responsibility” and “liability”. In recognizing that preventive measures were called for

in certain areas, it had accepted an exception to the overall concept of general responsibility, thus reverting to the concept of fault. Should it be concluded that, because it had thus moved further away from the original concept of strict liability, the Commission should abandon it altogether after so many years of work? He had the feeling that the position of pure legal theory which underlay the nature of strict liability was being weakened. The question was one of principle. The Commission had to define the legal principle that was applicable in the matter and it had to do so in conformity with its obligation to codify the law in that area. He therefore appealed to Mr. Idris to reconsider his position so as to enable the Commission to take a decision on that fundamental problem.

52. Mr. HE said that he endorsed the view that the principle of strict liability should be stated in the form of a general provision. The question was whether the Commission should draft that general provision or, on the contrary, deal first with specific provisions. Pointing out that there was definitely some overlapping between article C and article 14, he took the view that it would be preferable to defer the adoption of article D until later. The Commission should have specific provisions at its disposal before taking action on article D.

53. The CHAIRMAN said that the working group set up to consider article C could also deal with articles A and D, which had been the subject of various comments and suggestions. He therefore invited all members of the Commission who had spoken on those articles, namely, Mr. Barboza, Mr. Bennouna, Mr. He, Mr. Idris, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov, and Mr. Eiriksson, who would act as Chairman, to take part in the working group.

*The meeting rose at 1.10 p.m.*

## 2415th MEETING

*Wednesday, 12 July 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)** (A/CN.4/459,<sup>1</sup> A/CN.4/464/Add.2, sect. E, A/CN.4/468,<sup>2</sup> A/CN.4/471,<sup>3</sup> A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)

[Agenda item 5]

### CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-SEVENTH SESSION (*concluded*)

1. Mr. EIRIKSSON, speaking as Chairman of the working group set up at the previous meeting to deal with proposals made in plenary on the drafting of articles A, C and D (A/CN.4/L.508), recalled that the working group had been established in order to avoid turning the plenary into a drafting committee and to expedite agreement on the articles in question. The working group had been composed of Mr. Barboza, Special Rapporteur, Mr. Villagrán Kramer and Mr. Yankov, who chaired the Drafting Committee at the present session, Mr. Pambou-Tchivounda, the First Vice-Chairman of the Commission, Mr. Rosenstock, Mr. Tomuschat and himself. The working group had spent the whole of the previous afternoon on its task and had succeeded in reaching agreement on all the points which had been raised. Actually, some disagreement did remain, in principle, about whether article D was ready for adoption, but he would return to that matter later. Unfortunately, it had only been possible to circulate an informal document, in French and English only.

2. As already stated, the working group had confined itself to dealing with issues raised in the plenary. However, in considering forms of language to meet various concerns, it had felt obliged also to tackle related formulations. For example, it had changed the word *minimiser* as applied to risk in the French text of article B, to *réduire au minimum*, thereby bringing the language of the article into line with that used in the articles adopted at the previous session.

3. The revised version of draft article A [6] read:

*“Freedom of action and the limits thereto*

*“The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.”*

4. It would be seen that the second sentence had been somewhat streamlined. First, it now indicated that the specific obligations owed to other States should relate not only to “transboundary harm”, as in the original draft, but also, like the general obligation, to the prevention and minimization of such harm. Secondly, the work-

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

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

ing group had felt that referring to the “specific obligations” as “legal” might give the unintended impression that the “general obligation” was not “legal”. Hence, it was proposed that the adjective “legal” be deleted. Thirdly, the work in English and French had revealed certain difficulties in connection with the phrase “with respect to preventing and minimizing”, and the Group recommended the more direct form “obligation to prevent or minimize”, it being made clear in the commentary that what was meant was the obligation, as laid down in the articles, to take appropriate measures, described by some as an obligation of conduct rather than of result. Lastly, the view had been expressed that it would be more accurate to say that the freedom referred to in the first sentence of the draft article was “subject to” the obligations referred to in the second sentence than to say that it had to be “compatible with” those obligations.

5. The working group had not dealt with draft article B except to make the drafting change already mentioned in connection with the French text. Accordingly, the English text of draft article B [7] was the same as that proposed by the Drafting Committee in document A/CN.4/L.508 and read:

*“Cooperation*

“States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.”

6. Proposed draft article C [8 and 9] read:

*“Prevention*

“States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.”

7. In dealing with article C, the working group had proceeded on the premise, developed in plenary, that the words “or action” could be dispensed with and that the words “reasonable measures” should be replaced by “appropriate measures”, which corresponded to the wording of article 14 as provisionally adopted<sup>4</sup> and which, moreover, followed the many precedents referred to in the commentary to that article and the way in which a similar issue was treated in the articles on the law of the non-navigational uses of international watercourses. The resulting language was much more straightforward than the original text by the Drafting Committee, as befitted an article setting out a general principle.

8. As for the question, raised by Mr. Tomuschat, of the relationship between article C and article 14, the Group recommended that the commentary should note that, at the appropriate time, article 14 should be brought into harmony with the new article C and should be confined to an article on implementation, taking as its model, for

example, the Convention on Environmental Impact Assessment in a Transboundary Context. A new article 14 might read:

“States shall take all legislative, administrative or other action to implement the provisions of these articles [on prevention, etc.]”

The wording would then be referring both to the general obligation set forth in article C and to the more specific obligations set forth elsewhere in chapter II of the draft articles (such as prior authorization, risk assessment, non-transference of risk, and so on).

9. Proposed draft article D [9 and 10] read:

*“Liability and reparation*

“In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.”

10. Essentially two changes had been made. The first consisted in replacing the word “compensation” by “reparation”, the latter term being, in the working group’s view, generally accepted in the plenary as broader and therefore more appropriate. The second change, designed to avoid having to repeat the words “in accordance with” or “subject to” the articles, had been achieved by combining the two sentences of the article originally proposed by the Drafting Committee into one and qualifying both liability and reparation by the opening clause “In accordance with the present articles”. The title of article D had, of course, been changed accordingly.

11. As already stated, the proposed changes had been agreed upon by the working group. Some members, however, remained of the view they had stated in plenary that article D should not go forward at the present stage, while others remained of the view that it should. The working group had failed to agree on that point and had decided to leave the decision to the plenary. If the plenary decided that article D was to go forward, the members taking the opposite view would place their reservations on record. In any event, the article should be accompanied by a commentary indicating the various qualifications contained in the article—in effect, that it would be for the future work on the topic to determine the actual content of the obligation. Some members had considered that the commentary should, in addition, briefly refer to the various views on the nature of liability, on which material had been provided in two reports by the Special Rapporteur. If the article was not sent forward, the question of a commentary would not, of course, arise.

12. In conclusion, he wished to refer to a point which had arisen repeatedly within the working group and which the working group’s members had asked him to emphasize, namely, the need to reaffirm the view often expressed by the Commission that the articles it adopted should be accompanied by the most complete and informative of commentaries in order to allow readers to form

<sup>4</sup> See 2414th meeting, footnote 4.



an opinion on both the content and the origins of the Commission's product.

13. At the suggestion of Mr. BARBOZA (Special Rapporteur), the CHAIRMAN invited the Commission to consider the proposals of the working group article by article.

#### *Article A*

14. Mr. ROSENSTOCK said that article A, like the others in the series, had to be understood within the context of the specific provisions adopted at the previous session.

15. Mr. de SARAM, noting that article A was not yet accompanied by a commentary, said that he wholeheartedly concurred with the wording proposed at the present stage.

16. The CHAIRMAN, speaking as a member of the Commission, said that he was not entirely happy with the wording of the first sentence. It was surely not the Commission's intention to imply that States had only limited freedom in exercising activities in their territory that were not prohibited by international law. However, he was prepared to go along with the working group's proposal.

*Article A, as proposed by the working group, was adopted.*

#### *Article B*

17. Mr. PAMBOU-TCHIVOUNDA said that, as already explained by Mr. Eiriksson, the working group had not dealt with article B except by introducing a drafting change, in the French version, one which he welcomed. Had the Group considered the article, he would have suggested that the words "in minimizing its effects" should be replaced by "in remedying it". It would be recalled that the Commission had discussed that point at the previous session.

18. Mr. KABATSI said that he, too, would prefer the article to speak of remedying harm rather than of minimizing its effects. Eliminating the effects of significant transboundary harm was, at it were, the first option, the second option—that of reducing the effects of harm to the barest minimum—being resorted to only if the first was not feasible.

19. Mr. THIAM said he, too, took the view that the word "minimizing" was inappropriate. The effects of harm, once it had occurred, could be remedied but not reduced.

20. Mr. BARBOZA (Special Rapporteur) said the point raised was very interesting, but he feared that use of the word "remedy" might be taken to allude to reparation. Minimizing the effects of harm could include reducing those effects to zero. He would prefer the working group's text to remain as it stood.

21. Mr. EIRIKSSON, after pointing out that the working group had not been mandated to consider article B,

remarked that, since the subject-matter of the article was cooperation, it might be sufficient to replace the word "minimizing" by "dealing with".

22. Mr. FOMBA said that, unlike Mr. Thiam, he thought the effects of harm could indeed be reduced. In the case of marine pollution, for example, minimizing the effects of harm could include measures ranging from a complete clean-up to relatively slight improvements. The difference between the working group's text and that suggested by Mr. Pambou-Tchivounda was not very great, and for that reason he had no objection to keeping the text as it stood.

23. Mr. MAHIOU said that he preferred "minimizing" to "remedying", not because he could see no difference between them, but precisely because the latter term was much wider in scope and could, as the Special Rapporteur had already pointed out, be interpreted as including reparation or compensation. Article B dealt with the physical effects of harm, and the word "minimizing" was entirely appropriate in that context.

24. Mr. GÜNEY said that, for reasons already given by previous speakers, he too was in favour of adopting the working group's text without change.

25. The CHAIRMAN said that another possibility would be to add the words "eradicating or" or "removing or" before the word "minimizing".

26. Mr. BARBOZA (Special Rapporteur) said that in his view the word "minimizing" conveyed the proper meaning. It was, moreover, a hallowed term which appeared in similar conventions.

27. Mr. KABATSI said he did not think that it would create any problems if the expression "eradicating or minimizing" was used.

28. Mr. EIRIKSSON suggested that the expression "eliminating or mitigating", which occurred elsewhere, could perhaps be used.

29. Mr. TOMUSCHAT said that "wiping out" was the term used in the judgment in the *Chorzów Factory* case,<sup>5</sup> though it was, of course, a term of State responsibility.

30. Mr. GÜNEY said that, for reasons already cited by himself and other members, he had a marked preference for the word "minimizing", which should be retained.

31. Mr. BENNOUNA said that he would have no objection to replacing the word "minimizing" by the words "eliminating or mitigating" in the second part of the article, which dealt with prevention after the event. In the first part of the article, however, which dealt with prevention proper—or prevention before the event—there was no need for the words "or minimizing" and it would suffice to state "in preventing the risk".

32. Mr. ROSENSTOCK said that he favoured the text as it stood. The activities contemplated by the article would inevitably include many where the most that could be hoped for was that their effects could be mini-

<sup>5</sup> See 2379th meeting, footnote 19.

mized. "Minimizing" was both the traditional and the correct word in the context.

33. Mr. RAZAFINDRALAMBO said he supported that view.

34. Mr. BARBOZA (Special Rapporteur), agreeing with Mr. Rosenstock, said that it was not possible to provide for reparation through cooperation, inasmuch as the obligation to cooperate was founded on an entirely different basis from the obligation to make reparation. So far as cooperation was concerned, the article went far enough.

*Article B, as proposed by the working group, was adopted.*

35. Further to a point raised by Mr. PAMBOU-TCHIVOUNDA, Mr. BARBOZA (Special Rapporteur), supported by Mr. EIRIKSSON, suggested that article B should be placed after articles C and D.

*It was so agreed.*

#### Article C

*Article C, as proposed by the working group, was adopted.*

#### Article D

36. Mr. GÜNEY said that the working group had touched on substance and gone beyond its mandate. Moreover, article D was not compatible with the work the Commission had done at its preceding session, in 1994, on the law of the non-navigational uses of international watercourses. In the draft on that topic, the obligation not to cause significant harm, though a general obligation, had been linked to the obligation to exercise due diligence: thus, where the States concerned complied with the latter obligation, they would not incur responsibility. In that respect, article D lacked balance. Therefore, it should not be submitted to the General Assembly at the present stage.

37. Mr. TOMUSCHAT said that, while he did not think the working group—of which he had been a member—had exceeded its mandate, he did feel that it would be premature to accept the article before the Commission had studied fully all of the implications of an issue that was central to the whole draft. In particular, it should examine the threshold at which liability arose and the form of reparation, which should not be automatic. As it stood, the article would give rise to many difficulties and it would be unwise to adopt it. Furthermore, it should not be assumed that the article commanded the support of the majority in the Commission.

38. Mr. EIRIKSSON said that there had been no intention whatsoever in the working group of changing the substance of the article. The working group had merely considered two points: first, the replacement of the word "compensation" by the broader term "reparation" and, secondly, the elimination of the double reference to "the present articles". He was very much in favour of sending the article to the General Assembly, together with

commentaries that would reflect the discussion on those two points.

39. Mr. ROSENSTOCK said that he was unable to approve the adoption of article D, which was premature for a variety of reasons. The words "In accordance with the present articles" indicated that there was no intention to lay down a principle or rule that was independent of the specific provisions of the draft, which was both right and proper. But there were, as yet, no such provisions and the Commission had taken no decisions about their content. It would therefore be wrong to prejudice that exercise by attempting to adopt a principle forthwith. At most, the Commission should take note of article D and recognize that it was a matter to be kept in mind when it undertook the detailed drafting of provisions that might or might not reveal that it was prepared to state generally that there was some such principle. Furthermore, such practice as existed was limited to specific conventions, usually concluded between a small number of States in relative proximity to one another and dealing with specified dangerous or ultra-hazardous substances or activities. In some of those conventions, liability was limited in a variety of ways, often being confined to the operator or to fixed amounts. In the absence of any State practice to support the principle in article D, in the absence of a detailed study of the issue by the Commission, and in the absence of an attempt to elaborate detailed provisions that could provide some substance to the content of the article, it would be unwise to take any formal action at the present stage.

40. Mr. BARBOZA (Special Rapporteur) said he wished to reassure Mr. Güney that article D simply laid down a very general principle providing for the possible liability of the operator.

41. It was none the less an important principle and one that characterized the whole topic. The sense of article D, as drafted, was that where, under certain conditions to be established by the articles, significant transboundary harm gave rise to liability, there must be reparation. That principle, though not proclaimed as a universal principle, formed the basis for the draft's chapter on liability. It was also the corollary to and a necessary complement of the principle laid down in article A, concerning the freedom of States and the limits to that freedom. Liability was one way of enabling a dangerous activity, which a State was free to authorize or to carry on under its jurisdiction or its control, to be a legal activity. The other way was prevention, in that the activity had to be accompanied by all the necessary precautions to minimize the risk involved. One trend of opinion in the working group, which had been expounded by Mr. Tomuschat and Mr. Rosenstock, was that the Commission should wait until the chapter on liability had been examined at the next session before a principle was proposed on liability and reparation. The other trend of opinion held that the principle as now drafted should be submitted to the General Assembly forthwith, together with the other principles that had been approved. That course, it had been argued, would have the advantage of securing the guidance of Governments for the Commission's future work on the topic, or at least their reactions.

42. A chapter on liability had in fact already been included both in his fourth report<sup>6</sup> and in his sixth report,<sup>7</sup> and the principle at issue had long since received the Commission's general approval.

43. He had originally proposed three principles, which the Commission had endorsed and included in its report to the General Assembly on the work of its fortieth session. Those principles read:

(a) the articles must ensure to each State as much freedom of choice within its territory as is compatible with the rights and interests of other States;

(b) the protection of such rights and interests requires the adoption of measures of prevention and, if injury nevertheless occurs, measures of reparation;

(c) in so far as may be consistent with those two principles, an innocent victim should not be left to bear his loss or injury.<sup>8</sup>

44. The adoption by the Commission of the principle in article D would give him guidance for the next stage. There were in fact two reports on liability—his sixth and tenth<sup>9</sup> reports—and he would have to present them as alternatives and harmonize them. But he would require some orientation; there would be no point in undertaking that arduous task if the Commission itself had strong misgivings about such an elementary principle.

45. In the past, the only way in international practice to meet transboundary harm caused by an activity dangerous to persons, property or the environment had been through some form of liability, either the absolute liability of the State (as in the case of the Convention on International Liability for Damage Caused by Space Objects), the strict liability of operators, for example the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, or the strict liability of the operator with a subsidiary liability of the State or of some fund (as in the Vienna Convention on Civil Liability for Nuclear Damage, the Convention on Third Party Liability in the Field of Nuclear Energy or in the conventions on oil pollution). There could be some other variants, but in international practice, significant transboundary harm had always given rise to liability.

46. The present text was flexible enough to contemplate all possibilities. As it limited itself to stating that transboundary harm gave rise to liability and to reparation in accordance with the provisions of the articles of the draft, it certainly did not go beyond what had already been agreed by the Commission at the fortieth session, in 1988. On the other hand, he reminded the Commission that at its forty-fourth session, in 1992, it had been decided, consistent with the recommendation of the working group specially appointed by the Commission, that upon completion of the articles on prevention, the Commission would propose articles on remedial measures when activities had caused transboundary harm.<sup>10</sup> Thus,

he was of the opinion that the principle in article D should be referred to the General Assembly.

47. Mr. de SARAM said it was clear that article D, although seemingly simple, touched upon a fundamental question on which there had been differences of opinion for many years. As he saw it, the text of the article was fully acceptable in its present form. The question was whether the Commission should express a view by consensus on what in fact was the basis of an international obligation under public international law to compensate in the event of physical transboundary harm. It must be placed on record that that was a fundamental question on which there was considerable disagreement.

48. Mr. LUKASHUK said he congratulated the working group and its Chairman for the excellent work done. It would be useful to call upon such small groups in the future to help speed up the work in plenary.

49. It was clear that article D must remain in the draft, because it established an important principle. However, one of the vital norms in the draft thus referred to articles that did not yet exist. He therefore endorsed the proposal already made in the Drafting Committee to adopt the idea in principle but to defer finalization of the wording until the articles to which reference was being made became available.

50. Mr. VILLAGRÁN KRAMER said that the article was long overdue. For the past 15 years, the Commission had informed the General Assembly of the nature of its work, its approaches to the subject and the difficulties encountered. In the course of its report to the General Assembly on the topic, the Commission had drawn attention to the *Trail Smelter* case,<sup>11</sup> the *Lake Lanoux* case<sup>12</sup> and the *Corfu Channel* case,<sup>13</sup> as well as to a number of European and international treaties. The enunciation of the principle merely confirmed what already existed in international law: there was a general principle of international law that any harm caused to another State required good reparation or compensation.

51. If the Commission distinguished between lawful and wrongful acts, it would need to view the subject in a totally different perspective. In the case of a wrongful act, it was the violation of a norm, a commitment or an obligation, and not harm, that constituted the basis of liability, whereas in the case of a lawful act, of an act not prohibited by international law, it was important to decide whether or not it gave rise to liability. If the Commission said that it did not, then in his opinion there was something wrong in international law. The fact could not be ignored that a principle of law did exist and that harm, in the case of the theory of fault, gave rise to liability, as did the violation of a norm. Thus, the existence of a general principle of law was simply a fact that

<sup>6</sup> See 2413th meeting, footnote 12.

<sup>7</sup> *Yearbook* . . . 1990, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1.

<sup>8</sup> *Yearbook* . . . 1988, vol. II (Part Two), p. 18, para. 82.

<sup>9</sup> See footnote 1 above.

<sup>10</sup> *Yearbook* . . . 1992, vol. II (Part Two), p. 51, document A/47/10, para. 345.

<sup>11</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

<sup>12</sup> Original French text in 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>13</sup> See 2381st meeting, footnote 8.

the Commission would be taking into account by approving the draft.

52. The principle was very important in that it would open the way to determining the liability of private and public operators. It was difficult to see how liability for private or public operators could be established if there was no agreement on the substance, namely the existence of the principle. Nor was it apparent how liability and the amount of reparation due could be limited if the Commission did not agree that there was a basis for liability.

53. He totally disagreed with the proposal to defer consideration of article D. He was convinced that the article represented a step forward for the Commission, which would do well to inform the General Assembly of its approval. The working group had not overstepped its mandate whatsoever. It had simply settled a question of terminology by replacing "compensation" by "reparation" and by deleting one of the two references to "the present articles".

54. He strongly endorsed article D. If necessary, it should be put to the vote.

55. Mr. AL-BAHARNA said that, with all due respect to the working group for its efforts to reformulate the draft articles, he had much preferred the original version. He objected, in the case of article D, to the expression "reparation". The regime of liability was much more closely bound up with compensation than with reparation, which fell under the regime of State responsibility. Numerous examples in domestic jurisdiction, State practice, multilateral treaties, judicial decisions and arbitration all spoke of liability and compensation. For example, neither the draft international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea<sup>14</sup> nor the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface made mention of reparation. Consequently, he urged the Commission to reconsider using the term "reparation". The Special Rapporteur had completed 11 reports, in which he had invariably spoken of compensation. It was not clear why it was necessary to shift to the regime of reparation, which would be far more complicated.

56. As to the wording of article D, he proposed replacing the phrase "In accordance with the present articles" by "Subject to the present articles", which was stronger, and then ending the sentence after the words "referred to in article 1" and adding a new sentence to read: "Such liability gives rise to compensation".

57. Mr. KABATSI said that the principle of liability was qualified in article D by the phrase "In accordance with the present articles"—referring to articles which had not even been formulated. He would, nevertheless, accept article D as it stood, or in a slightly modified form, since it dealt with such an important matter. The articles bearing on the topic of international liability would not be complete without a specific article defining the circumstances under which liability arose. In its

present form, article D simply asserted the principle of liability and made no attempt to impose it.

58. Mr. JACOVIDES said that, while it would be helpful to have an overall view of the full set of articles, he could accept article D as it currently stood. The article would, of course, be subject to review in the light of further developments.

59. Mr. BARBOZA (Special Rapporteur) said that if, as suggested, the word "compensation" were to replace "reparation" in article D, the article would then fail to cover the important case of environmental harm. Where such harm occurred, compensation was not sufficient, because conditions had to be restored to their former state. Environmental harm was a fairly recent concern and it was perhaps for that reason that such cases were not dealt with in the instruments mentioned by Mr. Al-Baharna.

60. The issue of "compensation" versus "reparation" had already been taken up quite some time ago by the Commission. It was his impression that members had preferred the latter term, especially since "compensation" was precisely defined as monetary compensation in article 8 of part two of the draft on State responsibility.<sup>15</sup>

61. Mr. AL-BAHARNA asked whether the mere use of the word "reparation"—without further specifying the elements of such a regime—would in fact adequately cover the case of environmental damage.

62. Mr. HE said that it might be better to postpone the adoption of article D until the next session, for the Commission had not yet discussed the specific articles relating to liability. Many issues still had to be clarified.

63. Mr. BARBOZA (Special Rapporteur) said that the commentary could include mention of the points made by Mr. Al-Baharna.

64. The CHAIRMAN said he wished to suggest, as a compromise, that the Commission should adopt article D marked with an asterisk, which would read:

"\* As it is clear from the phrase 'In accordance with the present articles', the substantive content of article D is left to the later elaboration of the articles on liability. At this stage, article D is a working hypothesis of the Commission to enable it to continue its work on the topic."

In addition, the commentary could include the various views expressed with regard to article D.

65. Mr. JACOVIDES said that the Chairman's suggestion seemed a good compromise, as long as it was acceptable to the Special Rapporteur.

66. Mr. BENNOUNA proposed that, as they were redundant, the words "to enable it to continue its work on the topic" should be eliminated from the proposed text.

67. Mr. GÜNEY said that he could accept the proposed text if article D itself was amended. Thus, after the

<sup>14</sup> IMO, document LEG 72/4, annex.

<sup>15</sup> See 2414th meeting, footnote 7.

words "referred to in article 1", he would add "if all due diligence is not exercised". Furthermore, in his view, it would be best to postpone adoption of article D until the Commission had examined the Special Rapporteur's commentary to that article, at which point it could adopt both the article and the commentary.

68. Mr. VILLAGRÁN KRAMER said that, while not wishing to be obstructionist, he himself preferred to work with norms and principles. A working hypothesis could never in his opinion be considered the equivalent of a general principle of law. If the Commission could not arrive at a consensus at the next session, in 1996, the adoption of article D would have to be put to the vote.

69. Mr. YANKOV said that with the change suggested by Mr. Bennouna, the proposed text protected the views of all concerned. For the time being, article D was simply a working hypothesis. The Commission was not a legislative body and whatever articles it formulated were still proposals which had to be accepted by States.

70. Mr. AL-BAHARNA said that the words "provisionally adopted" might be substituted for "working hypothesis".

71. Mr. MIKULKA said that he endorsed both the proposed formulation and Mr. Bennouna's amendment to it.

72. He had been surprised by the assertion that article D could not be characterized as a "working hypothesis" because it dealt with *lex lata*. However, that was only one position. Other members had other views. It was precisely for that reason that the Chairman had suggested a compromise. Labelling article D as a "working hypothesis" was simply a way of indicating to the Special Rapporteur that he should continue with his work, based on the assumptions set forth in article D.

73. With regard to Mr. Güney's proposal to include a reference to due diligence, it might be more appropriate to mention that matter in the commentary, noting that the Commission would consider the problem of due diligence when it examined the specific articles on liability. Article D simply stated the conditions under which liability arose. Mentioning the subject of due diligence in article D could only complicate matters, because the question would then arise of exactly who or what had to show due diligence.

74. Mr. EIRIKSSON said that incorporating an obligation of due diligence in article D would in fact simplify matters, because the Commission would not have to adopt further articles on that subject. However, it was not at all clear that the members were ready to take that course of action. All possibilities should be left open for the time being. He agreed that the discussion relating to the link between liability and reparation should be included in the commentary.

75. Mr. ROSENSTOCK said that, as he understood it, if the Commission adopted article D as it stood, along with the proposed comment, it would eventually have to choose between a strict causal liability or, alternatively, a regime based on due diligence, based primarily on the articles on prevention already agreed upon.

76. Mr. MAHIOU said that, although he was not entirely satisfied with the proposed formulation, he could accept it, especially since it did represent a compromise between the opposing points of view. Moreover, it provided a guideline for the Special Rapporteur's future work.

77. In his opinion, the obligation of due diligence should not be incorporated in article D, because it would imply the inclusion in that same article of a set of issues which were reserved for future articles. He would point out that the Commission had just adopted the article on prevention, a matter which was treated in an entire set of articles. In the same way, the Commission would subsequently be reviewing a set of articles on the subject of liability and, at that time, it could decide whether article D should remain in its present form.

78. Mr. de SARAM said that the proposed formulation should be taken at its face value, in other words, article D was a working hypothesis that would enable the Commission to move ahead in its work. The formulation also had the merit of accommodating, in a procedural manner, the sharp divisions that had arisen on the subject.

79. Mr. GÜNEY said he could agree that the issue of due diligence should be dealt with in the commentary rather than in article D itself. The commentary should stress that the obligation of due diligence would be re-examined in the context of future articles.

80. The Commission should postpone any decision on article D until after it had reviewed the Special Rapporteur's commentary to the article. Furthermore, given the wide range of views among members, the Commission could only take note of article D, not adopt it.

81. Mr. BENNOUNA said that he wished to make a fraternal appeal to Mr. Güney to join the consensus to adopt the compromise formulation.

82. Mr. GÜNEY said that he could not ignore the appeal of his colleague and he certainly did not wish to hinder the Commission's progress. Nevertheless, he would prefer the article to be adopted provisionally. Once the Commission had examined the commentary, it could confirm its decision.

83. The CHAIRMAN said that the notion of provisionality was already implied by the words "working hypothesis".

84. If he heard no objections, he would take it that the Commission agreed to adopt article D, with the accompanying text he had suggested, as amended by Mr. Bennouna.

*Article D, as proposed by the working group, was adopted.*

*The meeting rose at 1.05 p.m.*

## 2416th MEETING

Thursday, 13 July 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacobides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (concluded)** (A/CN.4/459,<sup>1</sup> A/CN.4/464/Add.2, sect. E, A/CN.4/468,<sup>2</sup> A/CN.4/471,<sup>3</sup> A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE IDENTIFICATION OF DANGEROUS ACTIVITIES

1. Mr. BARBOZA (Chairman of the Working Group on the identification of dangerous activities), introducing the report of the working group<sup>4</sup> recalled that the working group's mandate had been to identify the activities which came within the scope of the topic. Those activities had already been defined, to a certain extent, in article 1 of the draft articles provisionally adopted by the Commission<sup>5</sup> as

activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

A definition of such a risk was also given in article 2, subparagraph (a). That initial definition had clearly been inadequate, however, because such activities involved major obligations for the Governments and operators concerned, particularly in terms of prevention and compensation in the event of harm. The working group had accordingly been established to form a clearer idea of, and to define, the activities in question.

2. The working group had held three meetings and had worked on the basis of a document prepared by the secretariat, presenting an overview of the ways in which the

scope of multilateral treaties dealing with transboundary harm and with liability and prevention had been defined in terms of the activities or substances to which they applied. The working group had also examined the practice of some other multilateral treaties dealing with a specific type of activity or substance, such as oil or nuclear material or the carriage of such material, which were easier to define because a specific activity was involved. Other treaties, such as the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, which related to all activities that posed a threat to the environment, covered a broader category of activities or substances and provided a list of activities or substances, either within the body of the treaty or in an annex thereto. Some of them contained a standard amendment clause or provisions on updating the list of activities or substances to which they applied. The Commission could therefore usefully draw inspiration from such documents because the draft articles it was to prepare on the topic under consideration were also general in nature.

3. The working group had studied and evaluated three alternatives for the draft articles. The first would be to leave the current definition in articles 1 and 2. It had seemed to the working group, however, that that did not respond to the concerns expressed in the Sixth Committee of the General Assembly and in the Commission that the draft articles did not provide sufficient guidance to States to enable them to comply with the obligations set forth in respect of prevention or with those that would be imposed by the articles on liability. The second alternative—to draw up and annex to the draft articles a list of activities or substances that were to be covered by the topic—had been found premature at the current stage of the Commission's work, since the degree of specification needed in the topic was directly linked to the type of obligations to be imposed by the articles on liability. The working group had therefore opted for the third alternative, namely, to revisit the question of providing more specificity to the scope of the articles once the Commission had completed its work on issues dealing with liability. The Commission would then be in a better position to make a decision on the issue, since it would have adopted a complete liability regime, together with a regime for prevention and specific provisions regarding the relationship between the two regimes. Since it was nevertheless aware that, at the present stage of work, the Commission and Governments must have a general idea of the kind of activities covered by the topic, the working group was of the view that the lists of activities in a number of conventions on transboundary harm, particularly those referred to in paragraph 9 of its report (A/CN.4/L.510), would provide that general idea. That did not mean that the activities or substances listed in the annexes to those conventions should or would necessarily be among the activities within the scope of the topic, or that the Commission should follow their model of identification. They might simply be useful to provide the Commission with a general or approximate idea of the types of activities involved and to enable the Commission to move on to the next stage of the work, namely, the liability regime.

4. In other words, the definition of the scope of the topic, as provided in articles 1 and 2, was not sufficient

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

<sup>2</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>3</sup> Ibid.

<sup>4</sup> For the composition of the working group, see 2397th meeting, para. 43.

<sup>5</sup> See 2399th meeting, footnote 6.

for the next stage of the Commission's work; on the other hand, a more precise definition would be premature at the present stage. In the meantime, the Commission could usefully work on the basis of the lists of activities and substances contained in the relevant instruments. Even if the elaboration of a precise list of activities was deferred to a later stage, the Commission could continue its work on the articles relating to the liability regime. That was the conclusion reached by the working group and the one contained in paragraph 10 of its report.

5. The CHAIRMAN said that, following a discussion on paragraph 10 of the report, which the Commission was invited to adopt as a recommendation, he wished to suggest a number of drafting amendments to the paragraph based on comments and proposals made by Mr. Al-Baharna, Mr. Bennouna, Mr. de Saram, Mr. Eiriksson, Mr. Idris, Mr. Rosenstock and Mr. Tomuschat.

6. In the first sentence, the words "general idea" should be replaced by the words "clear view". In the third sentence, the words "listed in those conventions" should be replaced by the words "listed in various conventions dealing with issues of transboundary harm". A new sentence would be inserted between the third and fourth sentences and would read: "Examples include the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991, the Convention on Transboundary Effects of Industrial Accidents of 17 March 1992 and the Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment of 21 June 1993". In the fourth sentence, the words "at some later stage" should be replaced by the words "at some point" and the words "States may require more specificity in the articles" should be replaced by the words "more specificity may be required in the articles". In the fifth sentence, the words "which have been adopted by the Commission" should be added after the words "provisions on prevention".

*Paragraph 10, as amended, was adopted.*

**The law and practice relating to reservations to treaties (concluded)\* (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>6</sup> A/CN.4/L.516)**

[Agenda item 6]

7. The CHAIRMAN said that the Special Rapporteur had drafted a proposed wording for the end of the chapter of the Commission's report on the law and practice relating to reservations to treaties, which had been distributed to the members of the Commission as document ILC(XLVII)/INFORMAL/5.

8. In the light of the comments made by Mr. Rosenstock, Mr. Eiriksson, Mr. Pambou-Tchivounda, Mr. Al-Baharna, Mr. de Saram and Mr. Pellet (Special Rapporteur), he suggested that the Commission should adopt the draft text, with the following amendments. In paragraph 1 (a), the words "as a whole" should be deleted.

In paragraph 1 (b), the words "try to" and the quotation marks should be deleted and the word "instrument" should be replaced by the word "guide". In the French text, the words *se présenteraient comme* should be replaced by the word *constitueraient*. The words "examples of" and "including derogation clauses" should also be deleted. In paragraph 1 (c), the word "should" should be replaced by the word "shall" and the words "felt the need to do so" should be replaced by the words "feels that it must depart from them substantially". Paragraph 2 should be amended to read: "These proposals constitute, in the view of the Commission, the result of the preliminary study requested by General Assembly resolution 48/31 of 9 December 1993." In paragraph 3, the words "through the Secretariat, to" should be added after the words "to send".

*It was so decided.*

**Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/464/Add.2, sect. F, A/CN.4/L.515, A/CN.4/L.518)**

[Agenda item 8]

#### REPORT OF THE PLANNING GROUP

9. Mr. PAMBOU-TCHIVOUNDA (Chairman of the Planning Group) read out the main parts of the report prepared by the Planning Group at the conclusion of four meetings held during the session, the first having taken place in the presence of the Legal Counsel. He particularly stressed the fact that, at the next session, the Commission was to spend most of its time on the topics of State responsibility and the draft Code of Crimes against the Peace and Security of Mankind, the Planning Group's recommendation being that a maximum of time should be allocated in the Drafting Committee to considering the corresponding draft articles. With regard to the long-term programme of work of the Commission, he said that, while there had been unanimity about the topic of diplomatic protection, it had been considered that the feasibility study on the second topic chosen, that of environmental law, should be based on the principle of an integrated approach, as opposed to the more fragmented approaches taken in other cases, and that the Commission should focus on problems of substance rather than on procedural problems, which had often been the subject-matter of its work on other topics. As to working methods, the Planning Group had dealt mainly with the question of commentaries on the basis of article 20 of the Commission's statute.

10. Mr. JACOVIDES said he regretted that the Planning Group had not chosen the topic of *jus cogens*. At some point—and the sooner the better—that concept should be discussed by the Commission, an ad hoc committee of the General Assembly or any other body because the situation in that regard could not be considered satisfactory, as explained in detail in the Outlines prepared by members of the Commission on selected topics of international law.<sup>7</sup> International tribunals and ICJ, in particular, could help to define and delimit the concept

\* Resumed from the 2412th meeting.

<sup>6</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>7</sup> *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/454.



of *jus cogens*. There was no lack of situations in the world that would, if they were submitted to the Court, enable it to spell out some of the more obvious rules in that area, especially the role prohibiting the use of force.

11. Mr. PELLET proposed that, in view of the decision taken on the topic of the law and practice relating to reservations to treaties, the penultimate sentence of paragraph 7 of the report should end after the words "model clauses". In paragraph 14 of the report, there seemed to be a contradiction between wanting to undertake a feasibility study on the topic of environmental law and saying at the same time that the Commission considered it appropriate to take up that topic, the point of the feasibility study being, precisely, to show whether taking up the topic was appropriate. It would therefore be better to state in the third sentence of the first paragraph of the text (A/CN.4/L.515, para. 14) that the Planning Group recommended inserting in the report of the Commission to the General Assembly that the Commission was considering the possibility of taking up the topic. Lastly, he strongly supported Mr. Jacovides' idea that the Commission should deal with *jus cogens*, on the understanding that it would be codifying not the contents of the concept, but its legal status and its effects in areas other than that of the law of treaties.

12. Mr. YANKOV (Chairman of the Drafting Committee) said that, at the current session, the Drafting Committee had held a total of 35 meetings, 17 of which had been devoted to the draft Code of Crimes against the Peace and Security of Mankind, 13 to State responsibility and 5 to international liability for injurious consequences arising out of acts not prohibited by international law. As far as the next session was concerned, he thought it was optimistic to say that the second reading of the draft Code was already at quite an advanced stage, whereas, in fact, it was entering the difficult phase of defining and listing crimes. The topic of State responsibility would also require many meetings if agreement was to be reached on solutions to the difficult problems raised by the concept of State crimes. In the case of international liability for injurious consequences arising out of acts not prohibited by international law, the Drafting Committee would also have to hold more meetings to complete the first reading of the draft articles. It therefore seemed to him that, at the next session, the Drafting Committee should be allowed at least 40 to 45 meetings, about 15 of them for the draft Code, preferably in the first three weeks of the session, and 20 to 25 for State responsibility. The first three weeks of the session would be spent mainly, if not exclusively, on work in the Drafting Committee, which should continue to have priority during the following seven weeks, before the last two weeks of the session devoted to the adoption of reports. The Commission's past practice had shown that the most productive sessions had been those when it spent the first three weeks on intensive work in the Drafting Committee.

13. The topic of environmental law was certainly a good choice, but the wording of the title should be reviewed since the combination of the adjectives "international" and "global" was a bit strange. Special Rapporteurs should be requested to submit commentaries to draft articles before those articles were considered in

plenary so that the other members of the Commission could make their first reactions known. Lastly, considering that the next session would be the last of the current quinquennium, the members of the Commission must all make an effort to reduce absenteeism, as the Commission should take priority over other commitments.

14. Mr. THIAM said that, since the Drafting Committee's work on the draft Code was far from complete, he had been surprised to read in the report that a maximum of time should be allocated to the Drafting Committee to considering the draft articles on State responsibility. He would like that sentence to be amended so that a maximum amount of time would also be devoted to the draft Code, which might even take priority, since it might be completed at the next session.

15. Mr. VILLAGRÁN KRAMER said that the Drafting Committee had what appeared to be quite a heavy programme of work for the next session. Since the experience of the Drafting Committee working at the same time as working groups had been very positive, the Bureau might consider the possibility of dividing the Drafting Committee into two so that it could consider topics not consecutively, but concurrently. As to the long-term programme of work, the study of any environmental issues was interesting, on the understanding that the Commission would not yet be carrying out a direct study of that topic. However, diplomatic protection had already been studied in depth and had been the subject of many handbooks. Moreover, in Europe and Latin America at least, private individuals could now bring cases directly before human rights courts. That topic therefore seemed less vital than that of environmental law.

16. Mr. VARGAS CARREÑO said that he would appreciate it if information could be provided informally on the topics which would be dealt with during the three weeks of intensive work scheduled for the Drafting Committee at the beginning of the forty-eighth session and on the composition of the Drafting Committee for each different topic so that members could prepare for that intensive work. With regard to the long-term programme, the feasibility study on environmental law was a good idea and diplomatic protection was an important subject, but it must not be forgotten that it was the Commission as it would be composed for the following quinquennium that would be making the final decisions and which might be interested, simply in terms of feasibility, in other topics, such as *jus cogens* or self-determination.

17. The CHAIRMAN, summing up the debate, said that the report of the Planning Group should indicate clearly that the Drafting Committee would give priority both to the topic of State responsibility and to that of the draft Code of Crimes; the first three weeks of the session would be used for intensive work by the Drafting Committee; and the topic of diplomatic protection, on which there had been a consensus in the Commission, should be recommended to the General Assembly so that the Commission could begin considering it as soon as possible. A feasibility study, on which the General Assembly would decide at a later stage, would be conducted on the topic of environmental law. The report of the Planning Group, redrafted and amended as necessary in the light of the drafting conclusions and comments made

during the debate, would be included in the Commission's report for consideration when the report was adopted. The composition of the Drafting Committee for each topic would be decided, as was the practice, at the beginning of the session.

*It was so decided.*

*The meeting rose at 1.10 p.m.*

## 2417th MEETING

*Friday, 14 July 1995, at 10.15 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Arangio-Ruiz, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*)\* (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce part three of the draft articles on State responsibility proposed by the Drafting Committee (A/CN.4/L.513), the titles and text of which read:

Part three

### SETTLEMENT OF DISPUTES

#### Article 1. Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

\* Resumed from the 2406th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

#### Article 2. Good offices and mediation

Any other State Party to the present articles, not being a party to the dispute, may, upon its own initiative or at the request of any party to the dispute, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

#### Article 3. Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in the Annex to the present articles.

#### Article 4. Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

#### Article 5. Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 3 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken counter-measures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

#### Article 6. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the Annex to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

*Article 7. Judicial settlement*

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the award the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. The issues in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration in conformity with article 6.

## ANNEX

*Article 1. The Conciliation Commission*

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 3 of part three by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

- (i) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (ii) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The 4 conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The 4 conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

*Article 2. The Arbitral Tribunal*

1. The Arbitral Tribunal referred to in article 5 of part three shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of, a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

2. Mr. YANKOV (Chairman of the Drafting Committee) said that, of the 35 meetings held by the Drafting Committee between 29 May and 10 July 1995, 13 had been devoted to the topic of State responsibility. He wished to express his appreciation to all the members of the Committee for their diligence and to the Special Rapporteur, Mr. Arangio-Ruiz, who had provided the Drafting Committee with valuable guidance. The assistance of the secretariat had also been highly valued.

3. The Drafting Committee had had before it articles 1 to 6 of part three (Settlement of Disputes) and the annex thereto proposed by the Special Rapporteur in his fifth report<sup>2</sup> and referred to the Drafting Committee by the Commission at its forty-fifth session, in 1993.<sup>3</sup> The Drafting Committee had also considered article 7 proposed by the Special Rapporteur in his seventh report (A/CN.4/469 and Add.1 and 2), which was included in document A/CN.4/L.513.

4. The dispute settlement system proposed by the Special Rapporteur in his fifth report had been very rigorous but of limited scope because it was concerned exclusively with disputes arising subsequent to the taking of countermeasures and did not deal with the settlement of disputes arising out of the interpretation and application of the future convention in general. The Special Rapporteur's system essentially aimed at correcting the negative

<sup>2</sup> See 2391st meeting, footnote 13.

<sup>3</sup> See *Yearbook... 1993*, vol. II (Part Two), p. 35, document A/48/10, para. 205.

aspects of the presently unilateral reaction system. The Special Rapporteur's proposed system, while limited in scope, was also somewhat rigid in that it led, through successive compulsory stages, to the unilateral submission to ICJ of the specific category of disputes concerned.

5. The Drafting Committee, having due regard to the views expressed in plenary, had broadened the scope of part three to cover any dispute arising out of the interpretation and application of the future convention. It had also proposed two different dispute settlement systems, a more demanding one for disputes arising subsequent to the taking of countermeasures, and a less rigorous one for disputes arising out of the interpretation or application of the future convention.

6. The Drafting Committee was aware that its proposed approach was innovative and might be considered as overambitious given the present general attitude of States towards dispute settlement and bearing in mind that State responsibility covered the entire spectrum of international law. The Committee had, none the less, felt that the Commission must not overlook its responsibilities in the progressive development of international law under Article 13 of the Charter of the United Nations and article 1 of its statute. A relatively bold approach was in order, since nothing prevented the Commission from taking, on second reading, a more modest line if the reaction of States so demanded. In all fairness to the Drafting Committee, it should be made clear that some members had expressed scepticism about the viability and general acceptability of the articles currently before the Commission and one member had suggested that the Drafting Committee should elaborate alternative formulas to be submitted to the General Assembly for its consideration. Despite those differences, all the members had faithfully collaborated in the effort to elaborate a balanced and technically sound dispute settlement system.

7. As a general rule, the system proposed by the Drafting Committee provided for compulsory conciliation, that is to say conciliation by unilateral request, followed by arbitration by agreement. However, in relation to disputes following the adoption of countermeasures, a different regime was proposed in favour of the State against which countermeasures had been taken: that State could, at any time, initiate arbitration by unilateral request.

8. The proposed rules were residual in the sense that States parties to any dispute arising out of the interpretation or application of the future convention, including disputes arising subsequent to the adoption of countermeasures, could at any time, by agreement, resort to any dispute settlement procedure and any dispute settlement mechanism of their choice.

9. Article 1 dealt with negotiation, the first choice and the most commonly used method in settling disputes. Under article 1, if a dispute regarding the interpretation or application of the future convention arose between two or more States parties to the convention, they should, upon request by any one of them, seek to resolve it amicably by negotiation. It should be stressed that each party could unilaterally initiate the negotiation process. Since no third party was involved, it was for the

parties to conduct the process in the way they considered most appropriate from the initial to the concluding stages and article 1 left their freedom of action unimpaired.

10. The phrase "dispute regarding the interpretation or application of the present articles" was all-embracing and encompassed disputes which had arisen following the adoption of countermeasures. The word "amicably" highlighted the desirability of scaling down hostilities and tensions and reaching a solution in a spirit of understanding and goodwill.

11. Article 2 dealt with good offices and mediation which were the mildest form of third party involvement. Any State party to the convention, not being party to the dispute, could tender its good offices or offer to mediate with a view to facilitating an amicable resolution of the dispute.

12. Resort to good offices and mediation was, of course, conditional upon acceptance by the parties to the dispute. While the State acting as the third party could not impose its will on the parties, it could foster a peaceful approach to the dispute by providing a channel of communication, facilitating dialogue and making proposals for an amicable solution of the dispute. The use of the word "amicable" in article 2 was intended to characterize the spirit that should govern the good offices or mediation effort.

13. Article 3 concerned conciliation. Unlike the corresponding article proposed by the Special Rapporteur in his fifth report, which concerned exclusively disputes that arose following the adoption of countermeasures, the present article also covered disputes arising from the interpretation or application of the convention.

14. The Drafting Committee, drawing on a number of recent conventions, had provided for resort to conciliation as a useful intermediate stage between negotiation (with or without the help of a third party) and arbitration.

15. As a procedure leading to a non-binding outcome, conciliation enabled each party to arrive at a better understanding of the other's point of view and to obtain an objective evaluation of the case without committing itself to particular terms of settlement. Indeed, in accordance with the traditional notion of conciliation, the outcome of the procedure under article 3 would take the form of recommendations. The process was none the less compulsory in the sense that, subject to the conditions enunciated in the first part of the article, each party could initiate it by unilateral request.

16. Two conditions had to be met to initiate the procedure by unilateral request. The first condition, namely the requirement that three months should have elapsed from the date of the first request for negotiations, performed a dual function: first, it provided a check against refusal to negotiate and dilatory practices at the negotiation stage; secondly, it gave negotiations a reasonable chance of achieving their purpose and prevented the premature involvement of a third party against the will of one of the parties. In that connection, he wished to stress that it was important, and in the interest of reaching an amicable settlement, not to put undue pressure on the parties. The parties could of course, by agreement, resort

to conciliation at any time and without having to comply with the three-month requirement. The second condition was that no mode of binding third-party settlement should have been instituted. That clause took care of cases in which the parties might be under an obligation, by virtue of another instrument, for instance a declaration of acceptance of the jurisdiction of ICJ, to resort to a binding third-party settlement. In such a case, the less rigorous procedure envisaged in article 3 would not apply.

17. The text of article 4, on the task of the Conciliation Commission, was based on the proposal made in his fifth report by the Special Rapporteur for article 2 of part three. In drafting article 4, the Drafting Committee had been guided by three considerations. First, the Conciliation Commission should be given access to all the information it might need to formulate its recommendations. Secondly, the work of the Conciliation Commission should be completed within a reasonable period of time, so that if the conciliation effort failed, resort could be had to other procedures without the overall dispute settlement process being unduly protracted. Thirdly, since the goal of conciliation was to find a solution acceptable to the parties, the Conciliation Commission should be given an opportunity to make preliminary proposals, to test the degree of acceptability of its recommendations.

18. Paragraph 1 of the article, which drew on paragraph 1 of article 15 of the Revised General Act for the Pacific Settlement of International Disputes, set out the framework within which the Conciliation Commission was expected to work. Under paragraph 1, the task of the Conciliation Commission was to elucidate the questions in dispute, to collect, with that object in mind, all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to settlement. As it was to gather information by "inquiry or otherwise", the Conciliation Commission had considerable freedom in selecting the method it considered most appropriate to that task. The wording "to endeavour to bring the parties to the dispute to settlement" also gave the Conciliation Commission a wide measure of discretion in the fulfilment of its task.

19. Paragraph 2 addressed three issues. First, it required the parties to provide the Conciliation Commission with a statement of their position regarding the dispute and the facts upon which that position was based. Secondly, it required them to provide the Conciliation Commission with any additional information or evidence as it requested. Thirdly, it required the parties to assist the Conciliation Commission in any fact-finding it might wish to undertake. The nature of fact-finding could vary, depending upon the nature of the dispute, and might involve the examination of witnesses, site visits, or assessment of the extent of injury. Fact-finding could take place in the territory of any of the parties, unless exceptional reasons made that impractical. In such a case, an explanation of those exceptional reasons had to be provided to the Conciliation Commission.

20. The underlying concern of paragraph 3 was to enable the Conciliation Commission to proceed step by step towards the formulation of final recommendations

in order to enhance the chances of those recommendations being acceptable to both parties. The preliminary proposals, which could be addressed to any or all of the parties, were without prejudice to the final recommendations. As indicated by the words "at its discretion", it was entirely up to the Conciliation Commission to determine whether the presentation of preliminary proposals served a useful purpose.

21. Paragraphs 4 and 5 dealt with the final stages of the conciliation procedure. Under paragraph 4, the Conciliation Commission had to submit the report containing its recommendations to the parties not later than three months from the formal constitution of the Conciliation Commission and it could specify the period within which the parties were to respond to those recommendations. The word "recommendations" highlighted the non-binding character of the conclusions of the conciliation procedure. The rest of the paragraph was intended to provide a reasonable time-frame for the conclusion of the procedure. The Drafting Committee had felt that a period of three months was sufficient for the completion of the report, and that the parties should be encouraged to react in a timely fashion to the recommendations. The latter part of the paragraph therefore specified that the Conciliation Commission could stipulate a time within which the parties to the dispute were to respond to its recommendations. There too, the Conciliation Commission enjoyed full discretion.

22. Paragraph 5 dealt with the last stage in the conciliation process. If the response to the Conciliation Commission's recommendations did not lead to settlement of the dispute, the Commission might submit to the parties a final report containing its own evaluation of the dispute and its recommendations for settlement. Such an action was entirely up to the discretion of the Conciliation Commission. Paragraph 5 included cases where the Conciliation Commission might be convinced that its recommendations, with some further adjustments, could provide the basis for an agreed settlement. The intention was to facilitate settlement of the dispute rather than to invite the Conciliation Commission to pass judgement on the reaction of the parties.

23. Article 5, on arbitration, reflected the basic distinction between disputes which had arisen following the taking of countermeasures and disputes arising out of the application and interpretation of the future convention. Paragraph 1 laid down the general rule and paragraph 2 set out the exceptional regime to which a State against which countermeasures had been taken might resort. Under paragraph 1, resort to arbitration was conditional upon the agreement of the parties. The parties could submit their dispute to an arbitration tribunal constituted in accordance with the procedure established in the annex to part three. Parties could also agree to establish any other type of arbitration tribunal they deemed appropriate. Since resort to arbitration was conditional upon the agreement of all parties, they could initiate the procedure at any time.

24. Under paragraph 2, the State against which countermeasures had been taken was entitled, unilaterally, to submit the dispute to arbitration. Arbitration under paragraph 2 was thus compulsory for the State

alleged to have taken countermeasures and the arbitration tribunal would be established on a mandatory basis, in accordance with the procedure set out in article 2 of the annex to part three.

25. The exact context of the term "dispute" in the first line of paragraph 2 had given rise to a divergence of opinion in the Drafting Committee. Some members maintained that the competence of the arbitral tribunal should be limited to the issue of countermeasures. Others contended that the competence of the tribunal would necessarily extend to the underlying dispute. According to the latter view, it would be impossible for the arbitral tribunal to determine the legality of a countermeasure without determining whether there had been a wrongful act. Furthermore, limiting the competence of the arbitral tribunal to a determination of the lawfulness of the countermeasures would not provide an effective means for settling the dispute between the parties as a result of the remaining unresolved issue. The latter view had prevailed in the Drafting Committee.

26. Article 6 laid down the general terms of reference for an arbitral tribunal referred to in article 5 in two situations, namely, (a) where the parties had voluntarily agreed to submit their dispute to arbitration under paragraph 1 of article 5 and had not agreed to terms of reference other than those provided for in article 6; or (b) where the allegedly wrongdoing State which was the object of countermeasures had unilaterally initiated the compulsory arbitration provided for in paragraph 2 of article 5.

27. Paragraph 1 of article 6 provided that the arbitral tribunal should decide "any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles". The first of those two criteria recognized that the dispute referred to the arbitral tribunal was determined by the issues of fact or law that were identified by the parties to the dispute as the subject of their disagreement; the second criterion was standard language used in the dispute settlement provisions of most international agreements. The Drafting Committee had recognized that, in the context of the draft articles on State responsibility, that criterion required a substantial degree of flexibility. An arbitral tribunal entrusted with the resolution of a dispute relating to the interpretation or, more especially, the application of the articles would necessarily need to determine factual and legal issues relating to the violation of international law allegedly committed by the wrongdoing State to the detriment of the injured State. The legitimacy of countermeasures taken by an injured State, for example, depended, *inter alia*, on the wrongfulness of the conduct of the State against which the countermeasures were directed. The word "any" was intended to cover all issues of fact or law that had to be decided by the arbitral tribunal in relation to the particular dispute between the parties.

28. Paragraph 1 indicated that the arbitral tribunal was to decide any such issues "with binding effect". It followed that an arbitral tribunal also had the inherent power to issue such binding interim or protective measures as might be necessary to ensure the effective performance of the task with which it had been entrusted,

namely, the resolution of the dispute between the parties. That would include the capacity to issue binding orders requiring the cessation of the wrongful act and the suspension of countermeasures pending the final decision of the arbitral tribunal and the resolution of the dispute. Given the general understanding on the subject of arbitral procedure, the Drafting Committee had not considered it necessary or appropriate to include detailed provisions in the draft articles on State responsibility with respect to the powers or the procedures of an arbitral tribunal. That point would be duly noted in the commentary.

29. As further indicated in paragraph 1, the procedures to be followed by the arbitral tribunal were addressed in the annex. Article 6 merely provided that the arbitral tribunal had to submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions. The Drafting Committee had considered that it was useful to provide a time-limit for the completion of the arbitral tribunal's work and that six months from the date of the final submissions of the parties was a reasonable period for doing so.

30. Paragraph 2 recognized the importance of an arbitral tribunal being able, when necessary, to resort to fact-finding for a proper determination of the facts at issue between the parties. In some cases, the arbitral tribunal might wish to undertake fact-finding in the territory of one or more of the parties to the dispute. Under paragraph 2 of the article it was entitled to do so. Although the parties were not, by virtue of the paragraph, placed under an obligation to permit such fact-finding, the Drafting Committee had felt that they should do so in order to facilitate the work of the arbitral tribunal and the resolution of the dispute. Furthermore, the arbitral tribunal should be permitted to draw appropriate inferences from a party's refusal to permit such fact-finding. That was consistent with the relevant jurisprudence, including the decision of ICJ in the *Corfu Channel* case.<sup>4</sup> The issue would be discussed in the commentary to article 6.

31. In article 7, the words "in conformity with article 6", at the end of paragraph 2, should be replaced by "in conformity with the Annex to the present articles". Consequent on that correction, a reference to article 7, paragraph 2, should be added to the reference to article 5 appearing in article 2, paragraph 1, of the annex. Article 7 was intended to deal with the problem that might arise following an arbitral proceeding when one of the parties to the dispute challenged the validity of the resulting arbitral award. Different views had been expressed as to whether the problem should be addressed in part three. While some members of the Drafting Committee had stressed the importance of addressing a situation in which a party asserted spurious claims of invalidity to avoid compliance with an unfavourable arbitral award, other members had expressed concern about adding an additional layer to the dispute settlement process by introducing a role for ICJ in relation to arbitral proceedings. The former view had prevailed in the Drafting Committee. The present wording was similar to that of

<sup>4</sup> See 2381st meeting, footnote 8.

articles 36 and 37 of the Model Rules on Arbitral Procedure.<sup>5</sup>

32. Paragraph 1 was intended to ensure the availability of an effective mechanism for resolving questions relating to the validity of an arbitral award. It provided that any party to the dispute might, by making a timely request, unilaterally refer the question of the validity of an arbitral award that had been challenged to ICJ if the parties had not agreed to refer the question to another tribunal within three months of the date of the award. The Drafting Committee had noted that the timely nature of a request for the determination of the validity of an award might depend upon the grounds on which the award was challenged, as was recognized in the Model Rules on Arbitration. That would be indicated in the commentary to article 7.

33. The competence of ICJ in the judicial proceedings envisaged in paragraph 1 would be limited—and he wished to emphasize that point—to either confirming the validity of the arbitral award or declaring its total or partial nullity if there were grounds for doing so. The Court would not be competent to review the award or to rule on its merits. In the absence of a declaration of nullity, the arbitral award would remain final and binding on the parties to the dispute. The Drafting Committee had felt that it was not necessary to elaborate the possible grounds for the invalidity of an arbitral award in paragraph 1 of article 7, as the Commission had already dealt with that question in the Model Rules on Arbitration. That would be duly noted in the commentary.

34. Paragraph 2 addressed a situation in which the arbitral proceeding had failed to resolve the dispute between the parties as a consequence of the invalidity of all or part of the arbitral award. It provided that any party could unilaterally submit the unresolved issues to a new arbitration in conformity with the annex to the present articles. The Drafting Committee had thought such a provision necessary to ensure the availability of an effective procedure for resolving the continuing dispute between the parties.

35. With reference to the annex to part three of the draft articles, he said that, since the substantive articles of part three envisaged conciliation and arbitration for the settlement of disputes arising out of the interpretation and application of the future convention, the annex dealt in two separate articles with, respectively, the conciliation mechanism and the arbitration mechanism.

36. Like the rest of part three, the annex laid down residual rules in the sense that the parties were free to agree on modes of settlement other than conciliation or arbitration or on mechanisms different from those envisaged in the annex. However, in the absence of agreement, in other words, if the third-party dispute settlement proceedings were initiated by a unilateral request, the machinery provided for in the annex was binding on both parties. So far as the annex was concerned, and in the context of compulsory proceedings, that meant three things. First, in the case of compulsory conciliation, the Conciliation Commission would mandatorily be consti-

tuted in accordance with the provisions of article 1 of the annex. Secondly, the arbitration procedure which might be initiated by a unilateral request under article 5, paragraph 2, of part three would mandatorily be conducted by an arbitral tribunal constituted in accordance with article 2 of the annex. Thirdly, once compulsory proceedings were instituted in accordance with article 1 or article 2 of the annex, they could be interrupted only with the agreement of both parties.

37. Again in drafting the annex, the Drafting Committee had been specially attentive to ensuring that it was fully consistent with the general approach reflected in part three, which, as he had indicated, distinguished between, on the one hand, disputes arising after one of the parties had taken countermeasures and, on the other hand, all other disputes arising from the interpretation or application of the convention, and which provided, in the case of the first category of disputes, for compulsory conciliation and/or arbitration, and, in the case of the second category of disputes, for compulsory conciliation and arbitration by agreement.

38. Article 1 of the annex, which concerned the Conciliation Commission, was based on the annex to the Vienna Convention on the Law of Treaties and on annex V to the United Nations Convention on the Law of the Sea. The text of paragraph 1 was identical with that of paragraph 1 of the annex to the Vienna Convention on the Law of Treaties.

39. In paragraph 2, the opening words of the *chapeau* paragraph gave expression to the concept of compulsory conciliation as embodied in article 3 of part three inasmuch as they enabled each party to initiate the conciliation proceedings unilaterally by a request to the Secretary-General. Subparagraphs (a) to (d), which contained standard arrangements and were self-explanatory, were modelled almost word for word on the annex to the Vienna Convention on the Law of Treaties. Subparagraph (e) was also closely modelled on the corresponding provision of the annex to the Convention, subject, however, to the elimination of the reference to the members of the Commission, which the Drafting Committee had found unnecessary. Accordingly, the text before the Commission only provided for the selection of conciliators from the list to be established under paragraph 1 of the article.

40. Paragraph 3 reflected the concept of compulsory conciliation and reproduced the terms of article 12 of annex V to the United Nations Convention on the Law of the Sea.

41. Paragraph 4, which laid down a standard rule governing most third-party dispute settlement organs, was modelled on article 13 of the same annex of the United Nations Convention on the Law of the Sea.

42. Paragraph 5 was a simplified version of paragraph 3 of the annex to the Vienna Convention on the Law of Treaties. Since the first sentence gave the Conciliation Commission almost complete discretion in determining its procedure, the Drafting Committee had not deemed it necessary expressly to provide for the various steps which the Conciliation Commission might take in discharging its functions, such as inviting the parties or

<sup>5</sup> See 2412th meeting, footnote 6.



international organizations with expertise in the area concerned to submit their views or drawing their attention to measures which might facilitate the settlement of the dispute. Nor did paragraph 5 deal with details relating to the Conciliation Commission's report. It did, however, specify the conditions under which the Conciliation Commission adopted its decisions. In view of the non-binding nature of the outcome of conciliation, the word "decisions" should be interpreted as referring to the Conciliation Commission's decision-making process, which, of course, extended to the formulation of recommendations. The relevant sentence reflected current practice and was closely modelled on existing precedents. Lastly, paragraph 6 was borrowed from article 3 (*h*) of annex V to the United Nations Convention on the Law of the Sea.

43. As to article 2 of the annex, dealing with the Arbitral Tribunal, he recalled that annex VII to the United Nations Convention on the Law of the Sea provided for a list of arbitrators, to be drawn up by the Secretary-General of the United Nations, from which members of the Arbitral Tribunal should preferably be chosen. The Drafting Committee had felt that as much leeway as was compatible with the requirements of impartiality should be left to all concerned in selecting the members of the Arbitral Tribunal, and had therefore omitted the requirement for a list of arbitrators.

44. In formulating article 2 of the annex, the Drafting Committee had drawn on article 3 of annex VII to the United Nations Convention on the Law of the Sea. It had, however, tried to simplify the extremely detailed provisions of that article. The reference in the first sentence of paragraph 1 to article 5 and article 7, paragraph 2, of part three covered, of course, the two hypotheses envisaged in article 5, namely, arbitration following a unilateral request as envisaged in paragraph 2 of article 5 and arbitration by agreement as provided in paragraph 1 of the same article. If the parties agreed to resort to a different type of arbitral tribunal, they remained entirely free to do so. If, however, arbitration was initiated by a unilateral request as provided in paragraph 2 of article 5, the Arbitral Tribunal would mandatorily be constituted in accordance with the provisions of article 2 of the annex.

45. Paragraph 2 of article 2 of the annex was based on subparagraphs (*d*) and (*e*) of article 3 of annex VII to the United Nations Convention on the Law of the Sea. The authority that would take the place of the parties in the event of difficulties in completing the composition of the Arbitral Tribunal was the President of ICJ, or its Vice-President, or the most senior member of the Court who was not a national of either party. The rationale behind those alternatives was to exclude the possibility of appointments being made by a national of one of the parties, with the attendant risk of casting doubt on the objectivity and impartiality of the Arbitral Tribunal. The same concern underlay the requirement in the last sentence of paragraph 2 that the members appointed by a third party should be of different nationalities. The corresponding provision of annex VII to the United Nations Convention on the Law of the Sea further prohibited the appointment of individuals who were in the service of, ordinarily resident in the territory of, or nationals of any

of the parties to the dispute. The Drafting Committee had considered that the prohibition should not extend to the case of appointments made as a result of the failure of one party to appoint its members. Since, under paragraph 1, that party had the possibility of appointing one of its nationals as a member of the Arbitral Tribunal, there was no reason to rule out that possibility when the appointment was made by a third party. Paragraph 3 of article 2 was taken from article 3 (*f*) of annex VII to the United Nations Convention on the Law of the Sea and differed from the corresponding provision of article 1 of the annex in only one respect, namely, the inclusion of the words "within the shortest possible time", which were intended to avoid unnecessary delays.

46. Paragraphs 4 and 5 had no equivalent in article 1 of the annex. The Drafting Committee had felt that, in view of the binding nature of the outcome of arbitration proceedings, it was essential that the subject-matter of the dispute, and therefore the terms of reference of the Arbitral Tribunal, should be clearly defined (either jointly by the parties or, failing agreement, by the Tribunal itself) at that start of the proceedings at the latest. Paragraphs 4 and 5 were equally applicable to arbitration proceedings instituted by unilateral requests under article 5, paragraph 2, of part three and to those instituted by agreement under article 5, paragraph 1. They were based on article 8 of the Model Rules on Arbitral Procedure.

47. Paragraph 6 paralleled paragraph 3 of article 1 of the annex. The Drafting Committee had borne in mind the difference between conciliation proceedings under article 3 of part three, which were always compulsory, and arbitration proceedings under article 5, paragraph 2, of part three, which were compulsory only if counter-measures had been taken. It had not, however, found it necessary to alter the language of paragraph 3 of article 1 of the annex to take account of that difference. In the case of arbitration under paragraph 1 of article 5, paragraph 6 postulated that the parties had previously agreed to resort to the Arbitral Tribunal provided for in article 2 of the annex, in which case they could not stop the process by failing to participate in the proceedings.

48. The Drafting Committee had not found it necessary to include in article 2 provisions along the lines of paragraphs 4 and 6 of article 1 of the annex, bearing in mind that the rules on arbitral procedure were well-established and did not need to be reiterated in the present context. One member of the Drafting Committee had thought, however, that there should be greater symmetry between articles 1 and 2 and had objected, in particular, to the non-inclusion of a paragraph providing that the Arbitral Tribunal was the judge of its own competence. That point would be elaborated in the commentary.

49. Paragraph 7 paralleled paragraph 5 of article 1 of the annex. Because of the binding nature of the outcome of the proceedings, the Drafting Committee had felt it appropriate expressly to reserve the possibility for the parties themselves to determine by agreement the procedure to be followed by the Arbitral Tribunal. As he had already indicated in introducing article 6, it was implicit in the nature of arbitration proceedings that the Arbitral Tribunal had the inherent power to issue such binding interim or protective measures as might be nec-

essary to ensure the effective performance of the task with which it had been entrusted.

50. Expressing the hope that the Commission would find it possible to adopt the recommended articles by consensus, he said that, since the report he had just introduced was the final report of the Drafting Committee at the present session, he wished to add a few remarks by way of general summing-up. The Drafting Committee had held a total of 35 meetings, of which 17 had been devoted to the Draft Code of Crimes against the Peace and Security of Mankind, 13 to State responsibility and 5 to international liability arising out of acts not prohibited by international law. It had adopted a total of 26 articles and an annex containing 2 further articles. It was, of course, for the Commission to assess the productivity of the Drafting Committee's work, but he wished to take the opportunity to express to all members of the Drafting Committee and to the three Special Rapporteurs his appreciation of their commendable efforts to arrive, as far as possible, at general agreement while respecting the views of all members. The Drafting Committee had made every effort to work as a team in an atmosphere of mutual respect and friendly cooperation, and that, he thought, had been its greatest asset.

51. Mr. ARANGIO-RUIZ (Special Rapporteur) said that part three of the draft would have to be completed when something was done about crimes at the next session. He had proposed an article on dispute settlement in the case of international crimes to become article 7 of part three of the draft. He referred the members of the Commission to the text of that draft article as proposed in his seventh report.

52. Contrary to the impression that the Chairman of the Drafting Committee might have given in his introduction, the articles adopted by the Drafting Committee for part three did not go beyond his proposals, in terms of innovation. What he had proposed for part three was a very tight set of procedures, regarded by some members as even revolutionary, which could be set in motion unilaterally and would lead to a settlement of any dispute following any countermeasure. To his mind, part three was preceded by article 12 of part two as he proposed in his sixth report, and specifically paragraph 1 (a), which provided a barrier against abuse of countermeasures.<sup>6</sup> That article had also been considered revolutionary and specified that an injured State could not take countermeasures unless it had exhausted the means of settlement available to it under international law.

53. There was nothing to that effect in the present part three as proposed by the Drafting Committee and the conciliation envisaged in that part did not, therefore, prevent the taking of countermeasures prior to bona fide attempts at an amicable settlement. Obviously, the Drafting Committee had been influenced by a minority of members who had challenged his proposals by stating that they were revolutionary, and one member had even affirmed that the provisions on dispute settlement were unnecessary in a convention on State responsibility, which was supposed to codify and progressively develop the substantive, but not the procedural, law in that area.

It should not, in his view, be suggested too strongly to States that major innovations were being proposed in the area either of settlement of disputes or of State responsibility. On the contrary, it seemed to him that States were being provided by the Commission with much less valuable advice than was needed if progressive development of the law in those areas was to be achieved.

54. Mr. PELLET said that, despite the hope voiced by the Chairman of the Drafting Committee, there could be no consensus since, for that to be achieved, everyone had to join in. He for one was not ready, no matter what happened, to join in a consensus on a very important draft, a draft that was totally unacceptable to him. The mechanism devised by the Drafting Committee further to the Special Rapporteur's proposals could be described as an absolutely remarkable system which constituted an unheard of advance in international law, a break with current methods that no member of the Commission could object to in the abstract. The draft called into question what were the most firmly established principles of positive international law, in particular the free choice of means for the settlement of disputes, the principle that there was no obligation on States to submit disputes to arbitration and, a fortiori, to judicial procedures. Article 3, for instance, introduced a mechanism of compulsory conciliation, which was contrary to the principle of free choice of means for the settlement of disputes. But the Drafting Committee had not stopped there: in article 5 it had also introduced compulsory arbitration. He appreciated that paragraph 2 of that article applied solely to disputes that arose in connection with countermeasures and that paragraph 1 provided for optional arbitration. That was only the outward appearance, however. In reality, what the Drafting Committee had conceived was a generalized system of compulsory arbitration, since all it would take to impose such arbitration was for one State, which perhaps had never yet thought of doing so, to adopt countermeasures in order to force another State to go to arbitration. To that extent, the proposed system, regardless of any considerations of realism and desirability, was harmful and dangerous. It would encourage recourse to countermeasures, which must be used as little as possible in international relations. Again, by definition, it would be primarily of benefit to powerful States. For example, France or the United States of America could force Chad or Belize to go to arbitration by having recourse to countermeasures: the contrary was not the case. In short, while compulsory arbitration might seem to represent progress, it had the perverse effect of encouraging recourse to the countermeasures that were reserved for the powerful.

55. Moreover, if the proposed system were adopted, it would be tantamount to imposing recognition on States of the competence of ICJ to hear any international dispute since, in the final analysis, any dispute could be reduced to a dispute involving responsibility. Indeed, the Chairman of the Drafting Committee had himself stated that responsibility encompassed the whole of international law. A generalized system of compulsory arbitration would be imposed on States, in any event on weaker States, and the principle of the optional settlement of disputes under international law would be brought to an end. It might be regarded as an advance, but the problem

<sup>6</sup> See 2393rd meeting, footnote 3.

posed by encouraging recourse to countermeasures still remained.

56. The Drafting Committee, in its keenness, had even reintroduced article 7, against which he had earlier voted and which provided for recourse to ICJ if the validity of an arbitral award was challenged. Contrary to all practice, however, that article failed to list the possible grounds for such a challenge. Even the forward-looking Model Rules on Arbitral Procedure contained a list of the grounds on which an application to nullify an arbitral award must be based. Under article 7, therefore, there would be no limitation on the grounds on which a State, dissatisfied with an award, could challenge the validity of that award before the Court. That was tantamount to introducing a procedure for appealing against arbitral awards which, though perhaps desirable in theory, was entirely alien to all the best practices of international law.

57. He was the first to recognize that the draft—apart from article 5, which was totally unacceptable, given the inequality it would create among States—probably pointed in the right direction, but he firmly believed that, on the whole, it was better to leave well enough alone. Much had been said of realism, but it was most unlikely that the draft would be enthusiastically received by States. Also, he was not unsympathetic to the argument that the Commission, as a body of independent experts, could, if it took the view that a particular system was good, propose that system to the General Assembly, at least on first reading. The system in question was, however, good only in part. It was also unrealistic. Above all, in proposing it, the Commission would be exceeding its mandate, which was to codify and progressively develop international law, not turn it upside down. In abandoning the principle of the free choice of means for the settlement of disputes, imposing compulsory arbitration for the settlement of any dispute, and introducing machinery for appeal to ICJ without the necessary safeguards, the Drafting Committee was certainly not codifying international law. Nor was it engaging in “progressive” development, however generous one might be in using the word “progressive”. Further, if the Commission did adopt the proposed articles, it would be revolutionizing the whole of international law, which was not what it was required to do by its statute. Such a course would also pose a great threat to the rest of the draft and in particular the acceptability to States of part one, to which he was still very much attached. The Commission would have threatened, purely for some abstract intellectual pleasure, probably the most important draft ever to have been placed before it.

58. On such an important matter, it seemed to him that a formal vote was essential, either on the text as a whole or on the two provisions that were totally unacceptable: article 5, paragraph 2, and article 7. A consensus would only distort the position of certain members, including his own: that position could be altered only if part three of the draft were declared to be optional, which was not the case.

59. Mr. JACOVIDES said that, over the years, he had consistently favoured the principle of compulsory third-party dispute settlement. Although for the time being

that could be no more than a desirable objective, it should none the less be the ultimate aim. In the particular case of State responsibility, there were even more reasons why such a principle should be applied, although its acceptability to the Commission and indeed to States as a whole was clearly limited. He would therefore go along with the draft proposed by the Drafting Committee, on the understanding that some slightly more elaborate arrangements could be arrived at, possibly at the Commission's next session, after the Sixth Committee had made known its reaction to the articles.

60. Mr. BENNOUNA said that it was difficult to speak calmly after Mr. Pellet had injected such passion into the debate. Naturally, Mr. Pellet's voice was but 1 among 35 and a consensus did not, of course, mean unanimity, particularly in the United Nations; rather, it signified an agreement in which the minority joined. Otherwise, the minority would have a right of veto, as it were. It was also unwise to threaten a vote which was in any event provided for in the rules.

61. What had surprised him most was that Mr. Pellet, in invoking the principle of the free choice of means for the settlement of disputes, had apparently forgotten the basic rules of international law. The Commission was not making a law but drawing up a draft convention to which a State could, or could not, accede, and in acceding to a convention, it expressed its consent to that convention. Mr. Pellet, who had taken part in the preparation of a major multilateral treaty, should know that there were hundreds of agreements which imposed the compulsory settlement of a dispute on the States in question; the draft convention with which the Commission was now concerned was just one more. The arguments Mr. Pellet had adduced, therefore, were quite unacceptable at the level of a body of experts in international law.

62. The other suggestion with which he would take issue was that small countries would be crushed by the major Powers if the parties to a dispute were required to have recourse to arbitration. That was putting a highly complex gloss on the matter, and he did not see it in that way at all. Indeed, such an argument—the small versus the powerful—should not even be raised. The fact was that there was a disparity in the balance of power throughout the world, and the law should seek to correct, not legalize, that disparity. In the specific case of responsibility, the law must take precedence over the use of force, and that was the principle laid down in article 12 of part two, which would have to be adopted sooner or later.

63. It was certainly not a question of a revolution but simply of continuity in the procedures for the settlement of disputes under international law. The only new factor was how to deal with article 12 of part two, and specifically, how to resolve the question whether or not the procedures for the settlement of disputes had to be exhausted before recourse could be had to countermeasures. In that connection he would remind members that his agreement on the articles as a whole was subject to the solution finally adopted for that article. It was interesting to note that, under the Understanding on rules and procedures governing the settlement of

disputes, priority was given to settlement of disputes over countermeasures.<sup>7</sup>

64. Again, the contention that there would be an unlimited right of referral to ICJ did not hold water since it was the validity, not the substance, of the award that would be at issue, as Mr. Pellet, who had pleaded before the Court on a number of occasions, should know. An award could be challenged, for instance, on the ground that its terms had not been respected, that it had not been delivered by the necessary majority, or that there had been a fundamental mistake of law. The case of the *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal) was one such case.<sup>8</sup> It was important, therefore, not to read into a text something that it did not say.

65. The articles before the Commission were well drafted. To make it quite clear that the validity of the award could not be challenged after one year, however, he would propose that, in paragraph 1 of article 7, the words "made within a period of one year from the date of the award" should be added after the words "any party". Subject to that amendment and to a final decision on article 12 of part two, he was in favour of the adoption of the text before the Commission.

66. Mr. BOWETT said that he had been very disturbed to hear Mr. Pellet comment on the draft in such terms. He shared Mr. Pellet's concern about the risk that the system of compulsory arbitration provided for in article 5 of part three might act as an encouragement to States to take countermeasures as a means of forcing arbitration upon the other party. None the less, in the Drafting Committee, Mr. Pellet and he had been in a minority. It seemed only proper, therefore, to allow the view of the majority to prevail on first reading and to await the reaction of States in the General Assembly to the minority view. He saw no reason, however, for allowing that view to deprive the Commission of a consensus.

67. He agreed that the title of article 7 was somewhat misleading and that it did not really convey the function of the reference to ICJ. A better title might perhaps be "Challenges to the validity of an arbitral award", which would more accurately convey what was meant.

68. Mr. Pellet was concerned that article 7 did not list, in the body of the text, the grounds on which a challenge to the validity of an arbitral award might be made. In the Drafting Committee it had been agreed that the commentary to the article would simply refer to and possibly restate the grounds already described in the Model Rules on Arbitral Procedure. There was not much dispute about those grounds and hence there seemed to be no need to clutter up the article simply by listing grounds on which nullity might be alleged.

69. As to the main thrust of the article, which was to allow ICJ to resolve disputes about nullity, Mr. Pellet had suggested that the motivation behind it had been an abstract pleasure for its proponents. That was nonsense. It was a matter of practical necessity, because the real

situation was that if one of the parties was dissatisfied with an arbitral award, it was all too easy for it to dismiss the award. All it needed to say was that the award was not sufficiently reasoned or that the tribunal had made a fundamental procedural error. There were grounds for nullity that could be trumped up and could be argued even when they had very little basis in fact. But as matters stood, once grounds were advanced by a State, the State was, as it were, freed from the obligation to abide by the award. That was an unacceptable situation, and it was therefore a matter of practical necessity, not abstract pleasure, to provide a mechanism to prevent that situation from arising. The solution would simply be to allow a referral to the Court when there was a ground of nullity alleged by one of the parties to the award. It was not a very novel process. As Mr. Bennouna had pointed out, the Court had functioned in exactly that way recently in the case of the *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal). Without the article, the gap was so serious that the whole system became worthless.

70. Mr. ARANGIO-RUIZ (Special Rapporteur) said that everything he had wanted to say had already been said by Mr. Bennouna and Mr. Bowett, except with regard to Mr. Pellet's remark that one of the adopted provisions would encourage resort to countermeasures. In particular, he agreed with the idea of provisional adoption, subject to a final decision on article 12, with which part three was closely linked.

71. With regard to Mr. Pellet's remark that article 5, paragraph 2, would encourage the taking of countermeasures, it was difficult to see how a State would resort to countermeasures merely to bring another party before an arbitral tribunal. Clearly, it all depended on how strong a State felt its case was. Why would a State waste countermeasures, which were costly, simply to bring another State before a tribunal which would obviously also be called upon to pronounce itself on the legality of the countermeasures?

72. He failed to understand the distinction between large and small States drawn by Mr. Pellet, who had argued that it was easier for France or the United States to resort to countermeasures than for Belize or Chad. Obviously, the countermeasures to which a large State resorted would not be on the same scale as those of small States, but even in the case of small States, article 5, paragraph 2, would be applicable. Mr. Pellet's argument just did not hold water. It was another way of misleading small States.

73. Mr. MAHIOU noted that Mr. Pellet had criticized the Drafting Committee for being abstract, but had himself committed the same mistake, notwithstanding the examples he had cited. In any event, if no provision was made for resorting to arbitration, large States were free to resort to countermeasures without any control. If they did not win a dispute with a small State, they would in any case take countermeasures. With the procedure set out in article 5, paragraph 2, the countermeasures would at least be subject to judicial review. The arbitral tribunal would judge the small State that had committed the error, but it would also judge the countermeasure taken by the large State. Therefore, it did not disturb him that, by

<sup>7</sup> GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (Sales No. GATT/1994-4), annex 2, p. 404.

<sup>8</sup> *Judgment, I.C.J. Reports 1991*, p. 53.

resorting to countermeasures, a large State could force a small one to accept arbitration. There were circumstances in which liberty oppressed and the law liberated. In the case at hand, the convention was one that would protect a small State and also compel it to respect the law. He therefore failed to see the difficulties raised by Mr. Pellet in connection with safeguarding the freedom of action of small States.

74. Mr. EIRIKSSON said that he disagreed with Mr. Pellet and endorsed the comments of Mr. Bowett. Mr. Mahiou's remarks on the abstract nature of the point being raised were also well taken. He would ask the Commission to imagine a situation in which article 5, paragraph 2, did not exist and a State was prepared to agree to arbitration and then took countermeasures or otherwise exacerbated the debate in such a fashion that the other State then agreed to go to arbitration. Article 5, paragraph 1, would have the same effect. Therefore, it was not article 5, paragraph 2, that would give rise to that abstract possibility. It would simply be the fact that the debate had been exacerbated to such an extent that a State was prepared to take the matter to arbitration or to defend itself in some way.

75. As to a point made by Mr. Bennouna, it was his recollection that the Drafting Committee had agreed to a new title for article 7 reading: "Validity of an arbitral award which complies with the draft model rules". If the Commission agreed with Mr. Bennouna on the need to be more specific about timing in article 5, paragraph 1, he was prepared to suggest an appropriate wording.

76. On a procedural point, the Commission could perhaps move on to the adoption stage at the present time, because it was necessary to be able to prepare the work of the following week on adoption of the commentary, which would be submitted along with the commentaries to articles 11, 13 and 14 as part of the "package".

77. Mr. LUKASHUK said that, after listening to so much firm support, his own endorsement was almost superfluous. Mr. Jacovides was correct in saying that at the present stage, the debate should not focus on details, which had been very carefully discussed and reflected in a text which, to his mind, represented the best possible formulation. Notwithstanding Mr. Pellet's brilliant, albeit emotional, criticism, no one could deny the high calibre of the draft. The fundamental objections to the draft had been of a purely practical nature. Whether or not States agreed was not the point: the draft should be referred to the General Assembly, and its excellent quality was a credit to the Commission.

78. Mr. IDRIS suggested that the word "other" in article 2 should be deleted, because it was redundant. The words "or otherwise" in article 4, paragraph 1, should be removed, because they were not clear, or else the phrase "all necessary information by means of inquiry or otherwise" should be recast to read "all necessary information". In other words, no restriction would be placed on the latitude of the Commission to resort to inquiry or otherwise. The words "In addition" in article 4, paragraph 2, should be deleted and the sentence rephrased to read "They shall further". Finally, he agreed with Mr. Bowett about the title of article 7, although he preferred the word "objection" to "challenge".

79. Mr. de SARAM said that, although he endorsed the articles, he had a reservation about article 4, paragraph 2, which contained a particular reference to fact-finding within the territory of any party to the dispute. It was unwise to seek to legislate for particular cases in general articles. No such provision was found in article 6. He hoped that his reservation would be recorded in the commentary.

80. As to article 5, paragraph 2, for those who opposed countermeasures, the solution lay in article 30 of part one of the draft. Personally, he failed to see how article 5, paragraph 2, could encourage countermeasures. If a State, in the exercise of a unilateral right, had recourse to a countermeasure, it seemed only fair that the State against which a countermeasure was taken should have the unilateral right to go to binding arbitration. It was not apparent to him what else a State against which a countermeasure had been taken could do.

81. Mr. ROSENSTOCK, referring to article 5, said that implicit in the statement of the Chairman of the Drafting Committee was that the phrase "Failing the establishment of the Conciliation Commission" in no way restricted the freedom of action of States. That should be made perfectly clear in the commentary.

82. He had some sympathy for Mr. Pellet's hesitation to leap into part three and about the extent to which the Commission had gone in establishing binding dispute-settlement mechanisms. As to the effect on countermeasures, he none the less suspected that what the Commission was seeing was an objection to countermeasures and to anything that made countermeasures more rationally conceivable, rather than an actual objection to the mechanism itself. It seemed to him that a mechanism that forced States into a third-party dispute settlement safeguarded the equality of States at all levels of the dispute. That was why many members had stressed that, by promoting arbitration, greater equality of treatment, not inequality, was being fostered.

83. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the general introduction to the commentary to part three contained a basic flaw: the whole description was closely dependent upon article 12. In his view, the Commission should adopt the articles provisionally, subject to finalization and the commentaries, as soon as it had completed its final version of article 12, which had not yet been adopted.

84. Mr. ROSENSTOCK said that the Commission should not be held hostage to a particular view on article 12. The article had been adopted by the Drafting Committee and then sent back to it at the request of the Special Rapporteur. In effect, the Drafting Committee had adopted the article twice. If the Special Rapporteur, the Drafting Committee and the Commission as a whole could not make progress on article 12, an effort could be made to find a compromise solution. But it was unacceptable to say that the Commission could not move forward on part three or on articles 11, 13 and 14 because it had not reached agreement on article 12—an approach that would deny the Commission the benefit of receiving the response of the General Assembly and would make the Commission look very foolish.

85. Mr. ARANGIO-RUIZ (Special Rapporteur) said everyone recognized that the interrelationship between article 12 and part three posed a problem. If some members were anxious to submit some articles with commentaries to the General Assembly, the Commission might send the commentaries to articles 11, 13 and 14. He did not think that it would look foolish. With regard to the previous speaker's remark about being held hostage, the real question was: who was being held hostage by whom?

86. Mr. ROSENSTOCK thanked the Special Rapporteur for his assurances that at least articles 11, 13 and 14 could be referred to the General Assembly, because that would be a step forward and would respond to what the Commission had been asked to do. In his view, it should also be possible to submit part three.

87. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was one thing to send the text of part three to the General Assembly with the small changes that had been suggested in the course of the current meeting, and quite another to send the commentary, which inevitably went beyond the individual articles and concerned the whole system and thus again tied in with article 12. As he saw it, the problem would not be resolved before the end of the current session.

88. Mr. EIRIKSSON said that, as a member of the Drafting Committee, he had never seen any such relationship with article 12. He had worked purely on part three. Much of the commentary to part three was purely functional. If the Special Rapporteur agreed, there could be a whole section of the commentary to article 12, in which he could reproduce his views.

89. Mr. PELLET said he wished it to be placed on record that he contested Mr. Rosenstock's interpretation of the adoption of article 12.

*The meeting rose at 1.10 p.m.*

## 2418th MEETING

*Monday, 17 July 1995, at 10.10 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacobides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

### Draft report of the Commission on the work of its forty-seventh session

1. The CHAIRMAN suggested that the Commission should consider its draft report to the General Assembly paragraph by paragraph, beginning with chapter II. He invited the members of the Commission to inform the secretariat directly of minor changes that were purely of a drafting nature and to bring up in plenary only those changes that involved substantive issues. The objective was that the Commission should submit the best possible report to its parent body.

#### CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.509 and Corr.1)

##### A. Introduction

Paragraphs 1 to 10

*Paragraphs 1 to 10 were adopted.*

*Section A was adopted.*

##### B. Consideration of the topic at the present session

Paragraph 11

*Paragraph 11 was adopted.*

Paragraph 12

2. Mr. IDRIS said that he considered the words "several Governments" at the end of the paragraph to be an exaggeration, especially as, later on, in paragraph 18, the Commission stated that "the reductions ... relied too heavily on the views expressed by a limited number of Governments".

3. Mr. THIAM (Special Rapporteur), supported by Mr. MAHIOU, proposed that the word "several" should be replaced by "certain".

*Paragraph 12, as amended, was adopted.*

Paragraphs 13 and 14

*Paragraphs 13 and 14 were adopted.*

Paragraph 15

5. Mr. RAZAFINDRALAMBO proposed that, in the third sentence, the word "perhaps" should be replaced by the words "at least".

*Paragraph 15, as amended, was adopted.*

Paragraphs 16 to 25

*Paragraphs 16 to 25 were adopted.*

## Paragraph 26

5. Mr. TOMUSCHAT proposed that the second sentence should be deleted because the statute of an international criminal court could define the competence of the jurisdiction concerned, but could not establish substantive rules.

*Paragraph 26, as amended, was adopted.*

## Paragraphs 27 and 28

*Paragraphs 27 and 28 were adopted.*

## Paragraph 29

6. Mr. YANKOV expressed the view that the words "minimalist" and "maximalist" were not precise enough to be used in a report of the Commission. The reference was in fact to those members who advocated a short list of crimes to be included in the Code and those in favour of a longer list.

7. Mr. MAHIOU said the purpose of paragraph 29 was to report on the various points of view expressed during the discussion of the list of crimes. In addition to the lack of precision referred to by Mr. Yankov, the two points of view were not treated equally, since two thirds of the paragraph were devoted to the so-called minimalist approach and only one third to the other. A number of views in favour of something in between the "maximalist" list adopted on first reading and the "minimalist" list in the Special Rapporteur's thirteenth report (A/CN.4/466) had also been expressed during the discussion. The paragraph therefore required more balanced and refined wording.

8. The CHAIRMAN suggested that the secretariat should be asked to redraft paragraph 29 to make it acceptable to everyone and that its consideration should be deferred until a later meeting.

*It was so decided.*

## Paragraph 30

9. Mr. KABATSI said "international State crimes" should not be referred to in the penultimate sentence in order not to give the impression that all "State crimes" were crimes against the peace and security of mankind.

10. Messrs. MAHIOU, TOMUSCHAT and KABATSI said that those words could refer only to article 19 of part one of the draft articles on State responsibility and that, if there was a link between the two topics, that should be clearly stated.

11. The CHAIRMAN suggested that the secretariat should check the meaning of those words and, if necessary, express the idea more clearly.

*Paragraph 30 was adopted.*

## Paragraphs 31 and 32

*Paragraphs 31 and 32 were adopted.*

## Paragraph 33

12. Mr. MAHIOU proposed that, in the first sentence, the words "members favouring the maximalist approach as well as those favouring the minimalist approach" should be replaced by "members favouring one of the two approaches" because, on that point, they had the same view.

13. Mr. IDRIS, referring to the second sentence, said that it would be better to get straight to the point about the exclusion of certain crimes. In order to avoid using the words "minimize" and "undermine", he proposed the following wording:

"There were various suggestions for addressing these concerns, including: indicating that the exclusion of the crimes was without prejudice to the serious nature or the consequences of those crimes or to the existing practice and doctrine with respect to those crimes."

14. Mr. MAHIOU said he was not convinced that the proposed text accurately reflected the idea which was contained in the sentence under consideration and which had been expressed by a number of members of the Commission during the discussion. The fear had been expressed, *inter alia*, that the exclusion of certain crimes from the list might give the impression that those crimes were not serious ones in other contexts or under other instruments. The Commission might be accused of minimizing the serious nature of certain crimes, such as colonialism, by excluding them from the list. It was therefore important to reflect that point of view, as the sentence now did, even if it was not the ideal solution.

15. Mr. THIAM (Special Rapporteur) said that, in fact, certain crimes had been excluded from the list not because of their degree of seriousness, but because of the technical and legal difficulties involved in defining them. Many diverging views had been expressed on the content of the crimes and the way they should be described or defined. That was the case of colonialism, on the definition of which no consensus had ever been reached. Those often insurmountable difficulties, and not the degree of seriousness of the crimes, had led him to shorten the list.

16. The CHAIRMAN suggested that Mr. Mahiou should submit a new wording for that sentence.

17. Mr. MAHIOU said that the sentence could be retained as it stood, since it adequately reflected the different points of view expressed and would enable the Commission to deal with possible criticism.

*Paragraph 33, as amended, was adopted.*

## Paragraph 34

*Paragraph 34 was adopted.*

## Paragraph 35

18. Mr. VARGAS CARREÑO said that the Treaty of Rio (Inter-American Treaty of Reciprocal Assistance), as referred to in the last sentence, had not been adopted by



OAS, but by the member States of that Organization. He therefore requested that the words “adopted by the Organization of American States” should be replaced by the words “adopted by the member States of the Organization of American States”.

*Paragraph 35, as amended, was adopted.*

Paragraphs 36 to 47

*Paragraphs 36 to 47 were adopted.*

Paragraph 48

19. Mr. TOMUSCHAT said he seemed to remember that the Special Rapporteur’s proposal that threat of aggression should be excluded from the list of crimes had been very widely supported by the members of the Commission and it would therefore be better to replace the words “Several members” by the words “Many members”.

*Paragraph 48, as amended, was adopted.*

Paragraphs 49 and 50

*Paragraphs 49 and 50 were adopted.*

Paragraph 51

20. Mr. MAHIOU said that several points of view had been expressed on article 18 and that some had perhaps not been fully reflected in paragraph 51. For many members of the Commission, it would be difficult to delete that article, but others had added that, if it was retained, some of its elements might be included in other articles. As a justification for its exclusion, reference had been made to “the lack of a precise definition required for criminal law”. The wording adopted on first reading was admittedly quite broad and vague and he regretted that no attempt had been made to give a more precise definition of colonialism based, for example, on that to be found in General Assembly resolution 1514 (XV), concerning the Declaration on the granting of independence to colonial countries and peoples, or in the annex to Assembly resolution 2625 (XXV) concerning the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, in which colonialism and alien domination were defined much more precisely by reference, *inter alia*, to the Charter and the principles of human rights and international peace and security. The idea of incompatibility with the Charter and the principles of human rights suggested that, if article 18 was not retained, the issue would come up for discussion during the consideration of the article on human rights violations. He would none the less not insist that the text of paragraph 51 should be amended, but he would like his comment to be reflected in the summary record of the meeting.

21. Mr. RAZAFINDRALAMBO said that he had been in favour of retaining the crime of colonial domination and other forms of alien domination in the draft Code

and even of retaining the reference in article 15, paragraph 7,<sup>1</sup> to the national liberation struggle. He therefore fully supported the point of view expressed by Mr. Mahiou.

22. Mr. AL-BAHARNA said that the words “concerns regarding the necessary precision required by criminal law disregarded the historical significance of this crime” were not very clear. He did not see why, out of a concern for precision, account should not be taken of the historical significance of the crime. He would like some explanations on that point.

23. The CHAIRMAN said he thought that what was meant was that the historical significance of the crime should also be taken into consideration. The sentence should therefore be amended so as to remove any ambiguity.

*Paragraph 51 was adopted on that understanding.*

Paragraphs 52 to 57

*Paragraphs 52 to 57 were adopted.*

Paragraph 58

24. Mr. VARGAS CARREÑO proposed that the words “the imprecise definition of the crime, even with respect to South Africa” should be deleted because, in his opinion, apartheid had been very clearly defined in South Africa.

25. Mr. ROSENSTOCK said that it was because of the imprecision and generality of the International Convention on the Suppression and Punishment of the Crime of Apartheid that many States were not parties to that instrument. That argument was thus entirely relevant and had, moreover, been put forward during the debate on the question. It should therefore be included in paragraph 58.

26. The CHAIRMAN said that, in so far as the paragraph reflected the views expressed by some members on that question, those words should be retained.

*Paragraph 58 was adopted.*

Paragraph 59

27. Mr. IDRIS asked in which context it had been stated that purely hypothetical crimes should not be included in the Code. He did not think that apartheid was a purely hypothetical crime.

28. The CHAIRMAN said that the last sentence did not belong in paragraph 59, which reflected the idea that apartheid, in one form or another, should be included in the draft Code and suggested that it therefore should be deleted.

*It was so agreed.*

<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.*

*Paragraph 59, as amended, was adopted.*

Paragraphs 60 to 62

*Paragraphs 60 to 62 were adopted.*

Paragraphs 63 and 64

29. Mr. VARGAS CARREÑO said that a new paragraph should be added between paragraphs 62 and 63 to reflect an important point, namely, whether crimes committed by individuals acting in their personal capacity and not as representatives of a State could in fact be regarded as crimes against humanity. He did not think so. Of course, the difference of opinion on that question was referred to in paragraph 64, but the wording of that paragraph was awkward and not very clear.

30. Mr. THIAM (Special Rapporteur) said that the question whether crimes against humanity could be committed only by agents of the State had been discussed at length by the Commission and it had finally reached the opposite conclusion. Such crimes could, for example, very well be committed by racist associations which were not in any way acting on behalf of a State.

31. Mr. MAHIOU said that there were two schools of thought in that regard: some would consider, for example, that crimes committed by the Mafia were not crimes which came under the Code, since they were not committed by agents of the State, while others would, rather, be of the opinion that, regardless of who committed them, such crimes had to be covered by the Code.

32. The CHAIRMAN asked Mr. Vargas Carreño to draft a paragraph reflecting those two points of view.

33. Mr. VARGAS CARREÑO requested the Secretary to the Commission to read out the draft paragraph he had prepared.

34. Ms. DAUCHY (Secretary to the Commission) said that the new paragraph would read:

“With regard to the proposal by the Special Rapporteur that the Code should be taken as covering not only persons who acted as agents or representatives of a State, but also those who committed a crime in an individual capacity, there was no agreement in the Commission. While some members held that the Code should relate only to crimes committed by agents or representatives of the State or by persons acting with the authorization, support or acquiescence of the State, other members stated that they were in favour of including crimes committed by individuals even in the absence of links with the State. By way of example, reference was made to the members of certain non-State organizations or agencies which committed crimes of the kind covered by the article under consideration.”

35. The CHAIRMAN suggested that the proposed new paragraph should be adopted as paragraph 63 of the report. Former paragraph 63 would become paragraph 64 and the existing paragraph 64, which would no longer serve any purpose, would be deleted. If he heard no ob-

jection, he would take it that those suggestions were accepted.

*New paragraphs 63 and 64 were adopted.*

Paragraph 65

*Paragraph 65 was adopted.*

Paragraph 66

36. Mr. TOMUSCHAT said that the word “limit” in the second sentence was not a good choice because torture was a narrower and more specific concept than that of cruel, inhuman or degrading treatment or punishment. For logic’s sake, the word “limit” should be replaced by the word “extend” and the other language versions should be brought into line with the English text.

*Paragraph 66, as amended, was adopted.*

Paragraphs 67 to 70

*Paragraphs 67 to 70 were adopted.*

Paragraph 71

37. Mr. MAHIOU suggested that, in the first line, the word “some” should be replaced by the word “several”, which better reflected the true situation.

38. Mr. THIAM (Special Rapporteur) said that he supported Mr. Mahiou’s proposal.

*Paragraph 71, as amended, was adopted.*

Paragraph 72

39. Mr. THIAM (Special Rapporteur) proposed that the word “some” in the first line should be replaced by the word “several”.

*Paragraph 72, as amended, was adopted.*

Paragraphs 73 and 74

*Paragraphs 73 and 74 were adopted.*

Paragraph 75

40. Mr. TOMUSCHAT said that, in the fourth sentence, the word “and” between the word “Conventions” and the words “Additional Protocol” might create confusion because it might suggest that article 3 common to the Geneva Conventions also appeared in the Additional Protocol. He therefore suggested that the word “and” should be replaced by a comma.

41. Mr. ROSENSTOCK said that the problem could be dealt with even more clearly if the word “and” was replaced by the words “as well as”.

*Paragraph 75, as amended, was adopted.*

Paragraphs 76 to 78

*Paragraphs 76 to 78 were adopted.*

Paragraph 79

42. Mr. LUKASHUK said that, even though it was difficult to draft a general definition of terrorism, the report should stress the importance the Commission attached to that problem, which was becoming more and more topical. The Sixth Committee should not be given the impression that the Commission was trying to avoid that question, on which a General Assembly resolution had recently been adopted, and that it did not want to include that crime in the draft Code.

43. The CHAIRMAN suggested that, in order to meet Mr. Lukashuk's concern, the beginning of the first sentence of paragraph 79 might begin with the following words: "While everyone recognized the danger of international terrorism,".

44. Mr. de SARAM said that he supported the opinion expressed by Mr. Lukashuk. In addition to the Chairman's suggestion, he proposed that, at the end of the first sentence, the words "should be included in the Code" should be replaced by the words "could, at this stage, in view of the continuing problems relating to its definition, be included in the Code".

45. The CHAIRMAN said that, if he heard no objection, he would take it that the two amendments were accepted.

*Paragraph 79, as amended, was adopted.*

Paragraphs 80 to 97

*Paragraphs 80 to 97 were adopted.*

Paragraph 98

46. Mr. TOMUSCHAT said that the last sentence was too vague in that it did not explain the discrepancy between the statutes of the international tribunals and the national legislation of the former Yugoslavia and Rwanda.

47. The CHAIRMAN said that the intended reference was to the death penalty. That could be explained in the sentence in question.

48. Mr. PAMBOU-TCHIVOUNDA said that the words "national legislation of the former Yugoslavia" were virtually meaningless.

49. Mr. RAZAFINDRALAMBO said that he agreed with that comment. Since the former Yugoslavia was now composed of several independent States, it would be more appropriate to say: "the national legislation of the States having formed the former Yugoslavia".

50. Mr. ROSENSTOCK said that he had no objection to those words, which referred to the legislation which had been in force in Yugoslavia when it had still existed,

the idea being that there could be no penalty without a law.

51. Mr. TOMUSCHAT said that he agreed with that point of view.

52. Mr. MAHIU said that it would have to be checked whether the legislation of the former Yugoslavia was not referred to in the statute of the tribunal set up to try the crimes committed in the former Yugoslavia.

53. Mr. KABATSI said that he agreed with the comment by Mr. Pambou-Tchivounda. Logically, it would be difficult to say that a statute was not consistent with national legislation which no longer existed as a result of the break-up of a State.

54. Mr. THIAM (Special Rapporteur) suggested that reference should be made to: "the legislation applicable in the former Yugoslavia".

55. Mr. PAMBOU-TCHIVOUNDA said that proposal was entirely in keeping with what the Commission meant to say. The word "national" should be deleted and the words "applicable in" should be added.

56. The CHAIRMAN suggested that paragraph 98 should be adopted with the inclusion of a reference to the death penalty and the amendments proposed by the Special Rapporteur and Mr. Pambou-Tchivounda.

*It was so agreed.*

*Paragraph 98, as amended, was adopted.*

Paragraphs 99 and 100

*Paragraphs 99 and 100 were adopted.*

Paragraph 101

57. Mr. IDRIS said that, although the Special Rapporteur had actually made the comment reflected in that paragraph, it might not be politically very sound to emphasize that point.

58. Mr. TOMUSCHAT proposed that the words "limited views of" should be replaced by the words "limited number of responses by".

59. Mr. THIAM (Special Rapporteur) said that he would not object to the deletion of paragraph 101, which only reflected a comment he had made orally.

60. Mr. ROSENSTOCK said that the reference to developing countries between dashes could be deleted, but it might be useful to let Governments know that the Commission could not take their views into account if those views had not been communicated to it.

61. Mr. PAMBOU-TCHIVOUNDA said that he endorsed Mr. Rosenstock's proposal that the paragraph should be maintained. He also wondered whether the statement it contained should not be softened by specifying that some members of the Commission had referred to the positions taken by Governments or their representatives in the Sixth Committee.

62. Mr. THIAM (Special Rapporteur) said that he could accept the proposal by Mr. Rosenstock. He would also agree that reference should be made to the fact to which Mr. Pambou-Tchivounda had drawn attention.

63. Mr. IDRIS said that Mr. Rosenstock's proposal met his concern and was entirely satisfactory.

64. The CHAIRMAN suggested that the words "—particularly of developing countries—" should be deleted and that Mr. Pambou-Tchivounda's idea of referring to statements made in the Sixth Committee should be adopted.

65. Mr. ROSENSTOCK said he did not think that the Commission should make a distinction only in that paragraph between the written comments of Governments and comments made by Governments in the Sixth Committee, all of which were and had been taken into account. It was none the less true that relatively few comments had been made. It was therefore totally unnecessary to amend that paragraph.

66. Mr. PAMBOU-TCHIVOUNDA said that, if the paragraph was not amended, the word "regretted" should be looked at once again.

67. The CHAIRMAN suggested that new wording for paragraph 101 should be submitted to the Commission later.

Paragraphs 102 to 107

*Paragraphs 102 to 107 were adopted.*

Paragraph 108

68. Mr. VARGAS CARREÑO proposed that, in the second sentence, the words "the view of Latin American members" should be replaced by the words "the view of some members" and that the words "necessarily pernicious" should be replaced by the words "always wrongful".

69. Mr. ROSENSTOCK said that he would like the second sentence to be purely and simply shortened. A full stop should be placed after the words "widely shared" and the second part of the sentence should be deleted.

*Paragraph 108, as amended, was adopted.*

Paragraphs 109 to 111

*Paragraphs 109 to 111 were adopted.*

Paragraph 112

70. Mr. GÜNEY said that the text proposed by the Special Rapporteur contained a definition. He therefore asked who was going to give a more acceptable definition and when. The wording of the paragraph should be changed so that it would reflect the debate more faithfully.

71. Mr. THIAM (Special Rapporteur) said that he would not object to the deletion of the paragraph if it was going to create problems. If it was retained, the words "more acceptable" should be replaced by the words "more precise".

72. Mr. TOMUSCHAT said that the debate was fully reported in paragraphs 79 to 85 of chapter II of the report and that paragraph 112 was only part of the "summing up of the debate by the Special Rapporteur".

73. The CHAIRMAN, supported by Mr. ROSENSTOCK, suggested that the paragraph should be amended to read: "If the crime of international terrorism were to be retained in the Code, he felt that it would be necessary to draft a more precise definition for the purposes of prosecution."

*It was so agreed.*

*Paragraph 112, as amended, was adopted.*

Paragraphs 113 to 115

*Paragraphs 113 to 115 were adopted.*

Paragraph 116

74. Mr. EIRIKSSON proposed that the words "Further to the decision reflected in paragraph 115 above" and the words "under the terms reflected in paragraph 114 above" should be deleted.

*Paragraph 116, as amended, was adopted.*

Paragraph 117

*Paragraph 117 was adopted.*

*The meeting rose at 1.05 p.m.*

## 2419th MEETING

*Monday, 17 July 1995, at 3.15 p.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, 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-seventh session (*continued*)**

**CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law* (A/CN.4/L.511 and Add.1)**

1. The CHAIRMAN invited the Commission to consider chapter IV of its report (A/CN.4/L.511 and Add.1), paragraph by paragraph.

**A. Introduction**

Paragraphs 1 to 7

*Paragraphs 1 to 7 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraphs 8 to 27

*Paragraphs 8 to 27 were adopted.*

Paragraph 28

2. Mr. TOMUSCHAT said that readers might have difficulty understanding the reference in the second sentence to a "right of action", for which there was no explanation other than the reference in footnote 14, subparagraph (c) (iii).

3. Mr. BOWETT proposed that the words should be replaced by either "right to sue" or "right of legal suit".

4. Mr. BARBOZA (Special Rapporteur) said that the problem did not arise in his original draft, since "*titulares de la acción*" in Spanish meant precisely that the State and bodies designated by it were entitled to appear in court to assert a right. If the English version was unclear, it should be modified.

5. The CHAIRMAN suggested that the words "right of action" should be replaced by "right to sue".

*It was so agreed.*

*Paragraph 28, as amended, was adopted.*

Paragraphs 29 to 37

*Paragraphs 29 to 37 were adopted.*

Paragraph 38

6. Mr. MAHIOU, supported by Mr. PELLET, suggested that the words "such acts", in the second sentence, should be replaced by "dangerous and ultrahazardous activities".

*Paragraph 38, as amended, was adopted.*

Paragraphs 39 and 40

*Paragraphs 39 and 40 were adopted.*

**C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law**

7. The CHAIRMAN said that a document, containing the text of the articles adopted at the present session, together with the commentaries, would be issued at a later stage. Since article D had been adopted as a working hypothesis, the words "as a working hypothesis," should be added before "D [9 and 10]" in the title.

*It was so agreed.*

**CHAPTER V. *State succession and its impact on the nationality of natural and legal persons* (A/CN.4/L.514)**

**A. Introduction**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraphs 3 to 6

*Paragraphs 3 to 6 were adopted.*

Paragraph 7

8. The CHAIRMAN, at the suggestion of Mr. PELLET, said that the words, "being essentially a matter of internal law," should be added after the word "nationality".

*It was so agreed.*

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 to 14

*Paragraphs 8 to 14 were adopted.*

Paragraph 15

9. Mr. PELLET said that the phrase "the discretionary power of the State with regard to nationality was not absolute", in the first sentence, was almost redundant. Under French administrative law, discretionary power was, by definition, not absolute. Accordingly, he would delete the word "discretionary" from that phrase.

10. Following a discussion in which Mr. MIKULKA, Mr. PELLET, Mr. VILLAGRÁN KRAMER and Mr. RAZAFINDRALAMBO took part, the CHAIRMAN suggested that the first clause of the first sentence of

paragraph 15 should read: "While the freedom of action of the State with regard to nationality was not absolute."

*It was so agreed.*

*Paragraph 15, as amended, was adopted.*

Paragraphs 16 to 22

*Paragraphs 16 to 22 were adopted.*

Paragraph 23

11. Mr. TOMUSCHAT, supported by Mr. MIKULKA and Mr. PELLET, said that the word "humanitarian" usually referred to the law relating to warfare, yet in the penultimate sentence of paragraph 23, it was being used to refer to human rights. Was the word "humanitarian" appropriate in that context?

12. Mr. de SARAM said that in the debate he had pointed out that, in matters pertaining to nationality, there were humanitarian considerations which had to be taken into account. In his view, the word "humanitarian" did not necessarily imply a connection with the laws of warfare and could be used in the context of human rights.

13. The CHAIRMAN suggested that the words "humanitarian aspect of the question" should be replaced by "humanitarian needs of the matter".

*It was so agreed.*

*Paragraph 23, as amended, was adopted.*

Paragraphs 24 to 28

*Paragraphs 24 to 28 were adopted.*

Paragraph 29

14. Mr. PELLET said that the words "proposed new definition", in the last sentence of the paragraph, should simply read "proposed definition", to avoid giving the definition more emphasis than it deserved.

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 34

*Paragraphs 30 to 34 were adopted.*

Paragraph 35

15. Mr. PELLET proposed that the words "in its preliminary study", in the first sentence, should be deleted, because they gave an erroneous impression of the Commission's approach.

*Paragraph 35, as amended, was adopted.*

Paragraph 40

16. Mr. PELLET said that, to be consistent with the decision on paragraph 15, the words "on the discretionary power of States", in the first sentence, should be replaced by "on the freedom of action of States".

17. Following a brief discussion in which Mr. MAHIOU, Mr. PELLET, Mr. RAZAFINDRALAMBO and Mr. LUKASHUK took part, the CHAIRMAN suggested that Mr. Pellet's proposal should be adopted.

*It was so agreed.*

*Paragraph 40, as amended, was adopted.*

Paragraphs 41 to 43

*Paragraphs 41 to 43 were adopted.*

Paragraph 44

18. Mr. TOMUSCHAT suggested that the references to the *Flegenheimer* and *Micheletti* cases should be accompanied by footnotes.

19. Mr. de SARAM suggested that, in general, when specific cases were referred to, the complete citation for the case should be provided in a footnote.

*Paragraph 44, as amended, was adopted.*

Paragraphs 45 to 49

*Paragraphs 45 to 49 were adopted.*

Paragraph 50

20. Mr. MIKULKA said that, as it stood, the first sentence of paragraph 50 might not properly reflect the discussion. The phrase "an obligation on which a consensus had emerged within the Commission," should be inserted, in the first sentence, after "an obligation on States to negotiate". Again, the word "additional", in the last sentence, should be replaced by "optional".

*Paragraph 50, as amended, was adopted.*

Paragraphs 51 to 54

*Paragraphs 51 to 54 were adopted.*

Paragraph 55

21. Mr. VILLAGRÁN KRAMER proposed that, in the Spanish version, the word "*retirada*", in the second line, should be replaced by "*revocación*".

*Paragraph 55, as amended in the Spanish version, was adopted.*

## Paragraph 56

*Paragraph 56 was adopted.*

## Paragraph 57

22. Mr. MAHIOU said that the word “omission”, in the first line, was inappropriate. The Commission had not omitted the question of the nationality of legal persons. It had assigned priority to other matters.

23. The CHAIRMAN said that Mr. Mahiou and the Special Rapporteur should perhaps consult and agree on an appropriate change in the wording.

*Paragraph 57 was adopted on that understanding.*

## Paragraph 58

*Paragraph 58 was adopted.*

## Paragraph 59

24. Mr. de SARAM suggested it should be made clear that the “regret” mentioned in the first sentence had been expressed by only one member.

25. Mr. AL-BAHARNA proposed that the words “Regret was, however, also expressed” should be replaced by “Regret was expressed by one member”.

*Paragraph 59, as amended, was adopted.*

## Paragraphs 60 to 66

*Paragraphs 60 to 66 were adopted.*

## Paragraph 67

26. Mr. de SARAM suggested that where the terms *jus soli* and *jus sanguinis* first appeared in the draft report, a footnote should be added indicating the precise meanings of those terms in English.

*Paragraph 67 was adopted.*

## Paragraph 68

*Paragraph 68 was adopted.*

## Paragraphs 69 and 70

27. Mr. PELLET said that his views on the matter referred to in the paragraph had not been included. Accordingly, he would add, either to paragraph 69 or 70, the following: “Doubt was also expressed as to whether the initial manner of acquiring the nationality of the predecessor State was of any relevance as regards the right of option.”

28. Mr. MAHIOU said that, while endorsing Mr. Pellet’s observation, he would prefer to present it in a positive fashion, for example by using the words: “The vari-

ous criteria for the acquisition of nationality were involved . . .”.

*Paragraph 69 and paragraph 70, as amended, were adopted.*

## Paragraphs 71 to 75

*Paragraphs 71 to 75 were adopted.*

## Paragraph 76

29. Mr. RAZAFINDRALAMBO said that, having been the author of the remarks identified in the text by the figures (1) and (3), he would prefer to see them grouped together and introduced by the words “One member remarked that”. The comment identified by the figure (2) could then be introduced by a phrase such as “The view was also advanced that”.

*Paragraph 76, as amended, was adopted.*

## Paragraph 77

*Paragraph 77 was adopted.*

## Paragraph 78

30. Mr. MAHIOU said that the word “supplementary”, in the first sentence, should be replaced by “residual”.

*Paragraph 78, as amended, was adopted.*

## Paragraphs 79 to 85

*Paragraphs 79 to 85 were adopted.*

## Paragraph 86

31. Mr. PELLET proposed the addition of a paragraph 86 that would provide a clear indication of where the Commission’s work on the topic stood at the conclusion of the forty-seventh session. It was important, in his view, that the General Assembly should be informed about the extent to which the Commission had been able to respond to resolution 49/51.

32. Mr. MIKULKA (Special Rapporteur) drew attention to the last two sentences of paragraph 7 of the report of the Planning Group (A/CN.4/L.515), which contained the requisite information. A paragraph along those lines could be added to chapter V of the report.

33. Following a discussion in which Messrs. TOMUSCHAT, ARANGIO-RUIZ, EIRIKSSON, ROSENSTOCK and PELLET took part, the CHAIRMAN suggested the text of new paragraph 86 to read as follows:

“In the view of the Special Rapporteur, the Working Group should be reconvened at the next session to complete its task, which would enable the Commission to meet the request contained in paragraph 6 of



General Assembly resolution 49/51. The Commission took note of the views of the Special Rapporteur."

*It was so agreed.*

*Paragraph 86 was adopted.*

*Section B, as amended, was adopted.*

*Chapter V, as a whole, as amended, was adopted.*

**CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (concluded) (A/CN.4/L.509 and Corr.1)**

**B. Consideration of the topic at the present session (concluded)**

*Paragraph 29 (concluded)*

34. The CHAIRMAN read out the following new text to replace paragraph 29 as it appeared in document A/CN.4/L.509:

"29. As to the range of crimes to be included in part two some members favoured a restrictive list as proposed by the Special Rapporteur to ensure a meaningful code strictly confined to the most serious types of behaviour that posed a serious and immediate threat to the peace and security of the whole of mankind, as recognized by the international community; to give priority to the crimes whose prosecution was provided for by well-established rules of international law and, customary rules whose application would not depend on the form of the future instrument; to exclude crimes on which there was insufficient existing practice or which were mainly of historical significance; to ensure the widest possible acceptance of the Code; to avoid undermining the success of the entire Code by engaging in a quixotic exercise resulting in yet another draft that would remain in the archives. There was a further suggestion to restrict the Code to crimes whose perpetrators were directly responsible by virtue of existing general international law, and primarily the international crimes of States for which individual criminal responsibility was only one of the consequences thereof. Other members favoured an expanded list, as compared with the list proposed by the Special Rapporteur. A comprehensive code was viewed as a more effective tool for the strengthening of international law and international peace and security, for the protection of the fundamental interests of the international community in preserving life, human dignity and property rights and for achieving a more appropriate balance between political realism and legal idealism. It was stressed that some of the crimes which had been excluded from the list adopted on first reading, for example apartheid and terrorism, were covered and defined by international instruments and fully qualified for inclusion in the future code. It was also noted that there was a wide range of positions as to the scope of the future code and that to categorize those positions as 'minimalist' or 'maximalist' would be an oversimplification. Those favouring a more comprehensive list of crimes also suggested that a restrictive list was no guarantee of acceptance of States, nor of consensus on its contents."

35. Mr. ROSENSTOCK said that he did not want to start a lengthy discussion and would be prepared to accept the proposed text if that was the wish of the Commission. However, the second sentence, beginning with the words "There was a further suggestion", was not clear, was not helpful and was not necessary, and he would prefer it to be deleted. The sixth sentence, beginning with the words "It was also noted", also seemed unnecessary, since the Commission had agreed not to employ the terms "minimalist" and "maximalist". The best course would be to delete it.

36. Mr. MAHIOU, recalling that the paragraph had been redrafted at his suggestion, said that he was prepared to accept Mr. Rosenstock's proposals and wished, in turn, to suggest that the text be further simplified by deleting the words "for example apartheid and terrorism" from the fifth sentence.

37. Mr. LUKASHUK endorsed Mr. Mahiou's suggestion and said that he was also in favour of the deletion, proposed by Mr. Rosenstock, of the sentence beginning with the words "There was a further suggestion to restrict" which, to his mind, was of somewhat academic interest.

38. Mr. MIKULKA said that, having been the author of the suggestion referred to in the second sentence, he was strongly opposed to its deletion. One of the physical consequences of international crimes of States was the fact that acts attributable to the State risked being punished at the international level without regard to the provisions of internal law. The sentence could be made clearer by inserting the words "on the international plane" between the words "criminal responsibility" and "was only one of the consequences thereof".

39. Mr. ROSENSTOCK said that the sentence, as proposed, was badly formulated and not legally plausible. If, for the sake of argument, there was such a thing as a State crime, an individual could not be held responsible for it.

40. Mr. MAHIOU said that if Mr. Mikulka, as the author of the suggestion in question, wanted the relevant sentence to be maintained, there could be no question of deleting it.

41. Mr. MIKULKA said that Mr. Rosenstock's objection would be valid only if the wider concept of what constituted a State crime were adopted, but not in the event of a more restrictive interpretation.

42. Mr. KABATSI proposed the deletion of the word "quixotic" before the word "exercise", near the end of the first sentence. The word carried implications of madness and was inappropriate.

43. The CHAIRMAN noted that the Commission had agreed to adopt the proposed new text of paragraph 29 with the following changes: the word "quixotic" towards the end of the first sentence to be deleted; the second sentence to be maintained with the addition of the words "on the international plane" after "individual criminal responsibility"; the words "for example apartheid and terrorism" in the fifth sentence to be deleted; and the sixth sentence to be deleted.

*Paragraph 29, as amended, was adopted.*

Paragraph 101 (*concluded*)

44. The CHAIRMAN suggested that paragraph 101 should be replaced by the following text:

“101. The Special Rapporteur noted that the limited number of replies from Governments as regards the draft articles approved on first reading made it difficult for him to assess the degree of support which those draft articles commanded.”

45. Mr. LUKASHUK said that he had no strong feelings about the proposed wording of the paragraph. At several places throughout the report, however, it had been noted that developing countries had failed to respond to the questions put to them. It was a major problem for developing countries, since only countries that had the qualified staff to do so could respond to such questions. It could perhaps be partly resolved through cooperation with the developing countries within the framework of organizations such as OAU and the League of Arab States. The Commission should also sound out the position of third world countries in the course of its work.

46. The CHAIRMAN invited the Commission to take note of Mr. Lukashuk's statement.

*Paragraph 101, as amended, was adopted.*

*Section B, as amended, was adopted.*

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

### CHAPTER III. *State responsibility (A/CN.4/L.512 and Add.1)*

#### A. *Introduction*

Paragraph 1

47. Mr. ROSENSTOCK proposed that the term “(mise en œuvre)”, in the penultimate line, should be deleted, as well as in the other paragraphs where it appeared.

*Paragraph 1, as amended, was adopted.*

Paragraphs 2 to 6

*Paragraphs 2 to 6 were adopted.*

*Section A, as amended, was adopted.*

#### B. *Consideration of the topic at the present session*

Paragraphs 7 to 16

*Paragraphs 7 to 16 were adopted.*

Paragraph 17

48. Mr. TOMUSCHAT said that the self-congratulatory tone of the paragraph created a bad impression and should be watered down.

49. The CHAIRMAN suggested that the Special Rapporteur and the Secretary to the Commission should be

asked to draft a new text, for consideration by the Commission later on.

*It was so agreed.*

Paragraph 18

50. Mr. GÜNEY, referring to the French text, said that some more suitable term should be found to replace the words “très séduisants”.

*Paragraph 18 was adopted on that understanding.*

Paragraphs 19 to 29

*Paragraphs 19 to 29 were adopted.*

Paragraph 30

51. Following a comment by Mr. TOMUSCHAT, the CHAIRMAN suggested that the words “a persona and”, in the last sentence, should be deleted.

*It was so agreed.*

*Paragraph 30, as amended, was adopted.*

Paragraph 31

*Paragraph 31 was adopted.*

Paragraph 32

52. Mr. TOMUSCHAT proposed that the words “of international regulations”, in the first sentence, should be deleted.

*Paragraph 32, as amended, was adopted.*

Paragraphs 33 to 37

*Paragraphs 33 to 37 were adopted.*

Paragraph 38

53. Mr. IDRIS said that the second sentence in its entirety was not clear. In particular, what was the difference between “a creation” and “an achievement”? One of them should be deleted.

54. The CHAIRMAN suggested that further consideration of the paragraph should be deferred to allow Mr. Idris time to consult the member who had expressed the view in question.

*It was so agreed.*

55. In response to Mr. EIRIKSSON, the CHAIRMAN said that a brief statement would be included in paragraph 7, stating, *inter alia*, that the Commission had agreed to refer the articles to the Drafting Committee, along the lines of similar references included in other chapters of the report.

*The meeting rose at 6 p.m.*

## 2420th MEETING

*Tuesday, 18 July 1995, at 10.10 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

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

**State responsibility (continued)\* (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)**

[Agenda item 3]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE<sup>2</sup> (continued)\***

1. Mr. GÜNEY said that, when the Commission had decided to provide for a dispute settlement mechanism in the draft articles, it had added to the complexity of an already difficult subject. The path it had chosen was at variance with a well-established practice of the Commission itself, which had in the past, when dealing with subjects that were just as important, generally refrained from providing for such a mechanism, leaving the matter to the conference of plenipotentiaries. Such had been the case, in particular, with the draft articles on the law of treaties.

2. As to substance, the Commission must take State practice into account in its work on the codification and progressive development of international law. The international community had always shown reluctance and apprehension towards compulsory third-party settlement of disputes. The draft under consideration (A/CN.4/L.513) did not take that situation into account, for in addition to introducing compulsory third-party settlement, it would also be establishing a vicious circle of dispute settlement, step by step, culminating in the kind of appeal represented by compulsory judicial settlement.

3. As for the definition of consensus given at an earlier meeting, once one member was firmly opposed to a decision, it was not possible to speak of consensus, whether or not the question was put to a vote.

\* Resumed from the 2417th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> For the text of the articles of, and the annex to, part three of the draft as proposed by the Drafting Committee, see 2417th meeting, para. 1.

4. Mr. THIAM said that he had indeed felt some reluctance in the past towards a draft which, by making arbitration compulsory, departed from the traditional rule whereby arbitration should be based only on the parties' consent. However, after a great deal of thought he had come to change his position. The provision contained in article 5 (Arbitration), paragraph 2, should be seen as the counterpart of the realistic decision not to prohibit countermeasures. Since the Commission had decided not to make countermeasures unlawful acts, it had had to provide some guarantee, some compensation, at least morally speaking, for weaker States. The only realistic compensation lay in the compulsory arbitration proposed in article 5, paragraph 2.

5. With regard to article 7 (Judicial settlement), some had wrongly presented it as being aimed at introducing an appeals procedure against arbitral decisions, citing the judgment of ICJ in the case concerning the *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*.<sup>3</sup> The plea against the arbitral award in that case had not been an appeal but a remedy against abuse of power, which was the type of remedy laid down in draft article 7. He did not find that provision at all disturbing, although he did think that the wording should make the nature of the remedy clearer. The Court was the judge of its own competence and it knew that an appeal against an arbitral award could not be brought before it.

6. He was therefore in favour of the draft articles, especially article 5, paragraph 2, and article 7.

7. Mr. MIKULKA said that he would like to make three comments. First, whereas parts one and two had been drafted without prejudice to the form that the Commission's work would ultimately take, that is to say whether or not it would be a convention, part three was clearly drafted with a convention in mind since it would be impossible to apply the articles contained in it outside of such a framework.

8. Secondly, he was pessimistic about the chances for such a convention. In such a sensitive matter as State responsibility, it would no doubt be preferable to consider provisions indicating, for example, the link between substantive rules and dispute settlements as a condition for the application of certain substantive rules. He also agreed with Mr. Güney's remark about the Commission's practice with regard to dispute settlement clauses. However, the most important and serious problem, as far as a convention was concerned, was the relationship between the dispute settlement system of the future convention on State responsibility and the systems in other instruments. The Commission should realize that any violation of rules of international law took place not in the abstract, but in a specific area of international law. The Commission could not fail to mention that relationship, and it should add one or two articles to clarify that issue.

9. Thirdly, regardless of any substantive discussion on article 5, paragraph 2, the cost of the mechanisms could not be completely disregarded.

<sup>3</sup> See 2417th meeting, footnote 10.

10. Mr. JACOVIDES said that he would like to make a suggestion concerning the title of article 7. Although the article actually dealt with the question of the validity of an arbitral award rather than with judicial settlement, using the expression “judicial settlement” could be justified from the standpoint of a regime which went from negotiation, to mediation, to conciliation, to arbitration. Consequently, the Commission might include the two ideas of “judicial settlement” and “validity of an arbitral award” in the title of article 7.

11. Mr. RAZAFINDRALAMBO said that most of the criticisms were of the compulsory phase of the dispute settlement system in the draft articles.

12. With regard to article 5, paragraph 2, he did not see the objections to settlement, by compulsory arbitration, in particular the fear that it would encourage States to resort to countermeasures. If a State decided to resort to countermeasures, it would deliberately trigger the compulsory arbitration procedure. On the other hand, if the State did not want the dispute to be settled by such a procedure, it would avoid taking countermeasures from the outset, and it would be free to use any of the means of amicable settlement provided in articles 1 to 3 and article 5, paragraph 1.

13. Judicial settlement, in article 7, was not a means of reformation of an arbitral award, but a means of review of the legality of the award, leading either to a rejection of the application or nullification of the award, similar to remedies against abuse of power. In the latter case, the issues in dispute might again be submitted to an arbitral tribunal, which alone could rule on the merits. For that reason, he proposed, on the one hand, that article 7 should be entitled: “Nullification proceedings” and, on the other, that article 7, paragraph 2, should be drafted to read: “In the event of total or partial nullification of the award, the issues in dispute may, at the request of any party, be submitted to a new arbitration.”

14. Some drafting suggestions could also be made. He endorsed the idea expressed at a previous meeting that the word “other”, in article 2 (Good offices and mediation), should be deleted. The word “negotiations”, in article 3 (Conciliation), should be in the singular. Provision should be made in article 4 (Task of the Conciliation Commission), paragraph 4, for exceptions to the three-month deadline in the event of exceptional circumstances. Article 5, paragraphs 1 and 2, should allow for recourse to an arbitral tribunal other than the one constituted in conformity with the annex, such as the Permanent Court of Arbitration. He proposed to add a paragraph 8 to article 2 of the annex, stipulating that the Arbitral Tribunal was empowered to rule on its competence in the case of dispute, as it was envisaged in article 1, paragraph 4, of the annex, for the Conciliation Commission.

15. Lastly, in cases in which the Commission was not able to reach a consensus on draft articles, it should proceed to a vote.

16. Mr. FOMBA said that, unlike articles 1 and 3, article 5 drew a distinction between disputes stemming from the initial taking of measures and those resulting from countermeasures. The question had arisen of whether the

article was not likely to encourage powerful States to take countermeasures. In his view, that was not necessarily so. Apart from the fact that smaller States were not always able to resort to countermeasures, the mechanism might be a comparatively effective weapon for restoring international justice when used by smaller States. The underlying philosophy of part three of the draft (Settlement of disputes) was that the purpose of the law was to ensure equality among States, big and small, to turn de facto inequality into compensatory legal equality. Therefore, article 5, paragraph 2, favoured neither the powerful nor the small countries, at least in absolute terms. As for article 7, it was actually concerned with challenging the validity of an arbitral award. It would therefore be preferable to amend the title accordingly, and to state exactly what period of time was allowed to request confirmation or nullification of the award. In any event, paragraph 1 of the article could not be a veiled means of granting ICJ the power to rejudge the substance of the award. Subject to the decision to be taken by the Commission on article 12 of part two, he accepted the draft articles under review and agreed that they should be submitted to the General Assembly.

17. Mr. LUKASHUK pointed out that, although the draft articles proposed by the Drafting Committee were in fact an advance on State practice, the Commission's mandate was very clear about the need for the progressive development of international law. The articles bespoke a high level of professionalism and should therefore be adopted by the Commission and submitted to the General Assembly.

18. Mr. BARBOZA said that he supported the draft articles proposed by the Drafting Committee, because he saw them as a significant step forward that followed the current trend in multilateral conventions to provide for a dispute settlement mechanism and even impose mandatory conciliation procedures. The strongest objections had been to compulsory arbitration in cases of disputes arising subsequent to countermeasures (art. 5, para. 2), but how could it be thought that the weak countries would see that provision as being anything other than a guarantee, indeed the only guarantee, available to them? As for article 7, it filled a gap that would have made the system inoperative and was in fact a practical provision intended to prevent States evading the arbitral award, and not a form of appeal. A clause of that type was often introduced by the parties themselves, in an arbitration compromise. Perhaps the title should be changed, to bring out the fact that the validity or nullity of the arbitral awards was at issue and to make the articles as a whole clearer by listing the grounds for nullification in the commentary.

19. Mr. VILLAGRÁN KRAMER, referring to article 5, paragraph 2, pointed out that, under the European Union instruments, the possibility of reprisals was excluded between member States but not towards non-member States. Similarly, article 18 of the Charter of OAS<sup>4</sup> prohibited economic and political reprisals between Latin American States but not towards African or European States, for example. The constituent instrument of WTO provided for a dispute settlement mecha-

<sup>4</sup> See 2407th meeting, footnote 6.

nism that prohibited reprisals.<sup>5</sup> There were obviously areas in which reprisals were subject to limitations and others in which no legal regime applied in that regard. The draft articles should therefore be placed in the context of those realities, that is to say they filled gaps where no rules were applicable. They were all the more deserving of support in that they provided the weaker countries with a right they could decide whether and in what conditions they wanted to exercise.

20. With regard to article 7, in the case of a dispute over an arbitral award, was it better to let tensions build up and relations turn sour, or on the contrary to provide for a mechanism to find legal solutions? The three best-known cases in that respect, that of the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), settled in 1960 by ICJ,<sup>6</sup> that of the proposal of the Mediator (specifically His Holiness Pope John Paul II) of 12 December 1980 concerning the Beagle Channel<sup>7</sup> and that of the *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), mentioned earlier, clearly showed that the draft articles responded to legal and political realities and deserved to be firmly supported and submitted to the General Assembly, where the Latin American countries would certainly not fail to support them just as firmly.

21. Mr. EIRIKSSON said that he wondered whether the debate over the title of article 7 was not based on a misunderstanding, since the Drafting Committee had actually agreed that the title should be "Validity of the arbitral award".

22. Mr. YANKOV (Chairman of the Drafting Committee) said that the title chosen by the Drafting Committee for article 7 was in fact the one indicated by Mr. Eiriksson, but the proposals made during the debate for changing it were interesting, inasmuch as the structure of the seven articles as a whole should be preserved by maintaining the expression "Judicial settlement". Perhaps article 7 should be entitled: "Judicial settlement concerning the validity of the arbitral award".

23. Mr. AL-BAHARNA said that he endorsed the draft articles, which he considered to be a consensus text, but would like to comment on a few details concerning both substance and drafting. In the case of article 4, paragraph 3 should indicate whether the Conciliation Commission, at its discretion, might also comment on the explanation given of the "exceptional reasons" referred to in paragraph 2. Paragraph 4 stipulated that the Conciliation Commission might specify the period within which the parties were to respond to its recommendations, but the idea of a time-frame was missing from paragraph 5, which should therefore begin with, "If, after the end of the period specified in paragraph 4, the response by the parties". Finally, paragraph 5 should state that, in the event that one of the parties had accepted the Commission's recommendations but the other had not, mention should be made of that in the final report.

<sup>5</sup> See 2417th meeting, footnote 9.

<sup>6</sup> *Judgment, I.C.J. Reports 1960*, p. 192.

<sup>7</sup> "Mediación de la Santa Sede sobre el Canal de Beagle", *Revista Española de Derecho Internacional*, vol. XXXVII, No. 1 (1985), p. 291.

24. Article 5, paragraph 2, did not seem to raise a real problem of the relationship between weak and strong States, but since it introduced the right to unilaterally submit the dispute to a tribunal, the same right might be accorded in paragraph 1, by replacing the expression "by agreement" with the word "unilaterally".

25. The phrase used in paragraph 2, "where the dispute arises between States Parties to the present draft articles" was not really needed, for everyone knew that the settlement procedure in question applied only to the States parties to the draft articles under review. Instead of repeating it each time, it might be better to insert, as a "chapeau", before article 1, at the very beginning of the draft, a sentence indicating that the dispute settlement procedure applied to the parties to the present draft articles.

26. With regard to article 7, paragraph 1 stipulated that ICJ might declare the total or partial nullity of the award, but paragraph 2 began with "The issues in dispute left unresolved" and therefore concerned only partial nullity. Paragraph 2 should therefore be reformulated and divided into two subparagraphs, the first to stipulate that, in the case of total nullity, the dispute would be resubmitted to arbitration, and the second to contain existing paragraph 2 preceded by "For partial nullification,".

27. With regard to the annex, for the sake of clarity it would be preferable to have not a single annex comprising two articles but two different annexes, the first entitled, "Rules relating to the Conciliation Commission" and the second "Rules relating to the Arbitral Tribunal". On another matter, the second sentence of article 1, paragraph 1, of the annex spoke of "every State which is a Member of the United Nations or a Party to the present articles". In his opinion, the word "or" should be replaced by "and", for the articles obviously did not apply to States that were not parties to them.

28. The expression "present and voting" should be added at the end of article 1, paragraph 5, and the second sentence of article 2, paragraph 7, should read: "Decisions of the Arbitral Tribunal shall be made by a majority vote of the five members present and voting." Article 2, paragraph 1, stated: "The three other arbitrators ... shall be chosen by common agreement from among the nationals of third States", whereas the Commission generally used the term "agreement" and not "common agreement". Furthermore, only one of the two formulations, "from among the nationals of third States", in paragraph 1, and "shall be of different nationalities" in paragraph 2, should be used. Lastly, the word "may", in the last sentence of paragraph 2, should be changed to "shall".

29. Mr. ROSENSTOCK said that he had been one of the two members of the Drafting Committee to express reservations about the dispute settlement procedure. It might indeed be questioned whether it was for the Commission, at the present stage, to decide in favour of a treaty-based instrument and whether the decision to include a part three was not a political decision that should be taken by a conference. The risk of conflict between those provisions and other dispute settlement systems should also be borne in mind, as had been pointed out earlier.

30. Despite those doubts, however, he believed it useful to give States indications of what such a dispute settlement system might be like, to provide them with a model, as it were. Article 5, paragraph 1, naturally left States free to act and gave them the opportunity, if they wished, to submit their dispute to an arbitral tribunal. Paragraph 2, however, went far beyond a mere suggestion, and it would therefore be useful to learn the General Assembly's reaction to it.

31. He was not entirely convinced by article 7, but it went without saying that States were free to accept or reject the proposed system. Accordingly, he would not object to the draft articles being submitted to the General Assembly in their present form.

32. Mr. TOMUSCHAT said he, too, thought it would be preferable not to include part three in the draft articles on State responsibility, but on the whole the proposed provisions had their merits; he would therefore be prepared to support them. Nevertheless, article 1 raised a basic problem, for the expression, "the interpretation or application of the present draft articles" was ambiguous. In particular, it raised the question of the link with the underlying dispute over primary rules, inasmuch as the draft articles dealt with secondary rules. Obviously, the dispute would never involve the draft articles on State responsibility alone. That problem had been raised in the Drafting Committee, and it had been clear that it would not be possible to keep to secondary rules and that the actual substance of the dispute would have to be examined. In that case, there would be a conflict between the general dispute settlement system under discussion and the particular systems provided for in specific treaties, as Mr. Mikulka had pointed out. How could that conflict be resolved and which system would prevail? It was a real difficulty that deserved careful consideration.

33. As for article 5, the principle set forth in paragraph 2, whereby the State against which countermeasures had been taken was entitled unilaterally to submit the dispute to an arbitral tribunal, would be particularly useful for smaller and weaker States, as Mr. Barboza had rightly pointed out. Hence, the objections to that paragraph were not very convincing. As far as the arbitral tribunal was concerned, he would have preferred it to be a standing body, given the practical, material and financial difficulties entailed in establishing a special tribunal of that type. Lastly, at the present stage in the work, namely four days from the end of the session, the Commission was not in a position to take all of Mr. Al-Baharna's proposals into account. It might none the less take note of them and use them as a basis for discussion when it came to consider the draft articles on second reading.

34. Mr. VARGAS CARREÑO said that the proposed draft articles properly codified the applicable rules and practice concerning dispute settlement. Mr. Tomuschat's remark regarding article 1 was entirely relevant and should certainly be included in the commentary, but in the case at hand, the proposed dispute settlement mechanism related essentially to disputes over the interpretation or application of the draft articles under consideration.

35. Articles 2, 3 and 5 reflected existing practice, since many other conventions provided for identical systems,

and they were therefore wholly appropriate. Article 5, paragraph 2, laid down a fundamental rule. Countermeasures were essentially exceptional in nature, and it was normal for the State against which countermeasures had been taken to be able, as proposed in the article, unilaterally to submit the dispute to an arbitral tribunal constituted in conformity with procedures set out in the annex. Although he fully approved of the idea expressed in article 7 and the way it was formulated, he agreed with other members that it would be better to amend the title and replace "Judicial settlement" by "Challenge to the validity of an arbitral award".

36. The provisions in the annex concerning the Conciliation Commission and the Arbitral Tribunal were entirely acceptable, especially since it was not the time to make changes. Any necessary amendments might be considered when the articles were considered on second reading.

37. The CHAIRMAN, speaking as a member of the Commission, said that he had no real objections to the proposed draft articles being adopted in their present form and being referred to the General Assembly. He would like to point out, however, that countermeasures were at best an attempt to "force the hand" of the law and at worst a threat to world public order. He would also point out that it was essential for the draft articles to be adopted by consensus. Any other approach would create more problems than it would solve.

38. Mr. PELLET said it was regrettable that some members of the Commission did not respect the views expressed by others. Those who tried to give "elementary" lessons in law should not make too many mistakes themselves. Thus, failure to join a consensus should not be confused with a veto. He had no intention of exercising a veto; he simply could not join a consensus on the proposed draft articles. He was prepared to endorse the views of Mr. Bowett, who shared his feelings about the danger inherent in article 5, paragraph 2, which encouraged the use of countermeasures, but he did not oppose a consensus, provided it was clearly indicated that part three of the draft was optional or at least that the Commission intended to consult States on whether the part should be made optional or compulsory. He was convinced that the provisions of part three posed a serious threat to the acceptability of the draft as a whole, but in particular of part one, to which he personally was very attached. That was basically why he was opposed to them.

39. He would point out to Mr. Thiam, who had challenged him on the point, that article 5, paragraph 2, indirectly but very clearly encouraged States to resort to countermeasures, which everyone knew were the weapon of the strong and only the strong; what was more, as Mr. Mikulka had also pointed out, the cost of arbitration was an aggravating factor for the poor States. He added that he agreed with Mr. Mikulka's proposal to the effect that at least one article should spell out the relationship between the system envisaged and other existing dispute settlement mechanisms, as he himself had suggested, unsuccessfully, in the Drafting Committee.

40. If, as Mr. Bowett had said, it would be nonsense to specify the conditions under which ICJ might be seized, the precautions taken by the Commission in 1958 to

limit and carefully specify the conditions for going to ICJ regarding the validity of arbitral awards were also nonsense. In his opinion, it would be wise to provide an exhaustive list of those conditions, as Mr. Barboza had proposed.

41. If, unfortunately, the draft were adopted, it would be useful at least to change the title of article 7 to read as Mr. Bowett or Mr. Razafindralambo had suggested. He was also in favour of the amendment proposed by Mr. Bennouna to limit the time-frame for recourse to ICJ.

42. The argument put forward by those in favour of the draft articles was that they were "for" the compulsory settlement of disputes. He too favoured such settlement, but he did not feel vested with the powers of a legislator to make a judgement in favour of the system that appeared to him the best in the abstract. The Commission's essential tasks were the codification and progressive and reasonable development of international law. However, the proposed draft articles were not reasonable. Accordingly, he requested that the text should be put to a vote. If the Commission refused, he was prepared to accept it, provided the report to the General Assembly clearly stated that the Commission had not been able to adopt the draft articles by consensus, a consensus to which he was firmly opposed, and that the arguments of the opponents, even if they were a minority, appeared in the report.

43. Mr. ARANGIO-RUIZ (Special Rapporteur), referring to Mr. Pellet's comment about the need for the report to the General Assembly to state clearly that part three was only optional in character, pointed out that everything the Commission submitted to the General Assembly and to Governments was ultimately optional in that it would be ultimately for States to decide whether given provisions of a project should be optional or compulsory. Accordingly, there was no point in saying so. One member had expressed concern about the scope of the draft articles and he would point out that disputes would plainly involve not only secondary rules but also primary ones. It was apparent from article 1 that the interpretation or application of the draft articles inevitably involved primary rules. As to the relationship with dispute settlement systems in other conventions, articles 3 and 5 expressly stated that a dispute could be submitted to conciliation or arbitration if it had not been settled "by agreement" or "failing an agreed settlement" and "no mode of binding third-party settlement has been instituted". Accordingly, if other settlement procedures did exist and had proved their worth, there was no reason not to use them. Obviously, it was "*lex specialis*" that would apply.

44. Some members had expressed reservations about article 7 because it did not specifically establish the period of time in which a party to a dispute could challenge the validity of an arbitral award. In his opinion, it did not lie with the Commission to establish the period. Only the Court could determine whether it was too late to challenge the validity of an arbitral award. The Commission should only be concerned with establishing the rules that were to apply when the challenge was initiated.

45. Lastly, with reference to the change proposed by Mr. Al-Baharna to paragraph 2 of article 7 for the pur-

pose of drawing a distinction between complete and partial nullification of the award, he would suggest, to settle the problem, that the words "The issues in dispute" should be replaced by "Any issue in dispute", which would allow for every possibility.

46. Mr. YANKOV (Chairman of the Drafting Committee) thanked all members who had taken part in the discussion for their useful and constructive criticism and for their suggestions. The proposals made could be classed in three groups. First, there were proposals for drafting changes that could be accepted immediately; secondly, proposals that could take the form of observations in the commentary; and thirdly, proposals and observations that it would be more useful to consider on second reading of the draft. The summary records could be useful in obtaining an accurate idea of the proposals made in connection with each article.

47. Generally speaking, he would point out, more particularly to Mr. Rosenstock, that part three had not been invented by the Drafting Committee. It was the result of a decision taken by the Commission itself several years earlier and approved by the General Assembly. Consequently, it was too late to go back on it. Moreover, it should be remembered that the articles were being discussed on first reading and it would be advisable to await the reaction of Governments. Perhaps it would prove necessary, as Mr. Mikulka had suggested, to insert a general clause clarifying the relationship between the draft and other multilateral conventions.

48. Considering article by article the comments and proposals made during the debate, he said that, in regard to article 1, he had duly noted Mr. Tomuschat's comment about the ambiguity of the phrase "the interpretation or application of the present draft articles". However, it seemed difficult at the present stage to reformulate the article entirely and he therefore proposed that either the commentary should include explanations about possible problems concerning the distinction between primary and secondary rules or to revert to the matter on second reading.

49. In regard to article 2, he welcomed the proposal by Mr. Idris to delete the word "other", which was redundant. Article 3 had not given rise to any special comment.

50. As far as article 4 was concerned, he could not agree to the proposal by Mr. Idris to delete the words "or otherwise" from paragraph 1. As the Drafting Committee had explained in its report, inquiry was not the only means the Conciliation Commission could use to collect information. It could also request reports, examine documents, hear witnesses, and so on. The words "or otherwise" served a purpose and could be clarified in the commentary.

51. With reference to article 5, Mr. Al-Baharna's proposal that the words "by agreement" should be deleted from paragraph 1 and replaced by "unilaterally" was not anodyne. It was a substantive change that concerned the entire philosophy of arbitration. The matter in hand was conventional arbitration, which presupposed an agreement.



52. Mr. AL-BAHARNA said he had not asked for the text to be changed. He had simply tried to draw a parallel with article 5, paragraph 2, and specify that, failing an agreement, either party could submit the dispute to an arbitral tribunal.
53. Mr. YANKOV (Chairman of the Drafting Committee) said that he took note of Mr. Al-Baharna's explanation. Again, with reference to article 5, Mr. Razafindralambo had proposed the addition at the end of each of the article's two paragraphs of a formulation specifying that the parties were free to choose the kind of arbitral tribunal to which they submitted their disputes. That was not necessary. It went without saying that the parties had such freedom of choice. The most one could do would be to emphasize it in the commentary.
54. Unlike article 6, on which no proposal had been made, article 7 had been the subject of much comment. To begin with, he suggested that the title should be changed to the one previously adopted by the Drafting Committee, namely "Validity of an arbitral award", for that was what the whole article was about. As to the proposal by Mr. Bennouna and several other members to insert a time-frame after the word "If", in the first line of paragraph 1, he would suggest that the idea could be developed in the commentary. However, it was his understanding that several members wanted to make further comments on that point.
55. Mr. AL-BAHARNA said it might be better to clarify the meaning of the word "timely", which was employed in article 7, paragraph 1.
56. Mr. ROSENSTOCK said that a clarification might be given in the commentary.
57. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, to make the paragraph more logical and specify the time from which the period of three months was to commence, the word "award", in the second line, could be replaced by "challenge".
58. Mr. PELLET said that, in his opinion, it was a substantive change and he could not agree to it.
59. The CHAIRMAN suggested that the existing formulation should be adopted. Every word had been weighed carefully by the Drafting Committee.
60. Mr. BENNOUNA, supported by Mr. ROSENSTOCK, said that the Special Rapporteur's proposal would indeed have the merit of making things more logical. It would be clear that the three-month period commenced when the award was challenged. However, the challenge itself should not take place too long after the award was made, but that could be explained in the commentary.
61. Mr. EIRIKSSON said that, in view of the Special Rapporteur's explanations, he saw no reason why the word "award" should not be replaced by "challenge". It was in fact a minor drafting change.
62. The CHAIRMAN said that, if he heard no objection, he would take it that members agreed to the change. He invited the Chairman of the Drafting Committee to continue his summing-up of the discussion.
63. Mr. YANKOV (Chairman of the Drafting Committee) said that two points had arisen in connection with paragraph 2 of article 7. The first was a drafting matter. Further to the comments by Mr. Al-Baharna, supported by a number of other members, the Special Rapporteur had suggested that, at the beginning of the paragraph, the words "The issues in dispute" should be replaced by "Any issue in dispute". The change seemed to command unanimity and he would take it that the Commission had agreed to it.
64. A second, more important, point concerned the reference to article 6 at the end of the paragraph. It had been pointed out that the reference could well lead to confusion and that it would be better to refer to article 2 of the annex. Mr. Razafindralambo, on the other hand, had thought it preferable to reformulate the paragraph. The proposal was attractive, but it could raise further problems. Accordingly, in view of the fact that the Commission would revert to the draft articles on second reading, he would suggest that, for the time being, the Commission should take note of Mr. Razafindralambo's comments so that they would be borne in mind at the next session and that only the first drafting change proposed for the paragraph should be adopted.
65. Mr. AL-BAHARNA said that, for greater clarity, it would be better to replace the words "The issues in dispute" by "Any issues in dispute". In addition, if the Commission decided to replace "award" by "challenge", that should be taken into account in the title of the article, which should then logically read "Challenge to the validity of an arbitral award".
66. Mr. BENNOUNA said that the French version of article 7, paragraph 1, was clumsy. The words "*par l'une ou l'autre*" should be replaced by "*du fait de l'une ou de l'autre*".
67. The CHAIRMAN said that he endorsed the proposal by the Chairman of the Drafting Committee to revert to Mr. Razafindralambo's suggestion on second reading of the draft articles. At that time, Mr. Al-Baharna's comments could also be looked at more closely.

*The meeting rose at 1 p.m.*

## 2421st MEETING

*Tuesday, 18 July 1995, at 3.15 p.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda,*

Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Vilagrán Kramer, Mr. Yamada, Mr. Yankov.

**State responsibility (concluded)** (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE<sup>2</sup>**  
(concluded)

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce certain proposals for amendments to the annex to part three of the draft on the settlement of disputes (A/CN.4/L.513).

2. Mr. YANKOV (Chairman of the Drafting Committee) said Mr. Al-Baharna had proposed that the word "or", in the second sentence of article 1 of the annex, should be replaced by the word "and". At that late stage in the session, however, he would himself suggest that the text should be retained as drafted, on the understanding that the point could be reconsidered on second reading. Mr. Al-Baharna had also proposed that the word "common", in article 2, paragraph 1, should be deleted. Again, it would, in his view, be preferable if the formulation was retained in its present form. Mr. Al-Baharna had further proposed that the words "may not be nationals", in the penultimate line of paragraph 2, should be replaced by "shall not be nationals". The original wording had, however, been taken from certain other instruments such as the United Nations Convention on the Law of the Sea, and he would advise that it should be retained. Mr. Al-Baharna had also suggested a number of drafting changes to paragraphs 3, 4 and 5, which could perhaps be dealt with when the draft was considered on second reading, as well as the addition, in paragraph 7, of the words "present and voting" after the words "five members". As he himself read paragraph 7, however, the Arbitral Tribunal, if made up of five members, would in any event be a duly constituted tribunal; he trusted therefore that Mr. Al-Baharna would not insist on that point.

3. Mr. Razafindralambo had also made a proposal concerning article 5 and might wish to explain it to the Commission.

4. Mr. RAZAFINDRALAMBO said that his proposal was simply that provision should be made at the end of paragraphs 1 and 2 of article 5 for the parties to a dispute to have recourse to an arbitral tribunal other than that constituted "in conformity with the Annex to the present articles".

5. Mr. YANKOV (Chairman of the Drafting Committee) said that Mr. Razafindralambo's proposal might have implications for subsequent stages of the mechanism provided for in the draft. In his opinion, it would be preferable to bear the point in mind for discussion at a later stage.

6. Mr. ROSENSTOCK said that the point had been discussed at some length in the Drafting Committee when it had been agreed that article 5, paragraph 1, was without prejudice to the freedom of action of States as to the form and timing of the arbitration, and that that should be made clear in the commentary. In the circumstances, there would seem to be no need for Mr. Razafindralambo's proposed amendment.

7. Mr. PELLET said that Mr. Razafindralambo's proposal underlined the need for serious thought to be given to the interplay between the draft articles and dispute settlement methods provided for elsewhere. The aim, after all, was to encourage recourse to a system for the settlement of disputes, and not necessarily to the particular system set out in the draft. Hence there was no reason to insist on that system. To that extent, Mr. Razafindralambo's proposal was perfectly reasonable. However, he would have preferred the proposal made by Mr. Rosenstock in the Drafting Committee, namely, that, where conciliation did not succeed, recourse could be had either to arbitration or to ICJ. That would avoid endless, complicated procedures. It had been said that, with the session drawing to a close, there was not enough time to deal with the matter, which could in any event be covered in the commentaries. That was not a valid argument. The issue was important and the Commission must take time to discuss it—if not at the current session then at the next one.

8. The CHAIRMAN said that Mr. Razafindralambo's proposal was not being rejected for lack of time. His own understanding of the position was that the point was already covered, since the parties to a dispute were not denied the freedom to establish the forum of their choice. There was nothing to prevent them from exercising such a right or from opting for the scheme provided for in the draft. The main question was whether that should be made clear in the body of the article or in the commentary.

9. Mr. de SARAM said he failed to see what the problem was. The word "may", in the third line of paragraph 1 of article 5, was permissive and did not preclude other systems for the settlement of disputes. If that had to be explained in the commentary, so be it.

10. Mr. BENNOUNA said that he fully agreed with Mr. de Saram. It was not a question of rushing matters but of achieving a result. Accordingly, he too failed to see where the problem lay.

11. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Razafindralambo's point could be covered briefly in the commentary.

12. The CHAIRMAN asked whether the Commission could agree at that stage to adopt the draft articles proposed by the Drafting Committee for part three, on the

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>2</sup> For the text of the articles of, and the annex to, part three of the draft as proposed by the Drafting Committee, see 2417th meeting, para. 1.

understanding that commentaries to those articles would be provided before the end of the session.

13. Mr. PELLET said that, as he had made plain at the previous meeting, he was opposed to the draft articles submitted in part three. He would therefore insist that the report did not state that part three of the draft had been adopted by consensus. He would also like to receive a guarantee from both the Commission's Rapporteur and the Chairman of the Drafting Committee that his opposition—opposition, not reservation—to the draft articles as a whole, and specifically to article 5, paragraph 2, and to article 7, would be recorded in the Commission's report to the General Assembly.

14. Mr. BENNOUNA said that, if Mr. Pellet was determined to oppose part three of the draft, he should seek a vote, as provided for in the rules of procedure. If, on the other hand, the matter could be settled without a vote, Mr. Pellet's views would be reflected in the summary record.

15. Mr. PELLET said that he did not wish merely to have his views reflected in the summary records. He wished it to be made clear in the report that two members had opposed adoption of the draft articles.

16. Mr. HE said that he would prefer part three of the draft articles to be adopted after parts one and two. If a vote was held at the current meeting, he would abstain.

17. Mr. AL-KHASAWNEH said that he endorsed Mr. Bennouna's views.

18. The CHAIRMAN asked whether members agreed to adopt the draft articles by consensus, with one member opposing.

19. Mr. BENNOUNA said that he firmly opposed the breaking of rules of procedure that had been established for decades. Mr. Pellet should either join in the consensus, with his views being reflected in the record, or request a vote.

20. The CHAIRMAN said that if Mr. Pellet wished to maintain his opposition, the Commission would proceed to a vote.

21. Mr. PELLET, replying to Mr. Bennouna, said that the Commission broke its rules of procedure every day, rules which made no provision for consensus. His own position had been meant to be flexible, but if the members insisted he would request a vote.

22. Mr. MIKULKA said that neither the Special Rapporteur nor the Chairman of the Drafting Committee had found it necessary to reply to the question he had raised at the previous meeting, namely whether they intended to return to the problem of the relationship between the system of dispute settlement contained in the draft articles and systems envisaged in other instruments. Referral to *lex specialis* was not sufficient. The question that arose was which *lex specialis*? In a case of diplomatic protection, for example, many instruments might apply. Indeed, if the Commission did not look into that problem itself, the General Assembly would tell it to do so. The

answer to his question would affect the way he intended to vote.

23. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was his impression that he had replied to Mr. Mikulka, not only by referring to *lex specialis* but by indicating that it was clear in some of the articles that other possibilities were open to the parties. The parties were in a strait-jacket, as it were, only in given situations such as the ones envisaged in article 3 and article 5, paragraph 2. In any case, he was the first to maintain that the Commission's work on dispute settlement within the framework of the draft on State responsibility was not completed. That could be seen clearly from the paragraphs which constituted the introduction to the commentary to the articles, which he hoped would be issued the following day. Considering the connection he had established from the outset between article 12, of part two, and part three, and considering also other problems in part three and the need to look into article 7, it was plain that the Commission must take up the issue in the future. In doing so, it would consider the general problem to which Mr. Mikulka had referred.

24. He, as well as Mr. Calero Rodrigues, had always objected to the Drafting Committee's examination of article 12 separately from part three. That method did not make it clear that there was a problem of coexistence between means of dispute settlement to which States were bound independently of the future convention, which had been his intention in article 12, and the means which were established directly in the convention by part three.

25. Mr. YANKOV (Chairman of the Drafting Committee) said he agreed that the Commission should return to the issue of the relationship between the proposed convention and other international instruments, and indeed a number of other issues as well. However, that should not be an obstacle to taking a decision now on draft articles that it had worked on for nearly two months. He wished to appeal to members' wisdom and sense of responsibility in that regard.

26. Mr. AL-BAHARNA said that he was reluctant to proceed to a vote.

27. Mr. MAHIOU said that there appeared to be a misunderstanding between Mr. Mikulka, on the one hand, and the Special Rapporteur and Chairman of the Drafting Committee, on the other. The latter both agreed that the problem raised by Mr. Mikulka needed further study.

28. Mr. ROSENSTOCK pointed out that commentaries were obviously the commentaries of the entire Commission. In the case in point, the commentary could only relate to the version of article 12 that had twice been approved by the Drafting Committee. He could not accept the introduction of other versions of article 12 into the commentary on part three, something that would plainly lead to voting on the commentary as well.

29. Mr. MIKULKA said that he was satisfied with the replies by the Special Rapporteur and Chairman of the Drafting Committee, regarding them as a promise that the problem would be taken up again. Accordingly, he would experience no difficulty regarding the adoption of the articles.

30. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in replying to Mr. Mikulka, he had acknowledged that there was a problem of the relationship between the dispute settlement means in part three and those to which the parties were bound in other relevant international instruments. Unfortunately, every time article 12 was mentioned, Mr. Rosenstock raised an objection.

31. With reference to the doubts expressed as to the feasibility of the draft articles becoming a convention, he did not see the point of the Commission working for many years on such a project without proposing a convention to States.

32. Mr. ROSENSTOCK, speaking on a point of order, said that he had never raised any objection to the Special Rapporteur saying or writing whatever he wished. He had merely said that it must be borne in mind that the commentaries of the Commission were the common property of the Commission.

33. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he did not know to which commentaries Mr. Rosenstock was referring. He had been working on commentaries, and he saw no reason why those commentaries should be known to Mr. Rosenstock any more than to other members of the Commission. In those commentaries, he pointed out precisely the fact that there was the problem of the relationship between part three and article 12 of part two, both as he had originally conceived it and as it currently stood. The fact that he mentioned article 12 did not mean that he wanted to impose his own solutions. He merely meant that the Commission must take a further look at part three together with article 12 in whatever form it ultimately took. The commentaries were undeniably the Commission's common property. However, the Commission could not in all conscience fail to state in the commentaries that there was a problem outstanding.

34. The CHAIRMAN said that, if he heard no objection, he would take it that the members agreed to proceed to a vote on part three of the draft articles on State responsibility, relating to the settlement of disputes (A/CN.4/L.513).

*Part three of the draft articles was adopted by 17 votes to 1, with 2 abstentions.*

35. Mr. AL-KHASAWNEH, speaking in explanation of vote, said that the articles in part three had called for compromise on all sides. Actually, he considered part three to be too weak. In particular, the fact that compulsory arbitration was confined to situations in which countermeasures had already been taken encouraged States to take the law into their own hands, in other words, to take countermeasures.

36. Mr. de SARAM said that he agreed with the views expressed by Mr. Al-Khasawneh and also earlier by Mr. Jacovides. The excellent mechanism provided for in part three gave States an opportunity at every juncture to choose their mode of dispute settlement. It was an achievement of which the Commission could be rightly proud.

## **Draft report of the Commission on the work of its forty-seventh session (*continued*)\***

### **CHAPTER III. *State responsibility* (continued)\* (A/CN.4/L.512 and Add.1)**

#### **B. *Consideration of the topic at the present session* (continued)\***

37. The CHAIRMAN invited the Commission to resume its consideration of chapter III of the draft report, beginning with paragraph 38.

Paragraph 38 (*concluded*)\*

38. Mr. AL-BAHARNA proposed that the word "continually" should be deleted from the last sentence of the paragraph.

39. Mr. ARANGIO-RUIZ (Special Rapporteur) and Mr. MAHIOU said they would prefer the original wording to stand: the adverb "continually" reflected what had actually happened during the debate.

40. Mr. YANKOV said that, as a general principle, the Commission should not change wording which reflected views expressed in plenary.

41. The CHAIRMAN suggested that, because many members were dissatisfied with the second sentence of paragraph 38 and since the ideas expressed in it were repeated elsewhere, the sentence should be deleted.

*It was so agreed.*

*Paragraph 38, as amended, was adopted.*

Paragraphs 39 to 42

*Paragraphs 39 to 42 were adopted.*

Paragraph 43

42. Mr. PELLET, supported by Mr. MAHIOU, said that the reference, at the beginning of the first sentence to the "Special Rapporteur's position" made it unclear whether the Special Rapporteur or the members had expressed the view described.

43. The CHAIRMAN suggested that the words "A number of members expressed agreement with the Special Rapporteur's position that", in the first sentence, should be replaced by "A number of members considered that".

*It was so agreed.*

*Paragraph 43, as amended, was adopted.*

Paragraphs 44 to 46

*Paragraphs 44 to 46 were adopted.*

\* Resumed from the 2419th meeting.

## Paragraph 47

44. Mr. YANKOV said that the reference to the views of the Special Rapporteur, in the first sentence, was unnecessary and should be deleted.

43. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had expressed the view reflected in paragraph 47 and had even produced an informal text dealing with the matter.

44. Mr. MAHIOU said that he, too, had expressed views on the subject dealt with in paragraph 47.

45. The CHAIRMAN suggested that the phrase "In response to a view expressed" should be inserted at the beginning of the first sentence. The reference to the Special Rapporteur would be retained.

*It was so agreed.*

*Paragraph 47, as amended, was adopted.*

## Paragraphs 48 to 57

*Paragraphs 48 to 57 were adopted.*

## Paragraph 58

48. Mr. TOMUSCHAT said that he objected to the fourth sentence of paragraph 58, which stated that "aggression was often committed by industrialized democracies".

49. Mr. ARANGIO-RUIZ (Special Rapporteur) said the assertion that aggression was often committed by industrialized democracies might appear to contradict the statement earlier in the same sentence that "aggression was a wrongful act frequently perpetrated by dictators or otherwise despotic governments". Nevertheless, it could not be said to be untrue and, since it expressed a member's opinion, it should be left as it stood.

50. Mr. BOWETT suggested that the words "was often", in the fourth sentence, should be replaced by "could be".

51. The CHAIRMAN suggested that the best solution would be to delete the entire sentence.

*It was so agreed.*

*Paragraph 58, as amended, was adopted.*

## Paragraph 59

52. Mr. HE proposed that the words "consequences of the crime", in the fourth sentence, should be replaced by "consequences of a crime".

*Paragraph 59, as amended, was adopted.*

## Paragraph 60

53. Mr. BOWETT proposed that the phrase "on the basis that the right to self-determination justifies it"

should be inserted after "it would be inconceivable for a judicial body to sever part of a State's territory", in the fourth sentence, in order to make the point more clear to the reader.

*Paragraph 60, as amended, was adopted.*

## Paragraphs 61 to 73

*Paragraphs 61 to 73 were adopted.*

## Paragraph 74

54. Mr. HE, supported by Mr. PELLET, suggested that the words "Some members, on the other hand", in the first sentence, should be replaced by "Other members".

*Paragraph 74, as amended, was adopted.*

## Paragraph 75

55. Mr. PELLET said that the first sentence in the French version should be changed to reflect the English version accurately.

*Paragraph 75 was adopted on that understanding.*

## Paragraph 76

56. Mr. ROSENSTOCK proposed that after the words "was viewed as incompatible with Article 27, paragraph 3", in the second sentence of paragraph 76, subparagraph (iii), the following words should be inserted: "bearing in mind, *inter alia*, that the Security Council would often be acting under Article 39 of Chapter VII".

57. Mr. PELLET proposed that, in the penultimate sentence, the words "in which case they were moot" should be replaced by "in which case they could not be adopted".

*Paragraph 76, as amended, was adopted.*

## Paragraphs 77 to 90

*Paragraphs 77 to 90 were adopted.*

## Paragraph 91

58. Mr. HE suggested that the following phrase should be added at the end of the paragraph: "when both the questionable notion of 'State crime' contained in article 19 of part one and its legal consequences could be dealt with at the same time".

*Paragraph 91, as amended, was adopted.*

## Paragraphs 92 and 93

*Paragraphs 92 and 93 were adopted.*

## Paragraph 94

59. Mr. PELLET proposed the deletion of the English terms appearing in the French text of the paragraph, which was perfectly satisfactory without them.

*Paragraph 94, as amended, was adopted.*

## Paragraphs 95 to 105

*Paragraphs 95 to 105 were adopted.*

## Paragraph 106

60. Mr. HE proposed that, in order to reflect the minority views more precisely, the order of the last two sentences should be reversed and that the words "It was furthermore argued that the Commission was missing an opportunity" at the beginning of what was now the penultimate sentence should be replaced by "It was furthermore proposed that the Commission should defer the consideration of this question until the second reading, when it would have an opportunity", the remainder of the sentence remaining unchanged.

61. Mr. ARANGIO-RUIZ (Special Rapporteur) noted that a sentence to the same effect had already been added to paragraph 91.

62. The CHAIRMAN said that, if the point had been made twice in the discussion, it could be reflected twice in the report.

63. Mr. PELLET remarked that the quality of the report was not enhanced by repetitions.

64. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, if Mr. He's amendment was to be adopted, he would wish to add a passage indicating his disagreement with the views reflected in the sentences in question.

65. Mr. ROSENSTOCK said that he had no objection to the proposed addition but did not consider it essential to wait for the second reading before considering at the same time the issues raised by the concept of crime and the consequences to be drawn therefrom.

66. The CHAIRMAN said that, unless he heard any objections, he would take it that the Commission agreed to the amendment proposed by Mr. He.

*Paragraph 106, as amended, was adopted.*

## Paragraph 107

67. Mr. JACOVIDES said that the expression "blank cheque" in the last part of the paragraph was unfortunate and could give rise to misinterpretations. Perhaps the words "would be tantamount to giving the Committee a blank cheque" might be replaced by "would be devoid of meaning".

68. Mr. MIKULKA said that he had employed the expression referred to and would prefer the text to be maintained as it stood.

*Paragraph 107 was adopted.*

## Paragraph 108

69. Mr. HE recalled that, after the vote referred to in the paragraph, two members of the Commission, Mr. Yamada and Mr. Thiam, had made statements explaining that their affirmative vote should not be interpreted as an endorsement of the draft articles proposed by the Special Rapporteur. He wondered whether a sentence to that effect should not be added to paragraph 108.

70. Mr. YAMADA said that the statement he had made in explanation of his vote was correctly reflected in the summary record of the 2406th meeting. He did not think a further reference in the report was necessary.

71. Mr. de SARAM suggested that the words "on the subject", at the end of the paragraph, should be replaced by "in the Commission".

*Paragraph 108, as amended, was adopted.*

72. The CHAIRMAN said that a short addendum to chapter III of the report, consisting of two or three paragraphs and reflecting the decision taken by the Commission earlier in the meeting, would be issued separately and placed before the Commission. He hoped members would be prepared to consider that document, as well as others still outstanding, even if they could not be made available in more than one or, at most, two languages before the end of the session.

73. Mr. PELLET said that a short addendum consisting of only two or three paragraphs would hardly suffice to reflect the lengthy discussion which had led up to the decision taken earlier in the meeting.

74. Mr. MAHIOU said that, while he understood the difficulties faced by the secretariat in having to translate so many documents at so late a stage in the session, he failed to see how members of the Commission who, like himself, had a less than perfect knowledge of English could adopt important decisions on the basis of documents available only in that language.

75. Mr. de SARAM said that he shared the concern expressed by Mr. Mahiou. Commentaries to draft articles, which the Commission would be called upon to consider during the remainder of the session, were even more important than the Commission's report and the full participation of members who did not use English as their working language was essential.

*The meeting rose at 6 p.m.*

## 2422nd MEETING

Wednesday, 19 July 1995, at 3.25 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, 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-seventh session (*continued*)

#### CHAPTER VI. *The law and practice relating to reservations to treaties* (A/CN.4/L.516)

1. The CHAIRMAN invited the Commission to consider Chapter VI of the draft report paragraph by paragraph.

##### A. Introduction

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Section A was adopted.*

##### B. Consideration of the topic at the present session

Paragraphs 4 and 5

*Paragraphs 4 and 5 were adopted.*

Paragraph 6

2. Mr. de SARAM, noting that the expressions “permissibility” and “opposability”, in the last sentence, were terms of art and might not be familiar to all readers of the report, suggested that they should be explained in the paragraph.

3. Mr. AL-KHASAWNEH pointed out that both terms were explained in paragraph 10 and suggested that a cross-reference should be included in paragraph 6.

*It was so agreed.*

4. Mr. BENNOUNA said that he had difficulties with the words “completion of political decolonization”, in the fourth sentence, and would prefer a formulation such as “ending of colonial domination”.

5. Mr. YANKOV agreed, adding that a similar change ought to be made in the first sentence of paragraph 31.

6. Mr. AL-KHASAWNEH said that he could see nothing wrong with the text as it stood.

7. Mr. PELLET (Special Rapporteur) said that the text corresponded to what he had said and should be maintained in both paragraphs.

8. Mr. de SARAM questioned the correctness of the words “political motives”, in the third sentence. If they were an exact translation of what Mr. Pellet had said in French, there would, of course, be no problem.

9. Mr. PELLET (Special Rapporteur) said that the English translation of the French expression “*arrière-pensées politiques*” was indeed a little lame.

10. The CHAIRMAN said that the secretariat would look into the matter at the editing stage.

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 to 10

*Paragraphs 7 to 10 were adopted.*

Paragraph 11

11. Mr. BOWETT said that the words “permissibilists” and “opposabilists” were not only unpronounceable but, in fact, non-existent in the English language. They should be replaced by a reference to “schools” of permissibility and opposability, a formulation which already appeared in paragraph 6.

*Paragraph 11, as amended, was adopted.*

Paragraphs 12 to 22

*Paragraphs 12 to 22 were adopted.*

Paragraph 23

12. Mr. IDRIS proposed that the phrase “unless they proved to be wholly impracticable”, at the end of the first sentence, should be deleted.

*Paragraph 23, as amended, was adopted.*

Paragraphs 24 to 28

*Paragraphs 24 to 28 were adopted.*

Paragraph 29

13. Mr. PELLET (Special Rapporteur) said that the tributes to the Special Rapporteur recorded in the first sentence, while highly gratifying to receive during the Commission’s deliberations, seemed out of place in the report. He would be prepared to see such references deleted in his own case and felt that it would be desirable if other Special Rapporteurs adopted the same approach.



14. The CHAIRMAN said he agreed that references to tributes paid during the discussions should be reduced to a minimum, but did not think that they should entirely disappear from the report. The secretariat would make the necessary changes.

*Paragraph 29 was adopted on that understanding.*

Paragraphs 30 to 34

*Paragraphs 30 to 34 were adopted.*

Paragraph 35

15. Mr. BOWETT said that the word "judge", at the beginning of the fourth sentence, should be replaced by "tribunal", as the ruling had in fact been made by five judges.

*Paragraph 35, as amended, was adopted.*

Paragraphs 36 to 41

*Paragraphs 36 to 41 were adopted.*

Paragraph 42

16. Mr. TOMUSCHAT said the paragraph seemed to imply that domestic law was the essential criterion which determined the difference between interpretative declarations and reservations. He wondered whether that had really been the view expressed in the debate.

17. Mr. ROSENSTOCK said that, as he recalled, the view expressed had been that interpretative statements were often a function or product of internal law.

18. The CHAIRMAN, speaking as the person expressing the view in question, agreed that the paragraph in its current form failed to reflect his meaning. A Government which, while entirely in agreement with the object of a treaty, was unable for reasons of domestic law to comply immediately with all its provisions would be inclined to make an interpretative declaration rather than a reservation. The text of the paragraph would be amended to reflect that idea.

*Paragraph 42 was adopted on that understanding.*

Paragraphs 43 to 57

*Paragraphs 43 to 57 were adopted.*

Paragraph 58

19. Mr. de SARAM, noting that the paragraph was the last one dealing with the debate on the problems of the topic as distinct from the scope of the Commission's future work on the topic, said that he could not find a reference in any of the previous paragraphs to his view that reservations were not necessarily, and not always, dictated by ulterior motives but that they sometimes stemmed from the failure on the part of a Government to

grasp all the nuances of a treaty's provisions. He would draft a sentence to that effect for inclusion in the appropriate paragraph.

20. Mr. PELLET (Special Rapporteur) suggested that the appropriate place would be at the end of paragraph 33.

*Paragraph 58 was adopted.*

Paragraph 59

*Paragraph 59 was adopted.*

Paragraph 60

21. Mr. THIAM proposed that the word "Some" at the beginning of the paragraph should be replaced by "Several".

*Paragraph 60, as amended, was adopted.*

Paragraph 61

22. Following a point raised by Mr. AL-KHASAWNEH, Mr. ROSENSTOCK proposed that the words "as risky as going back to the drawing board", in the second sentence, should be replaced by "as risky as revising the text of the Vienna Conventions".

*Paragraph 61, as amended, was adopted.*

Paragraphs 62 to 75

*Paragraphs 62 to 75 were adopted.*

Paragraph 76

23. Mr. IDRIS said that there seemed to be a certain lack of harmony between paragraph 76, the second sentence of which spoke of a "more flexible approach", and paragraph 26, which referred to the "drafting of model clauses". In his view, the two paragraphs should be harmonized for the sake of clarity.

24. Mr. PELLET (Special Rapporteur) said that the apparent lack of harmony between the two paragraphs in fact reflected a change of mind on his part as to the form the draft should take. None the less, he would like the two texts to stand as drafted.

*Paragraph 76 was adopted.*

Paragraphs 77 and 78

*Paragraphs 77 and 78 were adopted.*

Paragraphs 79 and 80

25. Mr. BENNOUNA said that it might have been better to preface paragraph 79 with a clause stating simply that the conclusions it listed were those of the Commission. A more serious problem, however, concerned sub-

paragraph (b), which was somewhat confused. It referred, on the one hand, to a guide, which would take the form of draft articles with commentaries, and, on the other, to model clauses. A guide should simply consist of a text designed to provide guidance concerning State practice, while model clauses should be proposed to States, along with commentaries, for possible incorporation in a convention. The conclusion set out in subparagraph (b) was basic to the Commission's work on the topic and must therefore be couched in the clearest terms, which was unfortunately not the case. The subparagraph should be reconsidered.

26. Mr. EIRIKSSON pointed out that the conclusion in question had already been adopted in the Commission following consultations. Consequently, discussion on it could not be reopened.

27. Mr. THIAM, agreeing with Mr. Bennouna, said that subparagraph (b) was not at all clear and it should be reworded. It was true that the conclusion had been adopted, but that did not mean it could not now be reviewed.

28. Mr. PELLET (Special Rapporteur) said that he had agreed to engage in consultations on the condition that, once the conclusion had been adopted, the matter would not be reopened. If the Commission none the less reverted to it, he would withdraw from the discussion. What was more, he would regard it as unfair to reopen the matter.

29. Mr. BENNOUNA, speaking on a point of order, said that he would ask the Special Rapporteur to withdraw his last remark. He was not questioning the Special Rapporteur's work, but merely asking him to clarify matters. It was important for members of the Commission to come to an agreement on a text that was to be submitted to the General Assembly.

30. Mr. MAHIOU said that, if paragraph 79 was understood to reflect the summary made by the Special Rapporteur, the responsibility for that summary lay with the Special Rapporteur and there would be no problem. The position would be different, however, if it was understood to reflect the conclusions of the Commission, and an amendment would be required. In any event, in his view paragraph 79 should remain as it stood.

31. Mr. BOWETT suggested that, to overcome the difficulty, the last phrase of subparagraph (b), reading "these provisions would, if necessary, be accompanied by model clauses" should be replaced by "the guide might also propose model clauses on reservations to be used in multilateral treaties with the aim of reducing controversies in the future". That would make a clear distinction between the purpose of the model clauses and the purpose of articles accompanied by commentaries.

32. Messrs. BARBOZA, IDRIS, TOMUSCHAT, de SARAM and YANKOV said that Mr. Bowett's suggestion was acceptable to them.

33. Mr. THIAM said that Mr. Bowett's suggestion would also be acceptable to him, unless the Special Rapporteur considered that subparagraph (b) reflected his own opinion, in which case the words "in the view of

the Commission", in paragraph 80, would have to be deleted.

34. Mr. AL-BAHARNA said that he saw no difference between subparagraph (b) as drafted and Mr. Bowett's suggestion. If it were agreeable to the Special Rapporteur, however, the subparagraph could perhaps end with the word "reservations", in the second sentence.

35. Mr. EIRIKSSON said that he had no difficulty regarding the text, at least in the English version. Mr. Bowett's suggestion simply spelt out the matter in more detail.

36. The CHAIRMAN said members appreciated that paragraph 79 expressed the Special Rapporteur's views but felt that, since it related to the form of the Commission's work on the topic and was to be submitted to the General Assembly, it should be clarified somewhat. He therefore appealed to the Special Rapporteur for his cooperation. In particular, was Mr. Bowett's suggestion acceptable to him?

37. Mr. PELLET (Special Rapporteur) said that it was a question of principle. The Commission had already discussed the text in question on two occasions and he had agreed to the negotiated text on condition that the Commission did not revert to the matter. Yet that was precisely what had happened. Consequently, he refused to participate in any further discussion on the matter. The Commission could do as it wished. If the text finally agreed was acceptable to him, he would say so. If not, he would tender his resignation as Special Rapporteur.

38. Mr. BENNOUNA said that he would like it to be placed on record that he found Mr. Pellet's behaviour before the Commission unacceptable. As Special Rapporteur, Mr. Pellet should take part in the discussion. If he did not do so, then paragraph 80 should be deleted.

39. Mr. THIAM said that, if paragraph 79 was retained, paragraph 80 would in any event have to be deleted, for it would be inaccurate to state that the Special Rapporteur's conclusions represented the views of the Commission.

40. Mr. EIRIKSSON said that Messrs. Bennouna, Mahiou and Thiam were mistaken in their recollection of what had occurred. Paragraph 80 had been part and parcel of the negotiated settlement and, consequently, the views reflected had been endorsed by the Commission. Therefore, he could not agree to the deletion of paragraph 80.

41. Following a proposal by Mr. IDRIS, the CHAIRMAN suggested that a small group, composed of Messrs. Bennouna, Bowett, Eiriksson, Mahiou, Pellet (Special Rapporteur), Rosenstock, Tomuschat and himself, should meet informally to agree on a revised text of subparagraph (b) of paragraph 79 for consideration by the Commission.

*It was so agreed.*

*The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.*

42. The CHAIRMAN announced that, in the informal discussions, agreement had been reached on the text for paragraphs 79 and 80. Paragraph 79 remained as it stood. For paragraph 80, a second sentence would be added at the end of the paragraph to read: "The Commission understood that the model clauses on reservations, to be inserted in multilateral treaties, would be designed to minimize disputes in the future." If he heard no objection, he would take it that the members agreed.

*Paragraph 79 and paragraph 80, as amended, were adopted.*

#### Paragraph 81

43. Mr. AL-BAHARNA proposed that the last phrase of the paragraph, "as regards reservations to treaties", should be placed after the word "questionnaire", and a full stop placed after the word "conventions".

*It was so agreed.*

*Paragraph 81, as amended, was adopted.*

44. Mr. BARBOZA said that a change should be made in the Spanish version of the title. "Ley" should be replaced by "Derecho".

45. Mr. de SARAM proposed that a new paragraph should be inserted after paragraph 33, reading:

"The view was also expressed by one member that it would be unrealistic to expect Governments not to insist on the protection of their national interests, after the adoption of a treaty, in the form of reservations, as they often did in the final stages before the adoption of a treaty in statements for the record—for inclusion in the *travaux préparatoires*. It also seemed reasonable to assume that Governments, when fully aware of all the issues and, having made up their minds to become parties to a treaty, would not wish to disengage themselves from the central core of obligations within a treaty. Moreover, there was no statistical or other basis for assuming that reserving States acted in bad faith. Indeed, in practice States that were making non-permissible reservations might well be under the misapprehension that the reservations were in fact permissible or might not in fact have looked into the question of what were or were not permissible reservations under a treaty."

*It was so agreed.*

*Section B, as amended, was adopted.*

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

#### CHAPTER I. Organization of the session (A/CN.4/L.517)

46. The CHAIRMAN invited the Commission to consider chapter I of the draft report (A/CN.4/L.517).

- A. Membership
- B. Officers
- C. Drafting Committee

- D. Working group on State succession and its impact on the nationality of natural and legal persons
- E. Working group on the identification of dangerous activities under the topic "International liability for injurious consequences of acts not prohibited by international law"
- F. Secretariat
- G. Agenda
- H. General description of the work of the Commission at its forty-seventh session

Paragraphs 1 to 13

*Paragraphs 1 to 13 were adopted.*

*Sections A to G were adopted.*

- H. General description of the work of the Commission at its forty-seventh session

Paragraphs 14 and 15

*Paragraphs 14 and 15 were adopted.*

Paragraphs 16 to 25

47. The CHAIRMAN drew attention to a number of corrections. In paragraph 16, the phrase "further to the decision reflected in paragraph 15 above," should be deleted. Paragraph 21 should read: "The Commission adopted the above-mentioned articles and the annex thereto in an amended form for inclusion in part three of the draft." In paragraph 24, the end of the first sentence should be replaced by: "namely articles A (Freedom of action and the limits thereto), B (Prevention) and D (Cooperation) and, as a working hypothesis, article C (Liability and reparation)". In paragraph 25, the following phrase should be inserted at the end of the paragraph: "and agreed that these conclusions constitute the result of the preliminary study requested by the General Assembly in resolutions 48/31 and 49/51".

*Paragraphs 16 to 25, as amended, were adopted.*

Paragraph 26

*Paragraph 26 was adopted.*

*Section H, as amended, was adopted.*

*Chapter I, as a whole, as amended, was adopted.*

#### CHAPTER VII. Other decisions and recommendations of the Commission (A/CN.4/L.518)

- A. Programme, procedures and working methods of the Commission, and its documentation

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

Paragraph 7

48. Mr. PELLET suggested that the words "as from 1995" should be deleted from the penultimate sentence.

49. Mr. ROSENSTOCK proposed that the clause, as amended by Mr. Pellet, i.e. “the Commission considers that its work could cover a period of five years”, should be replaced by “the Commission expects that its work will be completed within a period of five years”.

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 to 11

*Paragraphs 8 to 11 were adopted.*

Paragraph 12

50. Mr. EIRIKSSON proposed that, in the first sentence, the words “and decided, subject to the approval of the General Assembly, that the topic would be included on its agenda” should be inserted after the words “in favour of the topic of ‘Diplomatic protection’”.

51. Mr. IDRIS proposed that the words “*inter alia*” should be inserted, in the third sentence, after the words “It could cover”.

*Paragraph 12, as amended, was adopted.*

Paragraph 13

*Paragraph 13 was adopted.*

Paragraph 14

52. Mr. TOMUSCHAT said that, in the penultimate sentence, a better expression than “It would also cover” might be used, for example, “It would also analyse”. The same applied to the beginning of the third sentence in paragraph 12.

53. Mr. PELLET proposed that, in the French version, the word *ainsi* should be deleted from the last sentence. In the English version, in the same sentence, the phrase “The Commission would avoid” should be replaced by “The Commission should avoid”.

54. The CHAIRMAN suggested that the phrase in question might read: “The Commission intends to avoid duplication”.

*It was so agreed.*

*Paragraph 14, as amended, was adopted.*

Paragraphs 15 to 17

*Paragraphs 15 to 17 were adopted.*

Paragraph 18

55. Mr. IDRIS, supported by Mr. de SARAM, said that the commentaries included important legal concepts and were more than simply a gloss to the articles. In that connection, the second sentence of paragraph 18 was too restrictive. He proposed that the words “draft the briefest possible commentaries” should be deleted.

56. The CHAIRMAN suggested that the entire sentence should be deleted.

*It was so agreed.*

*Paragraph 18, as amended, was adopted.*

Paragraphs 19 and 20

*Paragraphs 19 and 20 were adopted.*

*Section A, as amended, was adopted.*

**B. Cooperation with other bodies**

**C. Date and place of the forty-eighth session**

**D. Representation at the fiftieth session of the General Assembly**

**E. International Law Seminar**

Paragraphs 21 to 35

*Paragraphs 21 to 35 were adopted.*

*Sections B to E were adopted.*

*Chapter VII, as a whole, as amended, was adopted.*

### **Visit by a member of the International Court of Justice**

57. The CHAIRMAN said that he took great pleasure in announcing the presence at the meeting of Prince Ajibola, a Judge of the International Court of Justice and a former member of the Commission whose significant contribution to its work was well known to everyone.

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

[Agenda item 2]

58. The CHAIRMAN said that the remaining commentaries would be available the following day, but only in English.

59. Mr. ROSENSTOCK said that the unavailability of overtime services accounted, in part, for the delay in issuing the commentaries. He wondered whether, at its next session, the Commission might allocate existing funds for those services.

60. Ms. DAUCHY (Secretary to the Commission) said that the problem arose not from lack of overtime services but from delays in the preparation and translation of the commentaries.

61. Mr. VILLAGRÁN KRAMER said that he was prepared to consider the commentaries in English.

62. Mr. PELLET said that he was, in principle, opposed to such a method of working. Moreover, it was not possible to give serious consideration to the commentaries and other remaining articles in the short time that

\* Resumed from the 2404th meeting.

remained. The Commission should not be compelled to examine in haste such an essential part of its work.

63. Mr. BENNOUNA said that, while he himself was prepared to consider the commentaries in English, other French-speaking colleagues might not wish to do so. It was not possible to conduct a meeting under such circumstances. He agreed fully with Mr. Pellet. The commentaries yet to be considered dealt with very delicate issues and could not be examined in haste. The Commission should instead inform the General Assembly that it would adopt the commentaries in question at the beginning of its next session.

64. Mr. ROSENSTOCK said that some of the responsibility for the lateness in distributing the commentaries lay with some members of the Commission. If the commentaries were not adopted at the present session, the Commission could not forward the articles it had adopted to the General Assembly and would, therefore, not be able to finish its work as planned.

65. Mr. BARBOZA said that he fully agreed with Mr. Rosenstock. He would point out that, although the articles on the topic for which he was the Special Rapporteur had been adopted only a few days ago, all the relevant commentaries had been available in English for the past two days.

66. Mr. TOMUSCHAT said that he was very concerned about the delay in receiving the commentaries, which would prevent the Commission from submitting any draft articles to the General Assembly. The commentaries to articles 11, 13 and 14 of part two of the draft on State responsibility could have been submitted for translation at the beginning of the session.

67. Mr. EIRIKSSON said that, while it was regrettable to have less time than usual to consider the commentaries, the work could still be done in the time remaining. Members must do their best to discharge the mandate assigned to them.

68. Mr. de SARAM said that he fully agreed with those who preferred not to adopt the commentaries hastily. That body of work was too important and represented the views of the Commission. He wished, therefore, to make a formal request that adoption of the commentaries should be placed on the Commission's agenda for the next session.

*The meeting rose at 6.30 p.m.*

## 2423rd MEETING

*Thursday, 20 July 1995, at 3.20 p.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba,

Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

### Draft report of the Commission on the work of its forty-seventh session (*continued*)

#### CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law (continued)* (A/CN.4/L.511 and Add.1)

1. The CHAIRMAN said that, in connection with chapter IV, the members of the Commission were invited to consider section B.4, which related to the establishment of a working group on the identification of dangerous activities.

#### B. Consideration of the topic at the present session (*concluded*)\*

##### ESTABLISHMENT OF A WORKING GROUP ON THE IDENTIFICATION OF DANGEROUS ACTIVITIES (A/CN.4/L.511/Add.1)

2. Mr. PELLET, referring to the establishment of the working group, said that, under its statute, the Commission, could, if necessary, call on experts. He wondered whether the dangerous activities which the proposed working group would identify were not precisely the type of activity on which it would be good to have the advice of technical experts.

3. Mr. BARBOZA (Special Rapporteur) said that Mr. Pellet's comment was entirely relevant. In drafting conventions on the environment, lawyers often worked in cooperation with technical experts. However, he pointed out that, in the last sentence of paragraph 4, it was stated that the list of activities would be prepared "through a method which the Commission could recommend at a later stage of work". That "method" might well include consultations with experts. He hoped that Mr. Pellet would find that explanation satisfactory.

4. Mr. de SARAM said that he supported Mr. Pellet's comments. Expert advice might well become necessary at some point or another. However, he was satisfied with the explanations given by the Special Rapporteur.

5. Mr. BOWETT said that he was sceptical about that approach. It was extremely difficult to prepare a list of dangerous activities because the dangers of an activity depended on all kinds of factors, such as duration, intensity, and the like, which had to be taken into account.

6. Mr. de SARAM said that Mr. Bowett had raised an important point. However, his own concerns were slightly different. Account must be taken of the fact that, whatever the results of the Commission's work, its conclusions would be taken very seriously by Governments. It was, however, difficult to ask Governments to comply

\* Resumed from the 2419th meeting.

with obligations of prevention or to take precautions without giving them specific reference points.

7. Mr. BARBOZA (Special Rapporteur) said that now was not the time to reopen the substantive debate on that question. All those points had been carefully considered by the Working Group and the Commission. The preparation of a list of activities was one of the possibilities considered. The Commission would decide later what action should be taken on that proposal.

8. The CHAIRMAN, summing up the exchange of views, said that, although no one denied the usefulness of expert services, the point raised by Mr. Pellet was not likely, at the current stage, to require a change in the text of the draft report. If he heard no objection, he would take it that section B.4 was adopted.

9. Mr. ARANGIO-RUIZ and Mr. EIRIKSSON said that they supported the Chairman's conclusion.

*Section B.4 was adopted.*

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

### CHAPTER III. *State responsibility (continued)\*\**

#### C. Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session

Draft commentaries to articles 13 and 14 of part two (A/CN.4/L.521)

10. The CHAIRMAN invited the Commission to consider the draft commentaries to articles 13 and 14.

11. Mr. IDRIS said that he wished to make some general comments on the adoption of those commentaries. There was no denying the importance of the consideration and adoption by the Commission of commentaries to draft articles. When draft articles had been adopted and the relevant commentaries had been submitted to the Commission, the question was whether the Commission could commit itself to them by consensus or, if necessary, by a vote. Once draft articles and their commentaries had been adopted, even on first reading, they bore the Commission's imprimatur. They thus achieved singular importance in the international community; they might guide international courts and might be cited in support of positions taken by States involved in disputes.

12. The Commission therefore had to ensure that every member had adequate time to read the commentaries carefully, go over them with other members and be thoroughly prepared to discuss them in plenary. It must not be forgotten that the Commission was accountable to the General Assembly, which expected it to carry out its work properly.

13. He therefore said he considered that he was not yet ready to discuss the draft commentaries to articles 13 and 14 now before the Commission. The fact remained that the draft articles and commentaries on State responsibility still had the highest priority and that the Com-

mission could and must submit all draft articles and commentaries thereto adopted as parts two and three, as well as the draft articles of part one, to the General Assembly and, through it, to Governments in 1996. Together with the draft statute for an international criminal court, those articles would be the main results that the Commission would have to show for its work during the current quinquennium.

14. However, in order to prevent the Commission from finding itself in a situation in future in which it would have to work in a rush, he suggested that the consideration of the draft articles and commentaries should be included in the agenda for the next session before the consideration of the report of the Planning Group.

15. Mr. BENNOUNA, speaking on a point of order, said that Mr. Idris had made a general statement, but the question now was whether the Commission should consider the commentaries to articles 13 and 14 at the current stage.

16. Mr. de SARAM said that the problem raised by Mr. Idris was very important because the Commission was not working as it should. He suggested that, if the Commission had some time left over at the last meeting, it should discuss ways of improving its methods of work.

17. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, even if the comments by Mr. Idris had been of a general nature, they related to his own work in particular. He regretted that the consideration of the draft articles and commentaries he proposed was constantly deferred and had been for several sessions. It was therefore essential for the commentaries to draft articles 13 and 14 to be considered without further delay. He recalled that the Commission was supposed to have completed the consideration on first reading of parts two and three of the draft articles on State responsibility at its forty-eighth session in 1996 and that it had no time to lose.

18. Mr. ROSENSTOCK said that he basically agreed with Mr. Idris, but, since the long awaited commentaries to articles 13 and 14 had now been submitted to the Commission, it would be better for it to get down to work and consider them. It was regrettable that it could not do the same for articles 11 and 12.

19. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the commentary to article 11, as just referred to by Mr. Rosenstock, had nearly been ready at the last session. He also noted that the consideration of articles 11 and 12 had been deferred for reasons beyond his control.

20. Mr. PELLET said that, for the sake of scientific rigour, he would like each quotation to be reproduced in the original language, followed by a translation in square brackets, as done in all academic work.

*Commentary to article 13*

Paragraph (1)

*Paragraph (1) was adopted.*

\*\* Resumed from the 2421st meeting.

## Paragraph (2)

21. Mr. de SARAM said that he would like clarification from the Special Rapporteur on the last sentence, which read: "The principle of proportionality provides an effective guarantee inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State using such measures". His own view was that, rather than providing an "effective guarantee", the principle of proportionality helped only to make the possibilities of countermeasures somewhat less likely.

22. Mr. ARANGIO-RUIZ (Special Rapporteur), referring to Mr. de Saram's request, said that the principle in question might be described as a "normative guarantee". The principle of proportionality was a criterion by which to assess the degree of justification of a measure or a countermeasure and the word "effective" was intended to indicate that, in view of the nature and gravity of the wrongful act, that was the most direct way of making that assessment. Obviously, if the word "effective" related not only to the formulation, but also to the implementation of the principle, reference should then be made to the Commission's efforts in connection with the settlement of disputes. The criterion would be in the hands of States until a third party had become involved and had decided on the degree of proportionality of a countermeasure.

23. Mr. AL-KHASAWNEH said that there was, of course, another point of view, namely, that the principle of proportionality gave the impression of being an effective guarantee, whereas, in fact, it was very difficult to determine.

*Paragraph (2) was adopted.*

## Paragraph (3)

*Paragraph (3) was adopted.*

## Paragraphs (4) and (5)

24. Mr. PELLET, noting that the so-called *Air Services* award referred to in paragraph (4) related to the case concerning the *Air Service Agreement between the United States of America and France*,<sup>1</sup> said that that should be mentioned at least once in the text. He also drew attention to a problem of consistency and logic between the last sentence of paragraph (4), which suggested that leeway was open to criticism, and the first sentence of paragraph (5), which stated that the Commission had opted for a flexible interpretation of the principle of proportionality.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the first line of paragraph (5), what was meant was a "flexible formulation" rather than a "flexible interpretation".

26. Mr. EIRIKSSON, referring to paragraph (4), said that the use of terms such as "manifestly" to modify the term "disproportionate" might have the effect of intro-

ducing an element of uncertainty and subjectivity and that should be made clear in that paragraph.

27. Mr. PELLET said that he agreed with that point of view and proposed that the word "excessive" should be added before the words "uncertainty and subjectivity" in the penultimate sentence. He would nevertheless like the Special Rapporteur to provide some clarification of the discrepancy between the end of paragraph (4) and the beginning of paragraph (5).

28. Mr. ROSENSTOCK said that the amendments proposed for paragraph (4) solved the problem of logic which had been raised and that he was not prepared to accept amendments to paragraph (5) which would upset the balance of the text.

29. Mr. TOMUSCHAT said he agreed that there was some inconsistency between paragraphs (4) and (5).

30. Mr. BENNOUNA said he did not think that the entire text should be amended. Only the first sentence of paragraph (5) should either be deleted or reworded.

31. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in order to understand the first sentence of paragraph (5) and perhaps also his proposal that the word "interpretation" should be replaced by the word "formulation", account had to be taken of the second sentence of that paragraph. What he had meant to say was that the Commission had adopted a flexible formulation of proportionality that could be adapted to the many different cases that might arise.

32. Mr. EIRIKSSON said that he could propose wording for the first sentence of paragraph (5), but the deletion of that sentence would be much better.

33. Mr. BOWETT proposed that the first sentence of paragraph (5) should be moved to the end of the paragraph.

34. Mr. PELLET said that the introductory sentence of paragraph (5) was necessary. He proposed that it should be amended to read: "The Commission opted for a stricter formulation of the principle of proportionality, while keeping its flexibility."

35. Mr. BENNOUNA proposed the following wording: "The Commission preferred another formulation of the principle of proportionality." He might be able to agree that the words "in order to keep it as flexible as possible" should be added at the end of that sentence.

36. Mr. BARBOZA suggested that the Special Rapporteur should hold informal consultations with a small group of members to work out the text of paragraphs (4) and (5).

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, following informal consultations, the following amendments should be made to paragraphs (4) and (5): in the fourth sentence of paragraph (4), the word "excessive" should be added before the words "uncertainty and subjectivity"; and the first sentence of paragraph (5) should be amended to read "Notwithstanding the need for legal certainty, the Commission has opted for a flexible concept of the principle of proportionality".

<sup>1</sup> See 2392nd meeting, footnote 10.



38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission adopted paragraphs (4) and (5), with the amendments indicated by the Special Rapporteur.

*Paragraphs (4) and (5), as amended, were adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

39. Mr. BENNOUNA proposed that the words “the human rights of its nationals” should be replaced by the words “its international obligations in respect of human rights” in order to show that reference was not being made to human rights within the meaning of internal law.

40. Mr. de SARAM said that paragraph (8) was worded in such a way that it suggested that it had been drafted only from the human rights point of view. It should refer to the international obligations of the State.

41. Mr. TOMUSCHAT said he supported Mr. Bennouna’s proposal that it should be explained that reference was not being made to human rights as provided for in national constitutions. Unlike Mr. de Saram, however, he did not think that article 13 focused on human rights; it simply referred to a particular situation in which there was no bilateral relationship in the traditional sense, but which was nevertheless taken into account because of the way it related to the effects on the injured State.

42. Mr. ROSENSTOCK pointed out that the text simply ruled out the possibility of saying that there had been no material damage to the injured State as a means of prohibiting the adoption of countermeasures. The purpose was not at all to give other States any right to intervene in the human rights situation of the nationals of the State concerned.

43. Mr. PELLET said that reference should first be made to the general idea that the existence of material damage was not a prerequisite and then the example could be given either of human rights or, more generally, of the rights guaranteed by international law to the nationals of the State concerned.

44. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the deletion of the reference to “its nationals” would defeat the purpose of the entire paragraph because the problem to which it related was precisely that of the absence of effects on other States. On the other hand, the comment by Mr. Bennouna and Mr. Tomuschat deserved attention and the words “its international obligations relating to” should be inserted after the word “violating”.

*Paragraph (8), as amended by the Special Rapporteur, was adopted.*

Paragraph (9)

45. Mr. PELLET proposed that a footnote should indicate that the Commission had agreed that the definition of “injured State” would be reconsidered.

46. Mr. AL-KHASAWNEH asked whether there had been an official decision that article 5 should be reconsidered. Since the Commission was free to reconsider any article on second reading, a footnote was not necessary in the present case.

47. Mr. TOMUSCHAT said that an important provision on proportionality was missing, namely, that on cases where different injured States took countermeasures. It had to be explained how the principle of proportionality was to be understood in such cases.

48. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the concepts of an injured State, more than one injured State and differently injured States undeniably gave rise to difficult problems which obviously made it an obligation for the Commission to reconsider article 5.

49. Mr. ROSENSTOCK proposed that, in the last sentence, the words “would be more limited” should be replaced by the words “could be more limited”.

50. Mr. de SARAM proposed that in the first sentence the words “in particular” should be replaced by the words “for example”.

*Paragraph (9), as amended by Mr. Rosenstock and Mr. de Saram, was adopted.*

Paragraph (10)

51. Mr. IDRIS proposed that the second sentence should be deleted because it made the first and third sentences difficult to understand.

52. Mr. BOWETT, supported by Mr. BENNOUNA, proposed that the words “such as the payment of compensation” should be added at the end of the second sentence.

53. Mr. ARANGIO-RUIZ (Special Rapporteur) said he did not see how the second sentence could create a problem. Its meaning was very clear, that is to say what determined lawfulness was not what determined proportionality. The “particular aim” in question could be cessation, acceptance of a settlement procedure, compensation, and so on, the latter not being given any preference over the others. However, if the Commission wanted that sentence to be deleted, he would not object.

54. Mr. TOMUSCHAT proposed that, in the third sentence, the words “could be of relevance” should be replaced by the words “is of relevance”.

*Paragraph (10), as amended by Mr. Idris and Mr. Tomuschat, was adopted.*

*The commentary to article 13, as amended, was adopted.*

*Commentary to article 14*

## Paragraph (1)

*Paragraph (1) was adopted.*

## Paragraph (2)

55. Mr. LUKASHUK said that the Covenant of the League of Nations and the Kellogg-Briand Pact had nothing to do with armed reprisals. The former restricted the use of force and the latter prohibited resort to war as a political instrument. Paragraph (2) was thus not truly in keeping with the Special Rapporteur's main idea and could not be endorsed as a commentary by the Commission.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said he had considered it necessary to explain that the principle of the prohibition of the threat or use of force, as stated in Article 2, paragraph 4, of the Charter of the United Nations, had not suddenly appeared in 1945, but had been the result of a lengthy and laborious process that had begun following the First World War.

57. Mr. LUKASHUK, supported by Mr. BENNOUNA, said that he understood the Special Rapporteur's intention, but noted that paragraph (2) referred not to the general principle of the prohibition of the use of force, but to the prohibition of armed reprisals that is something quite different.

58. Mr. ROSENSTOCK said that he fully agreed with Mr. Lukashuk. Apart from the first sentence, nothing in paragraph (2) or the relevant footnotes related directly to the question under consideration and might therefore easily be deleted. To indicate that the principle of the prohibition of the use of force was the result of a lengthy historical process, it would be enough to add a sentence such as that to be found at the beginning of paragraph (3), which clearly established the legal basis for that prohibition.

59. Mr. EIRIKSSON said that all the explanations given were far too long, if not unnecessary. With regard to the text of the first sentence of paragraph (2), he thought that the words "as prohibited by the Charter of the United Nations" should be added after the words "use of force" in order to make the meaning clear.

60. The CHAIRMAN said that the text would be amended accordingly.

61. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was surprised at the objections to paragraph (2) and the relevant footnotes. Quite frequently, States pleaded self-defence to justify resort to armed reprisals, thus getting round the prohibition of the use of force. It was, moreover, on the basis of that prohibition that armed reprisals were condemned 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>2</sup> He continued to believe that, in the context of countermeasures, it was

useful to describe the development of the principle of the prohibition and he would therefore like paragraph (2) to be kept as it stood.

62. Mr. TOMUSCHAT said that interpretation of the development of international law in the 1920s might be too optimistic because, at the time, it had been the use of excessive force, not the use of force itself, that had been regarded as unacceptable. Armed reprisals had therefore been considered admissible. The Commission must be wary of too subjective an interpretation of the development of the rules of international law in order not to lay itself open to criticism. Paragraph (2) should therefore be shortened.

63. Mr. PELLET, supported by Mr. IDRIS, said that the prohibition of the threat or use of force was a well-established principle of the Charter of the United Nations and it was therefore not necessary to describe the background to it. A matter of greater concern was the lack of explanations in paragraph (2) of the reasons why that prohibition, which was a rule of international law, was so important that it could not be contravened even by way of a countermeasure. In other words, the proposed commentary to subparagraph (a) simply described the principle of the prohibition of the use of force, but said nothing about the relationship between that prohibition and countermeasures.

64. Mr. AL-KHASAWNEH said that he did not agree with the preceding speakers. In his view, it was helpful to describe the historical context of the principle of the prohibition of the use of force, as the Special Rapporteur had done, and to do so briefly, contrary to what had been said. It was all the more helpful to retain the text of paragraph (2) because the Special Rapporteur described the difference between reprisals and countermeasures, on the one hand, and self-defence, on the other, and, for that purpose, needed historical reference points. Moreover, whether his interpretation of history was pessimistic or optimistic, as had been said, would have no effect on the prohibition of the use of force, which was now a well-established principle. He therefore saw no reason to delete the text of paragraph (2).

65. Mr. BENNOUNA said that some of the comments made and objections raised were well founded, although exceptions to the principle of the prohibition of the use of force were extremely limited by the Charter of the United Nations and that meant that armed countermeasures were prohibited as well. It was also true that, prior to 1945, that is to say before the adoption of the Charter, those principles had not been as strict. That was probably the idea that the Special Rapporteur had wanted to express and he might amend paragraph (2) on the basis of the comments that had been made.

66. Mr. ARANGIO-RUIZ (Special Rapporteur) said that all the speakers who had objected to paragraph (2) as it now stood had made only general comments. He would like them to be more specific. He personally was of the opinion that, despite some ambiguities, the Covenant of the League of Nations and the Kellogg-Briand Pact had already provided for a restriction on the use of force. That interpretation had been confirmed by practice during the period between the two World Wars. At the end of the Second World War, that trend had led to the

<sup>2</sup> General Assembly resolution 2625 (XXV), annex.

prohibition of force and the outlawing of armed reprisals, but the latter had often been confused with self-defence, as indicated in paragraphs (4) and (5) and in the relevant footnotes. He was nevertheless prepared to take account of all the specific proposals that might be submitted to him in writing in order to draft a text that would be more acceptable.

67. The CHAIRMAN said that, before a decision was taken on paragraph (2), the members of the Commission should consider the other paragraphs relating to article 14, subparagraph (a). He therefore invited them to comment on paragraphs (3) to (6).

Paragraphs (3) to (6)

68. Mr. LUKASHUK said he took the last sentence of paragraph (3) to mean that, although aggression was prohibited for one reason or another, the same could only be true of armed reprisals. However, reprisals could be legitimate and justified by various circumstances, whereas aggression was a crime that could not be justified in any way. He therefore wished to have some clarifications about the real meaning of the last sentence.

69. Mr. BENNOUNA pointed out that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations had been adopted not unanimously, but by consensus, and that the words “unanimously” in the third sentence of paragraph (3) should therefore be deleted.

70. Mr. TOMUSCHAT said that the Declaration had actually been adopted without a vote. He also thought that it would be difficult to base a prohibition on armed countermeasures on the prohibition of aggression and he therefore fully agreed with Mr. Lukashuk on that point.

71. Mr. BOWETT said that the problem was the result of the fact that paragraph (3) did not express the basic idea that the prohibition of the use of force provided for in Article 2, paragraph 4, of the Charter was a peremptory norm and that a State could therefore not adopt countermeasures which would lead to the violation of a peremptory norm. That was why armed reprisals were not admissible countermeasures. That general idea would have to be added in one of the paragraphs under consideration.

72. Mr. ARANGIO-RUIZ (Special Rapporteur), taking paragraph (3) sentence by sentence, said that the first sentence should be retained, subject to the replacement of the words “the express prohibition of the use of force” by the words “the express prohibition of force”. The second sentence should also be kept as it stood. It could be immediately followed by a sentence expressing Mr. Bowett’s idea. In the third sentence, the word “unanimously” could be deleted, as proposed. With regard to the fourth and fifth sentences, which referred to aggression, something that had given rise to objections on the part of some members, he pointed out that, in footnote 7, he quoted article 3 of the Definition of Aggression,<sup>3</sup> which defined a set of possible cases relat-

ing to the use of force that undoubtedly included armed reprisals and it was therefore not wrong to say that the prohibition of armed reprisals was implicitly confirmed by the Definition. However, the Commission was free, if it so wished, to delete the fifth sentence and footnote 7 relating to it.

73. As to paragraph (4), he proposed that the first sentence should be retained and that, in the second sentence, the phrase beginning with the words “such pleas of self-defence” and ending with the words “article 19 of the present draft)” should be deleted. He would also try to amend paragraph (2), to which there had been so many objections, but he did not think that he was expressing ideas in that paragraph which were not consistent with the trend towards the prohibition of the threat or use of force that had taken shape between the two wars.

74. Mr. ROSENSTOCK said that it would be better to delete the end of paragraph (4). The idea, also expressed in paragraph (6), that self-defence could only be a reaction to crimes was, in his view, completely wrong and unacceptable. The paragraphs under consideration were, in fact, all too long and it would be better to delete them and replace them by a single text that could be drafted along the lines of what Mr. Bowett had proposed, with a few appropriate footnotes. All the rest was unnecessary and misleading.

75. Mr. PELLET said that he partly agreed with Mr. Rosenstock and also shared Mr. Bowett’s opinion. What the Special Rapporteur said was on the whole accurate, but the problem was whether it should be made into a commentary to article 14. Paragraphs (2) to (5) should be completely revised. Paragraph (6) could be retained if it was amended. Starting with the first sentence, emphasis should be placed on the restrictive nature of the cases in which resort to armed force was lawful under the Charter, as well as on the peremptory nature of the prohibition of the use of armed force in all the other cases not provided for by the Charter, and it should be indicated that the consequence of that dual nature was the prohibition of countermeasures. The Commission might also explain that such a prohibition was in keeping with the intentions of the framers of the Charter, as stated, moreover, in paragraph (3), and, if the Special Rapporteur considered it necessary, conclude with a sentence such as that at the end of paragraph (4). He would submit a written proposal to the Special Rapporteur.

*The meeting rose at 6.15 p.m.*

## 2424th MEETING

*Friday, 21 July 1995, at 10.20 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi,

<sup>3</sup> Assembly resolution 3314 (XXIX), annex.

Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

### Draft report of the Commission on the work of its forty-seventh session (*continued*)

#### CHAPTER III. *State responsibility* (continued) (A/CN.4/L.512 and Add.1 and A/CN.4/L.521)

1. The CHAIRMAN invited the members of the Commission to resume its consideration of chapter III of the draft report.

#### B. Consideration of the topic at the present session (*continued*)\*

CONSIDERATION BY THE COMMISSION OF THE TEXTS ADOPTED BY THE DRAFTING COMMITTEE FOR INCLUSION IN PART THREE OF THE DRAFT ON STATE RESPONSIBILITY (A/CN.4/L.512/Add.1)

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

2. Mr. MAHIOU proposed that the words "Several members", in the first sentence, should be replaced by "Most members".

3. Mr. de SARAM said that, when reference was made in the Commission's report to the Model Rules on Arbitral Procedure, the status of those rules should be specified in a footnote.

*Paragraph 4, as amended, was adopted.*

Paragraph 5

4. Mr. PELLET proposed that, in the third sentence, the words "for many members" should be deleted.

5. Mr. THIAM said he wondered whether the first part of the second sentence, which stated that the approach recommended by the Drafting Committee might seem "too bold" to Governments, was necessary.

6. Mr. PELLET said that that had been the view of the large majority of members.

7. The CHAIRMAN said that he agreed with Mr. Thiam. A word other than "bold" would be preferable.

8. Mr. ROSENSTOCK proposed that the word "bold" should be replaced by "far-reaching".

*Paragraph 5, as amended, was adopted.*

\* Resumed from the 2421st meeting.

Paragraph 6

9. Mr. IDRIS said that, in his view, the idea contained in the last sentence of the paragraph had already been expressed in paragraph 5 and need not be repeated.

10. Mr. PELLET said he did not agree. Paragraph 5 dealt with the approach recommended by the Drafting Committee. The last sentence of paragraph 6 reflected a decision taken by the Commission.

11. Mr. ROSENSTOCK said that, at the present stage, the last sentence of paragraph 6 was clearly a hope rather than a reality.

*Paragraph 6 was adopted.*

Paragraph 7

*Paragraph 7 was adopted.*

*Section B, as amended, was adopted.*

C. Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session (*continued*)

Draft commentaries to articles 13 and 14 of part two (*continued*) (A/CN.4/L.521)

*Commentary to article 14 (continued)*

12. The CHAIRMAN invited the Commission to consider the text which had been circulated to members and which contained paragraphs (2) to (4) of the commentary to article 14 revised in response to comments made at the previous meeting. The text read:

"(2) *Subparagraph (a)* prohibits resort, by way of countermeasures, to the threat or use of force. The trend towards the restriction of resort to force which started with the Covenant of the League of Nations and the Kellogg-Briand Pact has culminated in the expressed prohibition of force contained in Article 2, paragraph 4, of the Charter of the United Nations. The obvious relevance of this prohibition to the use of force by an injured State in the pursuit of its rights is consistent with the intention of the framers of the Charter.<sup>1</sup> The consequent prohibition of armed reprisals or countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that 'States have a duty to refrain from acts of reprisals involving the use of force'.<sup>2</sup> That armed reprisals are recognized as prohibited is further evidenced by the fact that States resorting to force attempt to demonstrate the lawfulness of their conduct by characterizing it as an act of self-defence rather than as a reprisal.

<sup>1</sup> The framers of the Charter intended to condemn the use of force even if resorted to in the pursuit of one's rights, as reflected in the proceedings of the San Francisco Conference. See P. Lamberti Zanardi, *La legittima difesa nell diritto internazionale* (Milan, Giuffrè, 1972), pp. 143 *et seq.*, and R. Taoka, *The Right of Self-defence in International Law* (Osaka, Osaka University of Economics and Law, 1978), pp. 105 *et seq.*

<sup>2</sup> General Assembly resolution 2625 (XXV), subparagraph 6 of the first principle. R. Rosenstock, 'The Declaration of Principles of Interna-

“(3) The prohibition of armed reprisals or counter-measures as a consequence of Article 2, paragraph 4 of the Charter is also consistent with the decidedly prevailing doctrinal view;<sup>3</sup> as well as a number of authoritative pronouncements of international judicial<sup>4</sup> and political bodies.<sup>5</sup> The contrary trend, aimed at justifying the noted practice of circumventing the

tional Law concerning Friendly Relations: A survey’, *American Journal of International Law* (Washington, D.C.), vol. 65, No. 5 (October 1971), pp. 713 *et seq.*, in particular p. 726. ICJ indirectly condemned armed reprisals in asserting the customary nature of the Declaration’s provisions condemning the use of force in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (I.C.J. Reports 1986, pp. 89-91, paras. 188, 190, 191). The Final Act of the Conference on Security and Cooperation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II embodied in the first ‘Basket’ of that Final Act reads: ‘Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force’ (*Final Act of the Conference on Security and Cooperation in Europe*, signed at Helsinki on 1 August 1975 (Lausanne, Imprimeries Réunies, [n.d.])).

<sup>3</sup> The contemporary doctrine is almost unanimous in characterizing the prohibition of armed reprisals as having acquired the status of a general or customary rule of international law. See I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), pp. 110 *et seq.*, and in particular pp. 281-282; P. Reuter, *Droit international public*, 6th ed. (Paris, Presses universitaires de France, 1983), p. 510 *et seq.* and in particular pp. 517-518; A. Cassese, *Il diritto internazionale nel mondo contemporaneo* (Bologna, Mulino, 1984), p. 160; H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1986), p. 192 and pp. 493 *et seq.*, particularly p. 508; B. Conforti, *Diritto internazionale*, 3rd ed. (Napoli, Editoriale Scientifica, 1987), p. 356; C. Dominici, ‘Observations sur les droits de l’État victime d’un fait internationalement illicite’, in *Droit international 2* (Paris, Pedone, 1982), p. 62; F. Lattanzi, *Garanzie dei diritti dell’uomo nel diritto internazionale generale* (Milan, Giuffrè, 1983), pp. 273-279; J.-C. Venezia, ‘La notion de représailles en droit international public’, *Revue générale de droit international public* (Paris, July-September 1960), pp. 465 *et seq.*, in particular p. 494; J. Salmon, ‘Les circonstances excluant l’illicéité’, *Responsabilité internationale* (Paris, Pedone, 1987-1988), p. 186; and the fourth report of the Special Rapporteur on State Responsibility, Mr. Riphagen, *Yearbook . . . 1983*, vol. II, (Part One), p. 15, document A/CN.4/366 and Add.1, para. 81. The minority who doubt the customary nature of the prohibition are equally firm in recognizing the presence of a unanimous condemnation of armed reprisals in Article 2, paragraph 4, of the Charter as reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. See, for example, J. Kunz, ‘Sanctions in international law’, *American Journal of International Law* (Washington, D.C.), vol. 54, No. 2, April 1960, p. 325; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padova, CEDAM, 1967), p. 352 and pp. 361 *et seq.*; G. Arangio-Ruiz, ‘The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations’, *Collected Courses of The Hague Academy of International Law, 1972-III* (Leiden, Sijthoff, 1974), vol. 137, p. 536. It is also significant that the majority of the recent monographic studies on reprisals are expressly confined to measures not involving the use of force. See, in particular, A. De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (Milan, Giuffrè, 1985); E. Zoller, *Peace-time Unilateral Remedies: An Analysis of Countermeasures*, (Dobbs Ferry, New York, Transnational Publishers, 1984); and O. Y. Elagab, *The Legality of Non-Forcible Countermeasures in International Law* (Oxford, Clarendon Press, 1988). These authors obviously assume that ‘the prohibition to resort to reprisals involving armed force had acquired the rank status of a rule of general international law’ (De Guttry, *op. cit.*, p. 11). See also the Restatement of the Law Third, section 905 of which states that ‘[t]he threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to subsection (1)’. The subsection in question specifies that ‘a State victim of a violation of an international obligation by another State may resort to countermeasures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered’ (*Restatement of the Law Third: The Foreign Relations Law of the United States* (American Law Institute Publishers, St. Paul, Minn.), vol. 2, 1987, p. 380).

<sup>4</sup> The condemnation of armed reprisals and the consolidation of the prohibition into a general rule are supported by the statement of ICJ in the *Corfu Channel* (*Merits*) case with respect to the recovering of the mines from the Corfu Channel by the British navy (‘Operation Retail’) (I.C.J. Reports 1949, p. 35, see also *Yearbook . . . 1979*, vol. II (Part One), p. 42, document A/CN.4/318 and Add.1-4, para. 89) and, more recently, by the decision of ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case (I.C.J. Reports 1986, p. 127, paras. 248-249).

<sup>5</sup> See, for example, Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962 and 188 (1964) of 9 April 1964.

prohibition by qualifying resort to armed reprisals as self-defence, does not find any plausible legal justification and is considered unacceptable by the Commission.<sup>6</sup> Indeed, armed reprisals do not present those requirements of immediacy and necessity which would only justify a plea of self-defence.<sup>7</sup> According to a prevailing view in the literature which is consistent with international jurisprudence, the prohibition of armed reprisals or countermeasures has acquired the status of a customary rule of international law.

“(4) The prohibition of the threat or use of force by way of countermeasures is set forth in terms of a general reference to the Charter rather than the specific provisions of Article 2, paragraph 4. Furthermore, the Commission opted for a general reference to the Charter as one source, but not the exclusive source, of the prohibition in question which is also part of general international law and has been characterized as such by the International Court of Justice.”

<sup>6</sup> The anchors (writers) representing this minority trend have maintained that some forms of unilateral resort to force either have survived the sweeping prohibition of Article 2, paragraph 4, of the Charter, to the extent that they are not used against the territorial integrity or political independence of any State or contrary to the purposes of the United Nations but rather to restore an injured State’s rights or have become a justifiable reaction under the concepts of armed reprisals or self-defence based on the realities of persistent State practice and the failure of the collective security system established by the Charter to function as envisaged in practice. E. S. Colbert, *Retaliation in International Law* (New York, King’s Crown Press, 1948); J. Stone, *Aggression and World Order. A Critique of United Nations Theories of Aggression* (London, Stevens, 1958), especially pp. 92 *et seq.*; R. A. Falk, ‘The Beirut raid and the international law of retaliation’, *American Journal of International Law* (Washington, D.C.), vol. 63, No. 3, July 1969, pp. 415-443; D. W. Bowett, ‘Reprisals involving recourse to armed force’, *ibid.*, vol. 66, No. 1, January 1972, pp. 1-36; R. W. Tucker, ‘Reprisals and self-defence: The customary law’, *ibid.*, No. 3, July 1972, pp. 586-596; R. B. Lillich, ‘Forcible self-help under international law’, *United States Naval War College—International Studies* (vol. 62): *Readings in International Law from the Naval War College Review 1947-1977* (vol. II): *The Use of Force, Human Rights and General International Legal Issues*, texts compiled by R. B. Lillich and J. N. Moore (Newport (R.I.), Naval War College Press, 1980), p. 129; D. Levenfeld, ‘Israeli counter-Fedayeen tactics in Lebanon: Self-defence and reprisal under modern international law’, *ibid.*, vol. 66, No. 1, January 1972, pp. 1-36; R. W. Tucker, ‘Reprisals and self-defence: The customary law’, *ibid.*, No. 3, July 1972, pp. 586-596; R. B. Lillich, ‘Forcible self-help under international law’, *United States Naval War College—International Studies* (vol. 62): *Readings in International Law from the Naval War College Review 1947-1977* (vol. II): *The Use of Force, Human Rights and General International Legal Issues*, texts compiled by R. B. Lillich and J. N. Moore (Newport (R.I.), Naval War College Press, 1980), p. 129; D. Levenfeld, ‘Israeli counter-Fedayeen tactics in Lebanon: Self-defence and reprisal under modern international law’, *Columbia Journal of Transnational Law* (New York), vol. 21, No. 1, 1982, p. 148; and Y. Dinstein, *War Aggression and Self-Defence* (Cambridge, Grotius, 1988), pp. 202 *et seq.* For a critical review of the literature, see R. Barsotti, ‘Armed reprisals’, *The Current Legal Regulation of the Use of Force* (Dordrecht, Nijhoff, 1986), pp. 81 *et seq.*

<sup>7</sup> As recalled in the fifth report of the Special Rapporteur (*Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3), the Commission had expressed itself clearly on the concept of self-defence.”

13. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the secretariat had assured him previously that the commentaries to articles 13 and 14 had been informally distributed to a number of the members. Although he had received a few comments from Mr. Bowett, he had not received any from other members, which meant that some of the complaints expressed at the previous meeting had not been justified. If members had provided their comments earlier, the Commission would have saved a great deal of time at the previous meeting.

14. As to the changes in the commentary to article 14, he had removed from paragraph (2) the historical notes relating to the Covenant of the League of Nations and the Kellogg-Briand Pact and had done so *pro bono pacis* and simply to save time. Nevertheless, he firmly believed that those inter-war period instruments were of importance for a better understanding of the clear prohibition of armed reprisals emerging from the Charter of the United Nations. Paragraph (2) was therefore consid-

erably simplified, moving from a very brief reference to the Covenant and the Kellogg-Briand Pact to the culmination in the Charter of the trend towards the restriction of resort to force.

15. In response to observations made by Mr. Lukashuk, he had, with regret, deleted from the original version of paragraph (3) the reference to the Definition of Aggression. He wished to point out that a number of the coercive acts listed as instances of aggression in article 3 of the Definition were perfect examples of armed reprisals. The fact that the coercive acts had been listed as examples of aggression clearly implied a fortiori that such acts were prohibited. In addition, and most important in view of the frequent abuse of the concept of self-defence as a pretext for unlawful resort to armed reprisals, a few of the instances set forth in article 3 of the Definition corresponded to some of the very instances in which an attempt had been made to present armed reprisals as acts of self-defence.

16. Paragraph (3) of the revised commentary showed that the prohibition of armed reprisals or countermeasures as a consequence of Article 2, paragraph 4, of the Charter was also consistent with the prevailing doctrinal view as well as a number of authoritative pronouncements of international judicial and political bodies. It was better explained, in that paragraph, that the opposing trend aimed at justifying the practice of circumventing the prohibition by qualifying resort to armed reprisals as self-defence had no plausible legal justification and was considered unacceptable by the Commission. The fourth footnote to paragraph (3) contained a reference to the minority doctrine. Clearly armed reprisals did not present the requirements of immediacy and necessity that would alone warrant a plea of self-defence. The last sentence of paragraph (3) was a simplified version of what had been paragraph (5) in the original version of the commentary. Paragraph (4) of the revised commentary was a considerably shortened version of what had previously been paragraph (6).

17. Mr. YANKOV said he wished to thank the Special Rapporteur for his understanding and efforts. In his view, it was unfortunate that the historical background to the prohibition of armed force had been removed from the commentary. Although it had not made express reference to countermeasures, the Kellogg-Briand Pact was the first treaty to explicitly prohibit the use of force as a means of settling disputes and to recommend that disputes should be settled peacefully.

18. With regard to revised paragraph (3), he proposed that, at the very end of the paragraph, after "customary rules of international law", words should be added to the effect that the prohibition of armed reprisals or countermeasures had acquired the status of *jus cogens* in contemporary international law.

19. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the words "of a peremptory character" should be added after "international law," at the end of paragraph (3). He would none the less point out that the prohibition of armed reprisals or countermeasures was, in his personal view, a treaty obligation. It was neither a customary rule nor a peremptory rule. Personally, he failed to fully understand, in particular, what a peremp-

tory rule was. But that, of course, was only his own view. The commentary was the work of the Commission as a whole, not the Special Rapporteur.

20. Mr. de SARAM said he wished to thank the Special Rapporteur for the revised version of the commentary to article 14. The question of the limits of self-defence, dealt with in paragraph (3), was a very thorny one. It was essential to make the commentary precise so that it would not give rise to any debate on the matter in the Sixth Committee.

21. The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations was one of the major achievements of the General Assembly, adopted as part of the twenty-fifth anniversary celebrations. In general, the Declaration should not be mentioned in any way that might diminish its importance.

22. While he appreciated the references in the footnotes to articles written by members of the Commission, he would also recommend mention of the article by Oscar Schachter<sup>1</sup> which dealt with all of the matters under consideration in article 14.

23. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the last footnote to paragraph (3) of the revised commentary referred to the specific portions of his fifth report,<sup>2</sup> which dealt with the evolution of the Commission's views on the matter of self-defence.

24. Mr. LUKASHUK said that he wished to thank the Special Rapporteur for his efforts. Paragraph (2) of the revised commentary was acceptable. Nevertheless, he would suggest that, in the fourth sentence, the word "countermeasures" should be deleted: the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations referred to "reprisals", but not to "countermeasures". "Prohibited countermeasures" was not a satisfactory title for article 14. Countermeasures, by definition, were lawful. Other measures taken in reaction to a crime might be unlawful, but they were not considered to be countermeasures.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Lukashuk's comment was logical, but the title of the article had already been adopted. An explanation had been given by the Chairman of the Drafting Committee when the articles had been presented at the forty-fifth session in 1993. In his view, the title was self-explanatory and should not cause doubt in the mind of the reader.

26. Mr. VILLAGRÁN KRAMER cited the Charter of OAS,<sup>3</sup> which prohibited reprisals, whether armed or unarmed, and the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), which incorporated the Definition of Aggression. Accordingly, there was legal testimony to the Definition be-

<sup>1</sup> O. Schachter, "The right of States to use armed force", *Michigan Law Review*, vol. 82, Nos. 5 and 6 (April/May 1984), pp. 1620-1646.

<sup>2</sup> See 2391st meeting, footnote 13.

<sup>3</sup> See 2407th meeting, footnote 6.

yond its being contained in the General Assembly resolution.

27. Mr. EIRIKSSON proposed that in paragraph (2) the words "as prohibited by the Charter of the United Nations" should be added at the end of the first sentence.

28. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraphs (2) to (4), formerly paragraphs (2) to (6).

*Paragraphs (2) to (4), as amended, were adopted.*

Paragraph (7)

29. Mr. de SARAM said that, although he did not feel any changes were required, he would like to point out that the phrase "economic or political coercion" was not entirely satisfactory. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and the authoritative texts to which the Special Rapporteur referred used different formulations.

*Paragraph (7) was adopted.*

Paragraphs (8) and (9)

*Paragraphs (8) and (9) were adopted.*

Paragraph (10)

30. Mr. LUKASHUK, referring to the quotation at the end of the paragraph from the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, said that measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind were criminal acts prohibited by international law and were an entirely different matter from countermeasures. The reference should therefore be deleted from the paragraph.

31. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the action in question was prohibited. So, if a countermeasure met such a definition, it was unlawful.

32. Mr. TOMUSCHAT said he did not agree that any type of measure to coerce another State would be unlawful. However, paragraph (11) of the commentary made it clear the Commission had in mind only extreme economic or political coercion.

33. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations was clearly referring to extreme coercion.

34. The CHAIRMAN said that most of the points mentioned had been discussed at the time of adoption of the

articles. He urged the members not to reopen matters that could not be resolved.

*Paragraph (10) was adopted.*

Paragraph (11)

35. Following a brief discussion in which Mr. LUKASHUK, Mr. ROSENSTOCK and Mr. PELLET took part, Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the phrase "although non-binding" should be deleted from the last sentence of the paragraph.

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

36. Mr. TOMUSCHAT proposed that the fourth sentence should be deleted. The reference to the Falklands/Malvinas crisis was out of context and implied that the Commission agreed that the trade sanctions in question were a form of economic aggression.

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in his view, the sentence should be retained. The word "alleged" indicated that the Commission was not taking a stand on the issue.

38. Mr. PELLET endorsed the Special Rapporteur's remarks. Indeed, the Falklands/Malvinas example was apposite.

39. Mr. MAHIOU said that Mr. Tomuschat's proposal called the entire paragraph into question. The Falklands/Malvinas example could not be deleted without deleting the other examples in the paragraph. All of the examples were simply allegations. The Commission was not responsible for them and they should be maintained.

40. Mr. ROSENSTOCK said he endorsed Mr. Tomuschat's views. In fact, the rest of the paragraph following the words "involve countermeasures in a strict sense." should be deleted, since it implied that the Commission believed there was some validity to those arguments.

41. The CHAIRMAN suggested that the paragraph should end after the footnote which followed those words, and that all the examples should be included in that footnote.

42. Mr. PELLET said that he was opposed to that suggestion. The Commission would be retaining two irrelevant examples, those of Bolivia and Cuba, and eliminating the relevant examples.

43. Mr. YANKOV proposed that all the examples should be relegated to the footnote, for which the reference should be placed after the phrase "or other catastrophic effects", in the second sentence.



44. Mr. de SARAM proposed that the word "alleged" should be added before the expression "economic strangulation", in the second sentence.

45. The CHAIRMAN noted that, in keeping with accepted practice throughout the United Nations, examples should not be given in a way that would reopen discussion. Placing the examples in a footnote would make them less sensitive issues, without undermining their value.

46. Mr. IDRIS said he endorsed Mr. Yankov's proposal and also suggested that the footnote should include the sentence "This list is not intended to be exhaustive". On quite another matter, all references to the Soviet Union should contain the word "former".

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Yankov's proposal.

*Paragraph (13), as amended, was adopted.*

Paragraph (14)

*Paragraph (14) was adopted.*

Paragraph (15)

48. Mr. ROSENSTOCK proposed a new formulation for the paragraph. The first sentence would remain unchanged. The rest of the paragraph would read:

"Not all forms of countermeasures relating to diplomatic law or affecting diplomatic relations are considered unlawful. An injured State may resort to countermeasures affecting its diplomatic relations with the wrongdoing State, including declarations of *persona non grata*, the termination or suspension of diplomatic relations and the recalling of ambassadors."

49. Mr. TOMUSCHAT said that the examples given were not countermeasures but political decisions.

50. Mr. PELLET proposed that the phrase "the recalling of ambassadors" should be placed between "declarations of *persona non grata*" and "the termination or suspension of diplomatic relations". On a more general level, he had doubts about the advisability of article 14, subparagraph (c), which was, moreover, contradicted by the examples given in the first footnote to paragraph (17) of the commentary. He would develop those ideas further when that paragraph came to be discussed.

51. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Tomuschat's objection might be met if the word "countermeasures", in the fourth line, was replaced by "measures". As for Mr. Pellet's doubts, the subparagraph as he had originally drafted it had been quite different. Since the paragraph had already been adopted, however, Mr. Pellet's point would have to be considered when the article was discussed on second reading.

52. The CHAIRMAN asked whether the Special Rapporteur and Mr. Tomuschat might draft a new text for paragraph 15 in the light of the comments made.

*It was so agreed.*

Paragraph (16)

53. Mr. TOMUSCHAT proposed that the opening phrase should be replaced by "The area of prohibited countermeasures is delineated by those rules of diplomatic law" or by some wording along those lines.

*Paragraph (16), as amended, was adopted.*

Paragraph (17)

54. Mr. PELLET, said that the first footnote to paragraph (17) gave two different examples of the proposition stated at the beginning of the paragraph. Indeed, the first example directly contradicted the provision contained in article 14, subparagraph (c). He would therefore like the record to show that he had serious doubts about the wording of that subparagraph. In particular, he was not certain whether, so far as the infringement of the diplomatic privileges and immunities of a State's own representatives was concerned, the prohibition on reprisals or countermeasures was as well established as all that.

55. Mr. THIAM said that he shared Mr. Pellet's concern. The examples given were not very appropriate.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the difficulty with article 14, subparagraph (c) could be dealt with on second reading. The two examples cited in the footnote had been given simply to throw light on the problem.

57. The CHAIRMAN suggested that the Commission should take note of the fact that some members felt strongly that the examples given were not accurate examples of countermeasures and that it should agree to revert to the matter on second reading.

*It was so agreed.*

*Paragraph (17) was adopted on that understanding.*

Paragraph (18)

58. Mr. TOMUSCHAT said that paragraph (18) simply repeated the content of paragraph (16). It should be deleted.

*It was so agreed.*

Paragraphs (19) to (23)

*Paragraphs (19) to (23) were adopted.*

Paragraph (24)

59. Mr. TOMUSCHAT said that the paragraph was misleading and should be couched in more cautious terms. In its present form, it seemed to suggest that to suspend a treaty which provided for assistance in the field of, say, education would be unlawful. That would

be going too far and would place too much of a restriction on the political discretion of States.

60. Mr. de SARAM, agreeing with Mr. Tomuschat, said that it was not just a matter of drafting. A difficult issue was involved and it would have to be considered later.

61. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested that the problem might be overcome by adding, at an appropriate point, some non-committal phrase such as "Mention may be made of the following incidents which might be of some interest in considering the problem".

62. Mr. ROSENSTOCK said that a phrase along the lines suggested by the Special Rapporteur would help. It would also be helpful if the example of the measures taken by France was deleted.

63. Mr. KABATSI said that he would have preferred the commentary to refer to State A, State B and so on, rather than to incidents involving specific States, something which could only open old wounds. Moreover, to cite incidents involving just two or three States in a region could paint a particular picture of that region.

64. Mr. MAHIOU said that the Special Rapporteur had been faced with the problem of how to refer to State practice, as required by the statute of the Commission, in terms that were not unduly abstract. Admittedly, the first example cited was not relevant in terms of countermeasures and it could perhaps be deleted. Also, the phrase suggested by the Special Rapporteur might be amplified by a sentence to the effect that: "The examples which do not necessarily correspond to a situation involving countermeasures may serve as an illustration." But, given the lack of time, the most practical course might be to adopt Mr. Rosenstock's suggestion.

65. Mr. IDRIS said that he sympathized with Mr. Kabatsi. In particular, he was not at all sure about the relevance of the two examples cited in the first footnote to paragraph (17), which should perhaps be deleted.

66. Mr. AL-KHASAWNEH said he was at a loss to understand such extreme sensitivity about referring to specific countries by name. The examples given were readily available in literature published all over the world. Was the Commission's report to be pure theory, without reference to anything that had happened in the past? He for one did not favour such a timid approach.

67. Mr. THIAM said that, while he understood Mr. Al-Khasawneh's view, the point he had made earlier was that the examples referred to in the footnote were not, strictly speaking, countermeasures. It would therefore be better not to refer to them at all and he would propose that the footnote should be deleted.

68. Mr. de SARAM said he could not disagree more with Mr. Al-Khasawneh. The Commission had before it commentaries to draft articles, not summaries of the views expressed on those articles. Moreover, neither of the examples given had been discussed either in plenary or in the Drafting Committee. Hence he, too, would prefer to speak of State A, State B and so on, rather than specific cases.

69. Mr. ARANGIO-RUIZ (Special Rapporteur) said he could not agree that it would be better to refer to State A, State B and so on, which was altogether too academic, rather than to specific cases that were of relevance. The idea behind the paragraph was to convey the notion that States which applied any kind of measures, whether countermeasures or retortion, were sensitive to humanitarian considerations. In view of the objections raised, however, the first example cited concerning the personal security forces of Bokassa, could be deleted.

70. Mr. PELLET said he objected very strongly to the suggestion that States should not be named but only referred to by letters. The Commission had to illustrate what it was saying. The question of condemnation did not arise. Such an excess of diplomatic caution was, in his view, entirely out of place in a body that was composed not of diplomats but of legal experts. In his opinion, the example concerning Bokassa was a good one, for it showed that fundamental human rights had been taken into account. If he considered some examples inappropriate, it was certainly not because they might cause offence in certain quarters but because their relevance was questionable.

71. Mr. AL-KHASAWNEH said that he was, at best, only half convinced by Mr. de Saram's arguments. A proper sense of the Commission's importance ought not to lead members to belittle the importance of other United Nations bodies. As a Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities, he had had to deal with a highly sensitive subject, but that had not prevented him from naming names or prevented the Commission on Human Rights from adopting the report of the Subcommission on the subject.

72. Mr. MAHIOU said that the passages appearing in English in the French version of paragraph (24) should be deleted. They were unnecessary and confusing.

73. Mr. THIAM said he agreed that the members were not there to defend the susceptibilities of States. However, the examples in the footnote were inappropriate and should be deleted.

74. The CHAIRMAN suggested that the Commission should adopt paragraph (24) on the understanding that the examples would, as far as possible, be relegated to footnotes. A disclaimer would be added, indicating that the examples were merely illustrative and, in some cases, did not represent countermeasures, and making it clear that the Commission was not taking a position on the cases referred to or prejudging the positions of the parties involved.

75. Mr. TOMUSCHAT said that he was prepared to agree to the adoption of paragraph (24) subject to the addition of an explanatory sentence along the lines just indicated by the Chairman. However, the words in the third sentence, "by way of countermeasures", relating to the United States blockade of trade relations with the Libyan Arab Jamahiriya, should be deleted.

*Paragraph (24) was adopted on the understanding outlined by the Chairman.*

## Paragraph (25)

76. Mr. LUKASHUK questioned the correctness of the statement appearing in the first sentence of the paragraph, which seemed to be at variance with the quotation in the footnote which followed.

*Paragraph (25) was adopted.*

## Paragraph (26)

*Paragraph (26) was adopted.*

## Paragraph (27)

77. Mr. TOMUSCHAT proposed that the first sentence should be deleted.

*Paragraph (27), as amended, was adopted.*

## Paragraphs (28) and (29)

*Paragraphs (28) and (29) were adopted.*

**Organization of the work of the session  
(concluded)\*\***

[Agenda item 2]

78. The CHAIRMAN, noting that the Commission still had before it the commentary to article 11 of part two and commentaries to part three of the draft articles on State responsibility and commentaries to articles A, B, C and D on international liability for injurious consequences arising out of acts not prohibited by international law, invited members to decide whether a meeting was to be held in the afternoon and, if so, what items were to be discussed and in what order.

79. Mr. AL-KHASAWNEH proposed that the Commission should meet in the afternoon, if only out of courtesy to Mr. Barboza, the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

80. Mr. PELLET said that he wished to place on record his strong objection to having to engage in the essential exercise of adopting commentaries to draft articles under conditions of extreme pressure of time. If the Commission decided to meet in the afternoon, he was willing to cooperate, but only under protest.

81. Following a discussion in which Mr. ROSENSTOCK, Mr. AL-BAHARNA and Mr. EIRIKSSON took part, Mr. YANKOV formally moved under rule 71 of the rules of procedure of the General Assembly that the Chairman should rule that a meeting of the Commission should be held in the afternoon and that the remainder of the present meeting should be used for substantive, rather than procedural, matters.

82. The CHAIRMAN, having ensured the presence of a quorum, made a ruling in accordance with that suggestion.

83. Mr. PELLET appealed against the Chairman's ruling.

*The Chairman's ruling was upheld by 9 votes to 5, with 3 abstentions.*

84. The CHAIRMAN, noting that there was no time left for further substantive discussion at the current meeting, said that at the afternoon meeting the Commission would revert to the consideration of paragraph (15) of the draft commentary to article 14 of part two of the draft on State responsibility, which had been left in abeyance. It would then proceed to consider the commentary to article 11 of part two and the commentaries to part three of the draft on State responsibility, as well as the commentaries to articles A, B, C and D of the draft on international liability for injurious consequences arising out of acts not prohibited by international law.

85. Mr. PELLET said that he was entirely opposed to the consideration of the commentary to article 11.

86. Mr. ROSENSTOCK said that the question whether the commentary to article 11 should or should not be considered would have to be decided by a vote. As for the method of dealing with part three (A/CN.4/L.520), he would recommend leaving the introduction aside and proceeding immediately to the consideration of the substantive part, beginning with the commentary to article 1.

*The meeting rose at 1 p.m.*

## 2425th MEETING

*Friday, 21 July 1995, at 3.15 p.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*later:* Mr. Alexander Yankov

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. de Saram, Mr. Eiriksson, Mr. Idris, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Tomuschat, Mr. Vilagrán Kramer.

\*\* Resumed from the 2422nd meeting.

## Draft report of the Commission on the work of its forty-seventh session (concluded)

### CHAPTER III. State responsibility (concluded)

#### C. Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session (concluded)

Draft commentaries to articles 13 and 14 of part two (A/CN.4/L.521) (concluded)

*Commentary to article 14 (concluded)*

1. The CHAIRMAN said that the commentaries to articles 13 and 14 of part two of the draft articles on State responsibility had been adopted with the exception of paragraph (15) of the commentary to article 14. He invited the members of the Commission to decide on the following new text proposed by Mr. Tomuschat to replace the existing second sentence of that paragraph:

“An injured State could envisage action at three levels. To declare a diplomatic envoy *persona non grata*, the termination or suspension of diplomatic relations and the recalling of ambassadors are pure acts of retaliation, not requiring any specific justification. At a second level, measures may be taken affecting diplomatic rights or privileges, not prejudicing the inviolability of diplomatic or consular agents or of premises, archives and documents. Such measures may be lawful as countermeasures if all requirements set forth in the present draft articles are met. However, the inviolability of diplomatic or consular agents as well as of premises, archives and documents is a rule which may not be departed from by way of countermeasures.”

2. Mr. PELLET said that he was not entirely convinced by the last sentence of that text because it was not certain that the rule in question could never be departed from, even by way of countermeasures. He would, however, not insist that that sentence should be amended, but requested that his comment should be reflected in the summary record of the meeting.

*Paragraph (15), as amended, was adopted.*

*The commentary to article 14, as amended, was adopted.*

Draft articles, with commentaries, adopted by the Commission for inclusion in part three and the annex thereto (A/CN.4/L.520)

### Introduction

Paragraph (1)

3. Mr. ROSENSTOCK said that paragraph (1) contained many elements that did not belong in commentaries to draft articles. He did not want to start a lengthy debate on that point, but he hoped that the other members of the Commission would agree that that paragraph should be deleted.

4. Mr. PELLET said he wondered whether it was the usual practice to have such an introduction before the

commentaries to draft articles and, in particular, whether that had been done in the case of parts one and two of the draft.

5. Mr. ARANGIO-RUIZ (Special Rapporteur) said he seemed to remember that there was an introduction to some articles of parts one and two. He also recalled that, in recent years, part three had given rise to rather sharp differences of opinion among the members of the Commission and that it was important for the Sixth Committee to be so informed.

6. Mr. TOMUSCHAT suggested that the French term “*mise en oeuvre*” in brackets in the English text of the first sentence should be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (5)

7. Mr. ROSENSTOCK said that he had the same reservations about paragraphs (2) to (5) as about paragraph (1). They did not belong in the commentary.

*Paragraphs (2) to (5) were adopted.*

Paragraphs (6) to (8)

8. Mr. TOMUSCHAT, supported by Mr. PELLET, said that paragraphs (6) to (8) reflected the views of the Special Rapporteur and that the Commission could therefore not adopt them. He proposed that they should be deleted.

9. Mr. AL-KHASAWNEH, supported by Mr. YANKOV, said that he did not agree with Mr. Tomuschat because those paragraphs described the background to that question in the Commission and the General Assembly was entitled to be informed of all the possibilities that existed in that regard.

10. Mr. MAHIOU said that paragraphs (6) and (7) did in fact contain both useful factual information and subjective points of view that should not be included. Perhaps those two paragraphs should be amended so that they would be as factual as possible.

11. Mr. ARANGIO-RUIZ (Special Rapporteur) recognized that the problem raised by Mr. Mikulka and Mr. Tomuschat (2420th meeting) during the consideration of part three, namely, that of compatibility and coordination between obligations in respect of the settlement of disputes covered by the draft articles and obligations of the same kind deriving from other instruments for the parties to a future convention on responsibility, was a real one and the Commission should study it carefully at its next session. In any event, it was inevitable that problems should arise, both in the field of dispute settlement and in any other field involving State responsibility, between the provisions of the future convention on the topic and any other rule of international law.

12. He nevertheless pointed out that, in the current case, the problem arose only in connection with part three of the draft articles and article 12 of part two as adopted by the Drafting Committee at the forty-fifth ses-

sion in 1993.<sup>1</sup> It would not have arisen in the context of the dispute settlement system that would have derived from the text that he himself<sup>2</sup> and his predecessor<sup>3</sup> had proposed for article 12, paragraph 1 (a), which did not set aside any dispute settlement obligations which might be binding on the parties to a convention on responsibility under other instruments prior or subsequent to the entry into force of such a convention. In other words, no problem of compatibility or coordination arose from that article 12, paragraph 1 (a), or from part three, as proposed in 1993, because of the clear tenure of draft article 1 of part three, which expressly stated that neither party could resort unilaterally to a settlement procedure in connection with any dispute which had arisen following the adoption of countermeasures unless the dispute had been settled by one of the means referred to in article 12, paragraph 1 (a), or submitted to a binding third party settlement procedure within a reasonable time-limit; full account had thus been taken of existing procedures. He had wanted to make that quite clear in the introduction to the commentaries of part three. He was not trying to defend his position, but simply wanted to make all members of the Sixth Committee understand the situation, namely, that the problem of compatibility and coordination derived from the fact that article 12 and part one had been conceived in a certain way. That did not mean that the articles already adopted had to be necessarily modified, but only that the problem had now arisen and it should be given all the attention it required. In any event, he would have no objection if all those considerations were reflected in the commentary in a different way, for example in footnotes.

13. Ms. DAUCHY (Secretary to the Commission), replying to a question by Mr. Pellet, said it was true that it was not the Commission's practice to have an introduction before commentaries to draft articles. There was definitely no introduction of that kind to the commentaries to the articles of part one of the draft articles on State responsibility. Only part two of the draft Code of Crimes against the Peace and Security of Mankind contained a general introduction which set out some substantive problems relating to the articles, but did not describe the historical background to the question.

14. Mr. PELLET, supported by Mr. TOMUSCHAT, said that, in those circumstances, the entire introduction to the commentaries to the articles of part three should be deleted, particularly as it reflected the personal opinions of the Special Rapporteur, whereas an introduction should, as Mr. Mahiou had pointed out, be purely factual and descriptive.

15. Mr. EIRIKSSON said that paragraphs (6), (7) and (8) of that introduction obviously gave rise to problems. He therefore proposed that, before those paragraphs were deleted, the members of the Commission concerned should try, in cooperation with the Special Rapporteur, to draft a more acceptable text, such as the one that he himself had suggested, and that, in the meantime,

the Commission should go on to the following paragraphs.

16. Mr. LUKASHUK said that, because time was short, the Commission should stop discussing at length whether or not that text should be retained and, rather, deal with the substantive problems to which it gave rise and, in particular, the problem of the link between responsibility under the draft articles and responsibility deriving from other conventions, as referred to by Mr. Mikulka.

17. Mr. YANKOV said it was true that most of the paragraphs contained in the introduction belonged more in the Commission's report on the work of its forty-seventh session than in the commentary, the purpose of which was to explain the meaning of the articles of part three and interpret them on the basis of practice and case-law. It would therefore be better if the introduction to the commentary or at least paragraphs (1) to (8), were included in the Commission's report, since paragraphs (9) and (10) might be regarded as part of the commentary.

18. Mr. ROSENSTOCK proposed that paragraphs (9) and (10), which were acceptable, should be kept in part three as footnotes.

19. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in view of the objections to the introduction, he thought that Mr. Yankov's proposal was a good one. The entire content of the introduction could be included in the Commission's report so that it would be clear how the situation with regard to the question of the settlement of disputes had changed and so that the Sixth Committee would be able to understand the problem.

20. Mr. ROSENSTOCK said that he had no objection if the Special Rapporteur's views were reflected in the report, provided that those of other members were also reflected. He also did not think that the problem raised by Mr. Mikulka related only to part three of the draft articles. The problem was inherent to the draft as a whole.

21. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in his view, the problem raised by Mr. Mikulka related precisely to the coexistence and coordination of the dispute settlement procedures provided for in part three of the draft and the settlement procedures provided for in other instruments. It was thus in connection with part three that the problem should be referred to in the report.

22. Mr. YANKOV said he agreed with Mr. Rosenstock that the problem of the relationship between State responsibility under the draft articles and that deriving from other conventions could not be limited to part three dealing with dispute settlement. That would be too restrictive an approach. It should therefore be indicated, perhaps in a footnote, either at the beginning or at the end of the commentary, as Mr. Rosenstock had proposed, that the problem had arisen during the consideration of the question of dispute settlement, but that it could also arise in other areas dealt with in the draft articles, such as that of compensation.

23. Mr. MAHIOU recalled that, when Mr. Mikulka had raised that problem, he himself had pointed out that

<sup>1</sup> See 2396th meeting, footnote 7.

<sup>2</sup> See 2391st meeting, footnote 12.

<sup>3</sup> For the text, see *Yearbook... 1985*, vol. II (Part One), p. 11, document A/CN.4/389, article 10.

it also arose in connection with parts one and two of the draft articles. The Commission could nevertheless proceed on the basis of Mr. Rosenstock's proposal, on the understanding that, at the appropriate time, it would also have to consider the question of the relationship between the rules embodied in parts one and two of the draft and those contained in other conventions in force.

24. Mr. MIKULKA pointed out that the problem had arisen only during the discussion of part three of the draft quite simply because it was only then that the possibility of a convention on State responsibility had really been considered. The Commission had never decided definitely what form the draft articles would take. Mr. Rosenstock's proposal might therefore be the appropriate solution because, if the Commission adopted the idea of a convention, it would naturally have to bear that problem in mind when it considered parts one and two of the draft on second reading.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was surprised that doubts were suddenly being expressed about the nature of the instrument on State responsibility. In his view, it had always been clear that there would be a convention, not just a declaration of principles.

26. Mr. MIKULKA said he had, of course, never thought that there would be only a declaration. He simply wished to recall that the Commission had not yet decided what form the draft articles would ultimately take. It was clear, however, that, if it opted for a convention, the problem of the links between that convention and other existing conventions would necessarily arise.

27. The CHAIRMAN, summing up the discussion, said he thought that the Commission wanted the paragraphs constituting the introduction to the commentaries to part three of the draft articles to be transferred to the Commission's report to the General Assembly, on the understanding that, as Mr. Rosenstock had requested, all the points of view other than those of the Special Rapporteur which had been expressed during the discussion would also be reflected. For the time being, no footnote reproducing paragraphs (9) and (10) of the introduction would be included.

*It was so decided.*

28. The CHAIRMAN invited the members of the Commission to consider one by one the draft articles, with commentaries, proposed for part three and the annex thereto.

#### *Commentary to article 1*

##### *Paragraph (1)*

29. MR. TOMUSCHAT said that paragraph (1) did not explain what "a dispute regarding the interpretation or application of the present draft articles" was. That question was referred to in paragraph (5) of the commentary to article 5, which stated that such a dispute could include issues relating not only to secondary rules, but also to primary rules. In his view, that point should be made

clear in the commentary to article 1, which was a key provision.

30. Mr. ARANGIO-RUIZ (Special Rapporteur) said there was no doubt that the dispute would relate not only to secondary rules, but also, inevitably, to primary rules, since the former could not be applied without the latter.

31. Mr. YANKOV proposed that, for the sake of clarity, the words "including the provisions relating to primary or secondary rules" should be added at the end of the second sentence of paragraph (1).

32. Mr. AL-BAHARNA said he agreed with the Special Rapporteur that it was obvious that disputes would relate both to secondary and to primary rules and that it was therefore not necessary to say so. Moreover, the wording used in article 1 was also used in all conventions on the settlement of disputes.

33. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the clarification Mr. Yankov had provided might suggest that what was meant were only the provisions of the convention which were primary rules. However, article 1 covered any dispute which related not only to the provisions of the convention on State responsibility, particularly those which were secondary rules, but also to the primary rules contained in other conventions and in the rules of general international law. It would therefore be better to keep the wording of paragraph (1) as it stood.

34. Mr. LUKASHUK said that the Special Rapporteur's explanations fully met his concerns. He interpreted article 1 as meaning that, if a dispute regarding the interpretation or application of the draft articles arose between States parties to the draft articles, those States parties would try to settle it in accordance with the procedure provided for in the draft articles, if they had not agreed on another settlement system. In other words, the possibility was not ruled out that they might use another settlement system, if they so agreed.

35. Mr. PELLET said that the Special Rapporteur's explanation of the use of the words "the interpretation or application of the present draft articles" showed to what extent he had departed from past practice in that regard. Another aspect of paragraph (1) that bothered him was the apparent opposition between the word "negotiation" and the word "consultations" in the last sentence. If the Special Rapporteur considered that the word "negotiation" also included "consultations", he should say so. If not, the last sentence should be deleted.

36. Mr. YANKOV (Chairman of the Drafting Committee) said that the Drafting Committee had discussed that point and that, on the basis of past practice, had found that, in other conventions, consultations had been regarded as one means of negotiation among many.

37. Mr. ARANGIO-RUIZ (Special Rapporteur), referring to the first point made by Mr. Pellet, said that the words "the interpretation or application of the present articles" were regularly used in arbitration clauses, in which it was clear that they referred not only to the provisions of the treaty itself, but also to any other provision which might be relevant for the purposes of the application or interpretation of that treaty, that is to say other treaties and the rules of general international law.

38. With regard to the terms “negotiation” and “consultations” he agreed with the interpretation of the latter term given by Mr. Yankov.

39. Mr. MIKULKA said that, in order to avoid spending more time on a point which did not really give rise to any problem of substance, it would be enough to explain in the commentary that the word “negotiation” was to be taken in the broad sense.

*Paragraph (1) was adopted, subject to that drafting change.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

40. Mr. PELLET suggested that, in the French text, the words “*en français*” in brackets in the second line should be deleted.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

*The commentary to article 1, as amended, was adopted.*

*Commentary to article 2*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*The commentary to article 2 was adopted.*

*Commentary to article 3*

Paragraph (1)

41. Mr. PELLET said that the word “possible” in the first sentence was not a good choice because it could create confusion. In the last sentence, moreover, the reference to the Vienna Convention on the Law of Treaties was not quite accurate. Article 66 of that Convention referred to article 65, which in turn referred to Article 33 of the Charter of the United Nations. In fact, conciliation was one of the means provided for in Article 33.

42. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was surprised by Mr. Pellet’s first comment. The word “possible” in the first sentence was the logical counterpart of the word “If” with which the article began. The reference to the Vienna Convention on the Law of Treaties was also entirely comprehensible.

43. Mr. ROSENSTOCK said that the problem could be solved if the words “the means” in the last sentence were replaced by the words “other means”.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (7)

*Paragraphs (2) to (7) were adopted.*

*The commentary to article 3, as amended, was adopted.*

*Commentary to article 4*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

*The commentary to article 4 was adopted.*

*Commentary to article 5*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

44. Mr. ROSENSTOCK suggested that the words “the fourth step” in the second line should be replaced by the words “a potential step” and that the word “primarily” should be added after the word “intended” in the third line.

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

Paragraph (3)

45. Mr. PELLET suggested that, in the fourth sentence, the words “constitution of the arbitral tribunal” should be replaced by the words “constitution of an arbitral tribunal” so it would be quite clear that reference was not being made to the tribunal referred to in the annex. He also regretted that the possibility for the parties to agree to submit their dispute to another arbitral tribunal or to ICJ, which was implied, in paragraph (3) of the commentary, was not explicitly mentioned in article 5, paragraph 2.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was afraid that the inclusion of such a reference would remove the slight element of coercion contained in article 5, paragraph 2.

47. Mr. YANKOV (Chairman of the Drafting Committee) said that the report of the Drafting Committee stressed that the parties continued to be free to choose their course of action. However, it was clear that, if they chose the solution offered by article 5, they must also comply with the provisions of the annex. The present wording of paragraph 2 was thus more rigorous. In order to take account of Mr. Pellet’s comments, the following sentence might nevertheless be added at the end of paragraph (3): “Nothing would prevent the parties to a dispute from having recourse to any other tribunal by mutual agreement, including in the case provided for in article 5, paragraph 2.”

*Paragraph (3), as amended, was adopted.*



## Paragraphs (4) to (6)

*Paragraphs (4) to (6) were adopted.*

*The commentary to article 5, as amended, was adopted.*

## Commentary to article 6

## Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

*The commentary to article 6 was adopted.*

## Commentary to article 7

## Paragraph (1)

48. Mr. ROSENSTOCK suggested that, in the second sentence, the words “set forth in the present articles” should be added after the words “settlement system” and that, in the fifth sentence, the word “effective” should be deleted.

49. Mr. TOMUSCHAT suggested that, in the first sentence, the words “when one of the parties to the dispute challenges” should be replaced by the words “if one of the parties to the dispute should challenge”.

*Paragraph (1), as amended, was adopted.*

## Paragraph (2)

*Paragraph (2) was adopted.*

## Paragraph (3)

50. Mr. ROSENSTOCK proposed that, in the third sentence, the words “as such” should be added after the words “arbitral tribunal”.

51. Mr. PELLET said that the last sentence was unnecessary and could be deleted.

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

*Paragraph (4) was adopted.*

*The commentary to article 7, as amended, was adopted.*

## Annex

## Commentary to article 1

## Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

*The commentary to article 1 was adopted.*

## Commentary to article 2

## Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

## Paragraph (8)

52. Mr. YANKOV (Chairman of the Drafting Committee) suggested that the words “Model Rules on Arbitral Procedure” at the end of the paragraph should be followed by a reference to a footnote indicating that the Model Rules had been adopted by the Commission, but had not been endorsed by the General Assembly.

*Paragraph (8), as amended, was adopted.*

53. Mr. PELLET recalled that, when article 2 had been considered in the Drafting Committee and in plenary, it had been agreed that it would be explained that there was no symmetry between articles 1 and 2 because the rules of competence relating to arbitral tribunals could be regarded as having the status of customary rules and thus did not have to be repeated in the text. That explanation had not been included in the commentary. He therefore suggested that a new paragraph might be added reading:

“(9) It was not considered necessary, in connection with the Arbitral Tribunal, to reproduce some of the procedural provisions relating to the Conciliation Commission because the corresponding rules were considered to be sufficiently well established.”

*New paragraph (9) was adopted.*

*The commentary to article 2, as amended, was adopted.*

## Draft commentary to article 11 of part two

54. The CHAIRMAN recalled that the Commission had before it a draft commentary to article 11 which it would be unable to consider for lack of time. That fact should be reflected in its report to the General Assembly.

55. Mr. EIRIKSSON said that he would like to know the status of article 11, which had been provisionally adopted by the Commission at its forty-sixth session,<sup>4</sup> with a reservation concerning its link to article 12. He was of the opinion that, in the report of the Commission on the work of its forty-seventh session, article 11 should, as it were, have the same status, with the Commission indicating in a footnote that, because of the lack of time, it had been unable to adopt the commentary to article 11 following the adoption of the commentaries to articles 13 and 14.

56. Mr. PELLET said that he wanted article 11 to be clearly distinguished from articles 13 and 14. The commentaries to articles 13 and 14 had been adopted at the current session. The Commission had adopted article 11 at its forty-sixth session with its own status and an expla-

<sup>4</sup> For the text of article 11 of part two, see *Yearbook... 1994*, vol. II (Part Two), p. 151, footnote 454.

nation and, in that connection, the situation was still the same.

57. Mr. ROSENSTOCK said he did not agree that the Commission had adopted article 11 with a different status from that of articles 13 and 14. The Commission had been unable to adopt the commentary to article 11 at its forty-seventh session only because of the lack of time. Article 11 was only one of the many articles which the Commission would have to reconsider in the light of the direction its work would take in future.

58. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, like Mr. Pellet, he considered that article 11 was pending, as article 12 was, and that it would have to be considered at the next session.

59. Mr. EIRIKSSON stressed that, since the Commission was not officially submitting article 11 to the General Assembly, the status of that article was undeniably different from that of articles 13 and 14. It also differed from that of article 12, which the Commission had not adopted. In the footnote relating to article 11, the Commission should therefore recall that that article had been adopted at the preceding session and then include the last sentence of paragraph 352 of its report on the work of its forty-sixth session.<sup>5</sup>

60. The CHAIRMAN proposed that the Commission should use paragraph 350 of that report.<sup>6</sup>

61. Mr. ROSENSTOCK pointed out that articles 11 and 12 did not have the same status because a phenomenon comparable to what was called a "veto" in certain circles had so far operated for article 12, whereas article 11 had been adopted by the Commission. The most neutral way of presenting the situation would therefore be to say that the Commission had not had time to consider the commentary to article 11 and that, consequently, it would not officially transmit article 11 at the end of its forty-seventh session. The Commission had to stick to the facts and not try to rewrite history.

62. Mr. MIKULKA said that he also wished to emphasize the need not to confuse the status of article 11 and that of article 12.

63. Mr. PELLET said that, since the Commission had not dealt with article 12, it did not have to be referred to in the report. With regard to article 11, it should be indicated that, because of the lack of time, the Commission had not considered the commentary to article 11 which it had adopted at its forty-sixth session in 1994 and a footnote should reproduce what had been stated in the preceding report about the reservations to which the adoption of article 11 had given rise.

64. Mr. MAHIOU said that he supported that proposal, which safeguarded everyone's position.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission adopted the proposal by Mr. Pellet.

*It was so decided.*

<sup>5</sup> See *Yearbook* . . . 1994, vol. II (Part Two), p. 151.

<sup>6</sup> *Ibid.*

#### CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law (concluded)\**

##### C. *Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.519)*

##### 1. TEXT OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION ON FIRST READING

*Section C.1 was adopted.*

##### 2. TEXT OF DRAFT ARTICLES A [6], B [8 AND 9], C [9 AND 10] AND D [7], WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SEVENTH SESSION

##### *Commentary to article A [6]*

##### Paragraph (1)

66. Mr. LUKASHUK said that the reference to the Charter of the United Nations at the end of the paragraph was incorrect. Either it should be deleted or reference should be made directly to the Declaration of the United Nations Conference on the Human Environment.

67. Mr. BARBOZA (Special Rapporteur) said that he saw no reason to delete the reference to the Charter, which appeared both in Principle 21 of the Declaration of the United Nations Conference on the Human Environment and in Principle 2 of the Rio Declaration on Environment and Development.

*Paragraph (1) was adopted.*

##### Paragraphs (2) to (10)

*Paragraphs (2) to (10) were adopted.*

##### Paragraph (11)

68. Mr. TOMUSCHAT proposed that, in the second and third sentences, the words "must be" should be replaced by the word "is".

*Paragraph (11), as amended, was adopted.*

##### Paragraphs (12) and (13)

*Paragraphs (12) and (13) were adopted.*

*The commentary to article A [6], as amended, was adopted.*

##### *Commentary to article B [8 and 9]*

##### Paragraphs (1) and (2)

69. Mr. YANKOV (Chairman of the Drafting Committee) said that, at the end of the first sentence of the two paragraphs, the words "last year" should either be

\* Resumed from the 2423rd meeting.

replaced by a precise indication of the year or should simply be deleted.

*Paragraphs (1) and (2), as amended, were adopted.*

Paragraphs (3) to (9)

*Paragraphs (3) to (9) were adopted.*

Paragraph (10)

70. Mr. PELLET said that the scope of the last sentence was quite broad since it established hard law obligations for the State that he found excessive. He would like that sentence to be deleted.

71. Mr. BARBOZA (Special Rapporteur) said that he did not agree with that point of view. The concept of “due diligence” was, rather, very flexible and the sentence in question was a kind of illustration of the general idea contained in the penultimate sentence. He therefore did not see why it should be deleted.

72. Mr. ROSENSTOCK said that the obligation of due diligence, which was flexible when considered generally, stopped being flexible when it involved an obligation to do something. He was of the opinion that, if the Commission decided to end the last sentence with the words “scientific developments”, the preceding sentence could be expanded somewhat and the obligation of due diligence could be given more substance without making it too strict.

73. Mr. BARBOZA (Special Rapporteur) said that he could accept that suggestion, although he considered that it was not reasonable to claim that that sentence would have the effect of turning an obligation of conduct into an obligation of result.

74. Mr. ARANGIO-RUIZ said he objected to the idea that that sentence imposed a strict obligation on the State. However, to make the idea of flexibility more explicit, the words “aimed at ensuring safety” should be inserted between the words “due diligence” and “requires” in the last sentence.

*Paragraph (10), as amended by Mr. Arangio-Ruiz, was adopted.*

Paragraph (11)

*Paragraph (11) was adopted.*

Paragraph (12)

75. Mr. PELLET proposed that the penultimate sentence should be amended to read:

“It is the view of the Commission that the level of economic development of States is one of the factors to be taken into account in determining whether a State has properly fulfilled its obligation of due diligence.”

In the last sentence he proposed that the words “economic level” should be replaced by the words “level of economic development”.

*Paragraph (12), as amended, was adopted.*

Paragraph (13)

76. Mr. ROSENSTOCK proposed that, in order to establish a parallel between the first and last sentences, the words “to mean reducing” should be replaced by the words “to mean that the aim is to reduce”.

*Paragraph (13), as amended, was adopted.*

*The commentary to article B [8 and 9], as amended, was adopted.*

*Commentary to article C [9 and 10]*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

77. Mr. ROSENSTOCK proposed that, in the penultimate line, the words “treaty-based and” should be added after the word “are”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

78. Mr. LUKASHUK said that the word “party” was ambiguous because it could refer to States, as well as to legal persons.

79. Mr. YANKOV said that there was a language problem. The word “party” was correct because it could mean the operator, the State, and so on, but it would have to be seen whether the same was true in Russian and in French.

80. The CHAIRMAN, supported by Mr. MAHIOU, suggested that the word “party” should be replaced by the word “entity” in all languages.

81. Mr. BARBOZA (Special Rapporteur) said he still thought that, in English, the word “party” was correct because it could mean an entity, a legal person or a natural person. He would, however, not object to the proposed amendment.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) to (11)

*Paragraphs (6) to (11) were adopted.*

## Paragraph (12)

82. Mr. ROSENSTOCK said that, in the last sentence of the citation, starting with the words "if the two Governments" emphasis should be added because it described a key element of the system of compensation decided on by the Tribunal.

*Paragraph (12), as amended, was adopted.*

*Mr. Yankov took the Chair.*

## Paragraph (13)

83. Mr. PELLET said that the conclusion stated in paragraph (13) was entirely wrong because it did not reflect the complexity of the system of compensation decided on by the Tribunal and overlooked the fact that a failure had been the basis for compensation.

84. Mr. BARBOZA (Special Rapporteur) said that he had a radically different interpretation of the award, which was, in his opinion, a typical example of liability for risk.

85. Mr. ROSENSTOCK said that it was not for the Commission to take a stand on the interpretation of the award in the *Trail Smelter* case,<sup>7</sup> which had given rise to controversies ever since it had been handed down. A factual explanation should nevertheless be added, namely, that there had been a prior agreement between the parties on the payment of an indemnity.

86. Mr. MAHIOU said that, in order to reflect accurately the two possibilities taken into account by the Tribunal, the word "only" should be added between the word "not" and the word "on".

87. Mr. AL-BAHARNA said that he supported Mr. Rosenstock's proposal.

88. Mr. PELLET said that, in his view, paragraph (13) should simply be deleted.

89. Mr. TOMUSCHAT said that the amendment proposed by Mr. Rosenstock did not add anything and did not make it possible to draw any conclusion about liability. He also proposed that paragraph (13) should be deleted.

90. Mr. BARBOZA (Special Rapporteur) pointed out that it was a shame not to draw any conclusions from the precedent-setting case referred to, but, because of the lack of time, he was resigned to the deletion of paragraph (13).

*Paragraph (13) was deleted.*

## Paragraphs (14) to (31)

*Paragraphs (14) to (31) were adopted.*

<sup>7</sup> See 2415th meeting, footnote 11.

## Paragraph (32)

91. Mr. PELLET said that the last sentence was awkward and should be deleted.

*Paragraph (32), as amended, was adopted.*

*The commentary to article C [9 and 10], as amended, was adopted.*

## Commentary to article D [7]

## Paragraph (1)

92. Mr. LUKASHUK said that greater emphasis should be placed on the principle of cooperation, which was even more important than the principle of good faith.

93. Mr. IDRIS, noting that the words "cooperation" and "cooperate" were used in paragraphs (1) and (2), proposed that, in the first line of paragraph (1), the words "the principle of" should be inserted before the word "cooperation".

*Paragraph (1), as amended, was adopted.*

## Paragraph (2)

*Paragraph (2) was adopted.*

## Paragraph (3)

94. Mr. TOMUSCHAT said that the reference to the second "*Rainbow Warrior*" case<sup>8</sup> as an example of cooperation for the protection of the environment was rather inappropriate. He therefore proposed that the second sentence should be deleted.

*Paragraph (3), as amended, was adopted.*

## Paragraphs (4) to (10)

*Paragraphs (4) to (10) were adopted.*

## Paragraph (11)

95. Mr. TOMUSCHAT requested the Special Rapporteur to explain what he meant by the word "eventually" in the second sentence.

96. Mr. BARBOZA (Special Rapporteur) said that "eventually" meant "in the end" or "ultimately".

97. The CHAIRMAN said that the word "*éventuellement*" would therefore have to be deleted in the French text.

*Paragraph (11), as amended in the French text, was adopted.*

<sup>8</sup> Decision of 30 April 1990 by the France-New Zealand Arbitration Tribunal (*International Law Reports* (Cambridge), vol. 82 (1990), pp. 500 *et seq.*).

*The commentary to article D [7], as amended, was adopted.*

*The commentaries to draft articles A, B, C and D, as a whole, as amended, were adopted.*

*Section C.2 was adopted.*

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

*The draft report of the Commission on the work of its forty-seventh session, as a whole, as amended, was adopted.*

#### **Closure of the session**

98. Mr. TOMUSCHAT requested that, in view of the invaluable services she had provided to the Commission

for so many years, Ms. Dauchy should be maintained in her post as Secretary to the Commission in 1996.

99. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission endorsed Mr. Tomuschat's request and would transmit it to the competent Secretariat authorities.

*It was so decided.*

100. After the usual exchange of courtesies, the CHAIRMAN declared the forty-seventh session of the International Law Commission closed.

*The meeting rose at 6 p.m.*







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