Document:-
A/CN.4/L.412

Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: titles of chapter I and parts I and II of the draft; articles 1, 2, 3, 5 and 6 - reproduced in A/CN.4/SR.2031 to 2033

Topic:
Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

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53. Mr. AL-QAYSI, supported by Mr. BEESLEY, said that draft article 5 complemented article 4. If the wording proposed by Mr. Eiriksson for article 5, paragraph 1, were adopted, the wording of article 4, paragraph 3, would also have to be amended. He urged the Commission to adopt article 5 in the form proposed by the Drafting Committee.

54. Mr. McCAFFREY (Special Rapporteur) also urged the Commission to adopt article 5 as proposed by the Drafting Committee.

55. Mr. EIRIKSSON said that his intention had not been to change article 4, paragraph 3. He had simply hoped that his amendments would remedy the inconsistencies between article 4 and article 5.

56. Mr. KOROMA said that he would like his view that article 5 was not in accordance with political reality to be placed on record. He hoped that that provision would be reviewed at a later stage.

57. Mr. REUTER said that he had no objection to the adoption of article 5, but wished to place on record his reservations concerning the incompatibility between paragraphs 1 and 2, and concerning the legal effects of paragraph 1. Those were matters of substance that would have to be discussed more thoroughly at a later stage.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 5 as proposed by the Drafting Committee.

Article 5 was adopted.

59. The CHAIRMAN said that the meeting would rise to enable the Planning Group of the Enlarged Bureau to meet.

The meeting rose at 11.35 a.m.

2031st MEETING

Friday, 10 July 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Tribute to the memory of Mr. Senjin Tsuruoka, former member of the Commission

1. The CHAIRMAN announced with deep regret the death of Mr. Senjin Tsuruoka, a former member of the Commission, who had made an important and lasting contribution to its work.

At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Senjin Tsuruoka.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.412)

[Agenda item 5]

Draft articles proposed by the Drafting Committee

Titles of chapter I and parts I and II of the draft *and* Articles 1, 2, 3, 5 and 6

2. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of chapter I and parts I and II of the draft code and draft articles 1, 2, 3, 5 and 6 as adopted by the Committee (A/CN.4/L.412), which read:

CHAPTER I

INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2. Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and punishment

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime, irrespective of any motives invoked by the accused that are not covered by the definition of the offence, and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

. . .

Article 5. Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

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* Resumed from the 2001st meeting.

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

Article 6. Judicial guarantees

Any person charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular:

1. In the determination of any charge against him, he shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty.

2. He shall have the right to be presumed innocent until proved guilty.

3. In addition, he shall be entitled to the following guarantees:

(*a*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*b*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*c*) To be tried without undue delay;

(*d*) 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 in any such case if he does not have sufficient means to pay for it;

(*e*) 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;

(*f*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*g*) Not to be compelled to testify against himself or to confess guilt.

3. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) recalled that draft articles 1 to 11[5] as submitted by the Special Rapporteur in his fifth report (A/CN.4/404) had been referred to the Drafting Committee at the present session (see 2001st meeting, para. 31). The Committee had devoted to them 12 of the 39 meetings it had held during the session and had finally adopted articles 1, 2, 3, 5 and 6 (A/CN.4/L.412) in the light of the discussion on them at the present session.

4. The Drafting Committee had decided to leave aside draft article 4 (*Aut dedere aut punire*) for the time being, and therefore had not discussed the article. On the other hand, it had discussed draft article 7 (*Non bis in idem*) at length. The principle laid down in that article was regarded by some members as essential, but others considered that it would be acceptable only if it were subject to certain conditions designed to prevent abuse. Due to lack of time, however, the Drafting Committee had been unable to agree on a new form of wording.

5. Also due to lack of time, the Committee had been unable to consider draft articles 8 to 11. Consequently, six draft articles would still have to be examined at future sessions of the Commission.

6. The Drafting Committee's first recommendation related to the actual title of the topic. As pointed out during the discussion in plenary, the word "crimes" had been used in some versions and "offences" in others—a difference that derived from General Assembly resolutions adopted towards the end of the 1940s. Having discussed the matter in an endeavour to harmonize all the language versions in substance and in form, the Committee recommended that the term "crimes" should be used in all languages. Accordingly, while the title of the topic would for the time being remain as it appeared on the Commission's agenda and in General Assembly resolutions on the subject, the word "crimes" would henceforth be used in all languages in the titles and texts of the draft articles. If the Commission accepted that recommendation, it might wish to recommend in its report that the General Assembly approve that decision and amend the title of the topic in English with a view to greater harmonization and equivalence between the various language versions. The Commission therefore had to decide whether it wished to use the word "crimes" in all languages and whether to recommend to the General Assembly that the title of the topic in English should be amended accordingly.

7. Mr. JACOVIDES said that he supported the change proposed by the Drafting Committee, which responded to the wishes expressed in the past both in the General Assembly and in the Commission itself and for which there were cogent reasons. The proposed new title for the topic was more accurate legally and carried greater weight politically. In addition, the use of the term "crimes" in the English text would make for harmonization with the other language versions.

8. Mr. BEESLEY said that he could have accepted the retention of the term "offences" at the beginning of the English text of article 1, provided the word "crimes" was used in the subsequent explanation, namely the expression "crimes against the peace and security of mankind", so as to stress the seriousness of the crimes covered by the draft.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to accept the proposal by the Drafting Committee to replace the term "offences" by "crimes" in the English text of the draft and to recommend to the General Assembly that it amend the title of the topic accordingly.

It was so agreed.

TITLES OF CHAPTER I AND PARTS I AND II

10. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Drafting Committee had for the moment accepted the title of chapter I (Introduction) and the titles of parts I and II as proposed by the Special Rapporteur. They were, however, provisional and would probably have to be re-examined. In the mean time, the Committee recommended that the Commission adopt those titles.

11. Mr. CALERO RODRIGUES, supported by Mr. EIRIKSSON, said that, although he did not wish to press the point at the present stage, he still believed that the draft articles should be divided into parts and the parts into chapters, as was the Commission's usual practice. He therefore reserved his position on that question and trusted that, on second reading, the Commission would bring the wording into line with that adopted in most other conventions.

12. Mr. ARANGIO-RUIZ said that, strictly speaking, he had no objections to the Drafting Committee's proposals, but he did have a reservation with regard to the title of part I (Definition and characterization). A

[5] For the texts, see 1992nd meeting, para. 3.

definition was, as it were, a label, whereas characterization related to the substantive treatment of a crime. He therefore accepted the title of part I for the time being, subject however to any changes he might suggest in the light of the texts to be adopted later.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the titles of chapter I and parts I and II of the draft code.

The titles of chapter I and parts I and II of the draft code were adopted.

ARTICLE 1 (Definition)

14. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 1 was very close to the text submitted by the Special Rapporteur and referred to the Drafting Committee, except for the square brackets around the words "under international law". The construction of the sole sentence that made up the article now followed the English version, which had been taken as a model, and the text started in all languages with the words "The crimes . . .".

15. Some members of the Drafting Committee had considered that the words between square brackets should be retained, while others had taken the view that they should be deleted. The former had argued that those words had appeared in the 1954 draft code and felt they were a logical and necessary means of declaring that the crimes in question were crimes under international law as reflected in numerous conventions and declarations of the organized international community. Other members had feared in particular that the words would be a source of confusion between the present topic and the topic of State responsibility, for States would in any event be bound by the code and the crimes covered existed independently of the code. The Drafting Committee had decided to draw attention to the difference of views by using square brackets, and to revert to the matter later. The word "defined" had also given rise to some reservations, since the draft article did not seem to be a definitional article. The Committee had none the less decided to retain the word, on the understanding that it was taken to mean "indicated" or "determined".

16. The Drafting Committee had also considered the possibility of adding a second paragraph containing a general definition of the crimes covered by the code, together with certain criteria. In that connection, Mr. Pawlak had proposed the following text (A/CN.4/L.419):

> "Crimes against the peace and security of mankind are the acts which jeopardize the most vital interests and the very existence of mankind, violate the fundamental principles of international law, and threaten civilization and the basic human right to life."

Some members of the Drafting Committee had taken the view that the question of a general definition should be discussed immediately, but most had considered that it was a complicated matter and that such a course would have been premature. The Committee had decided to leave the question aside and revert to it later, perhaps after the establishment of the list of crimes, which would probably contain specific criteria for each of the acts.

17. The title of the draft article as proposed by the Special Rapporteur remained unchanged.

18. Mr. BEESLEY said that he had some reservations regarding the use of the term "definition" as the title of article 1 but could wait until the Commission's work had made much more headway before coming to a final decision.

19. As to the text of the article, he was in favour of retaining the words "under international law", provided they were placed between the words "constitute crimes" and the phrase "against the peace and security of mankind". He therefore formally proposed that such a change be made. In particular, the word "defined" should be kept, for he could not possibly agree to an open-ended code, especially if the question whether or not there were grounds for adding other crimes were left to national jurisdictions.

20. He also wished to comment briefly on the revised text of article 1 proposed by Mr. Pawlak in the Drafting Committee, which the Special Rapporteur had read out (para. 16 above). The intention was commendable, but the text read more like a General Assembly resolution than an article for the code. Far from strengthening the definition of crimes against the peace and security of mankind, that text would, if adopted, tend to soften it. It would introduce a great many criteria into the definition and in effect create as many loopholes. He therefore did not favour its adoption.

21. In reply to a question by the CHAIRMAN, Mr. PAWLAK explained that his suggested reformulation of article 1 was not intended to be discussed at the present stage as a concrete proposal and should be taken up at a later stage of the Commission's work on the draft code.

22. Mr. MAHIOU said he thought that the reference to international law was appropriate and therefore favoured deletion of the square brackets around the words "under international law" for the reasons already stated by the Chairman of the Drafting Committee: the Commission was concerned with crimes under international law, not internal law, as was apparent from draft article 2. Moreover, the Commission had already used that expression, more particularly in the Nürnberg Principles.[6] The Drafting Committee had harmonized the wording of all the language versions, but article 1 as formulated by the Special Rapporteur[7] was more logical and apposite.

23. Mr. BARSEGOV said that the presence of the words "under international law" in square brackets raised a very important question of principle and the Commission must resolve it. A code of crimes could not possibly be drafted if there was any doubt about the fact that it dealt with crimes under international law. He had not envisaged any problem in that respect, in view of the

[6] *Ibid.*, footnote 12.

[7] *Ibid.*, para. 3.

numerous existing documents in which such crimes were carefully defined. If the acts covered by the draft code were not regarded as crimes under international law, the very basis for the Commission's consideration of the topic would be undermined. The Commission was examining acts which were considered as crimes under international law in accordance with recognized conventions and the general norms of international law. It was apparent from the title of the topic itself that the Commission was required to codify existing norms. If the reference to international law were excluded from the definition of crimes, the binding legal character of conventions such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid* or the Convention on the Prevention and Punishment of the Crime of Genocide, as well as other relevant norms of international law which defined crimes against humanity, would be called into question. For that reason, he could not fail to endorse Mr. Mahiou's proposal. The General Assembly would inevitably raise questions about the work of the Commission if the reference to international law were retained between brackets. In any event, there was no doubt that the overwhelming majority of members of the Commission considered that the crimes covered by the code were indeed crimes under international law. The other members who were in favour of deleting the reference were free to reserve their position on the matter.

24. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he saw no point, at the present stage in the Commission's work, in repeating statements which had been made to the Commission before the draft articles had been referred to the Drafting Committee and which had then been reiterated before the Drafting Committee. It would suffice if members of the Commission spoke for or against the Drafting Committee's proposals.

25. Mr. CALERO RODRIGUES pointed out that, when the Drafting Committee placed words between square brackets, it did so in the hope that the Commission would be able to settle the matter. It amounted to offering a choice between two alternatives.

26. Mr. ILLUECA said that, during the general discussion, he had spoken in support of the expression "crime under international law"; but in view of the divergence of views that had emerged and the deadlock facing the Commission, the best course would be to retain article 1 in its present formulation and invite the Sixth Committee of the General Assembly to express its views.

27. Mr. GRAEFRATH said that, in the Drafting Committee, he had accepted that article 1 be presented to the Commission as it appeared in document A/CN.4/L.412 because he had expected that the discussion in the Commission would lead to the removal of the square brackets around the words "under international law". Those words represented an important qualification of the kind of crimes covered by the draft code. He therefore strongly supported Mr. Mahiou's proposal to remove the square brackets. Members who preferred them to be retained could of course place their views on record.

28. Mr. ARANGIO-RUIZ said that he was opposed to Mr. Mahiou's proposal to remove the square brackets around the words "under international law". There were good reasons for retaining the text as it stood.

29. Mr. EIRIKSSON said he, too, was in favour of retaining the square brackets around the words "under international law".

30. Mr. JACOVIDES said that he supported Mr. Mahiou's proposal and could also accept Mr. Beesley's proposal regarding the placing of the words "under international law".

31. He had great sympathy with Mr. Pawlak's proposal for the text of article 1 (see para. 16 above), but found it much too ambitious in its present form. He therefore suggested that it should be recast so as to read:

> "Crimes against the peace and security of mankind are the acts which jeopardize the most vital interests of mankind and violate the fundamental principles of international law."

That more modest language would prove more acceptable and still adequately underline the gravity and importance of the subject.

32. Mr. FRANCIS said that he agreed with Mr. Beesley regarding the placing of the words "under international law". He would have favoured the removal of the square brackets, but felt that the Commission was not in a position to take a decision on that point at the present stage.

33. Mr. ARANGIO-RUIZ said that the draft code would eventually take the form of an international convention, namely a body of rules of international law setting forth rights and obligations. There was no doubt that the provisions of the code would then form part of international law. The fact that the crimes were defined in an instrument of international law thus rendered any reference to international law superfluous. But for the persons who committed such crimes to be prosecuted, in other words for the code to be implemented—whether implementation was to be entrusted to an international tribunal, was to remain within the competence of States or was to be dealt with under a mixed or transitional system—the crimes covered by the code also had to be characterized as crimes under internal law. Far from limiting the scope of the code, the omission of any reference to international law in article 1 would strengthen the condemnation of the crimes. Only when the code had been incorporated by all States parties into their internal law would it be fully implemented. To dispel any ambiguity in that regard, he would again stress that the effectiveness of the code would depend on its being incorporated into the internal law of States.

34. Mr. CALERO RODRIGUES said that he supported Mr. Mahiou's proposal, as well as Mr. Beesley's useful suggestion.

35. Mr. PAWLAK said that he strongly supported Mr. Mahiou's proposal. The inclusion of the words "under international law" in article 1 was essential. It would be most surprising to omit them, bearing in mind the reference to "a crime under international law" contained in Principle I of the Nürnberg Principles, which the Commission itself had adopted at its second session,

in 1950.[8] Besides, in the 1954 draft code, article 1 stated that offences against the peace and security of mankind were "crimes under international law".

36. As to his own proposed reformulation of article 1, which would be considered at a future date, he took note of the interesting suggestion made by Mr. Jacovides (para. 31 above).

37. Mr. HAYES said that it was still uncertain whether the draft code would be declaratory of existing crimes or constitutive of crimes against the peace and security of mankind, and thus open to the inclusion of new crimes. The words "under international law" were unnecessary if the code was to be purely declaratory. If, on the other hand, it was intended to cover new crimes, those words would be inappropriate.

38. The proposal by Mr. Beesley raised a different issue. If the words "under international law" were placed between the word "crimes" and the phrase "against the peace and security of mankind", at the end of the article, they would become unnecessary if the draft code became international law and, of course, inaccurate if it did not.

39. Mr. AL-QAYSI said that, when the Drafting Committee had placed square brackets around the words "under international law", it had done so in order to express its own intention to revert to the matter at some later stage.

40. A fundamental issue of substance had been raised, namely whether the draft code was to be declaratory of existing crimes or constitutive of new crimes. It was difficult to see how anyone could support both Mr. Mahiou's proposal and Mr. Beesley's seemingly innocuous proposal, since the first was based on the declaratory approach and the second on the constitutive approach. It would be remembered that, in the past, there had been considerable division of opinion as to whether or not such crimes as colonialism, mercenarism and *apartheid,* which had not appeared in the Nürnberg Principles, were to be regarded as crimes against the peace and security of mankind.

41. For his part, he would be prepared to support Mr. Mahiou's proposal in regard to the substance, for those crimes were already crimes under international law, but he considered that the Commission would not be able to settle the matter at the present stage. He was therefore prepared to wait.

42. Mr. MAHIOU said he had certainly not thought that his proposal would give rise to such a heated debate. At the same time, if an article prepared by the Drafting Committee gave rise to differences of view, it was only natural that the point at issue should be discussed in plenary. In the present case, the square brackets in draft article 1 indicated an area of disagreement which should be reflected in the summary records of the Commission, since the Drafting Committee's work was of an informal nature. The use of square brackets was, moreover, a tradition of the Commission: for instance, in the draft articles on jurisdictional immunities of States and their property, article 6, in particular, contained a reference between square brackets to the "relevant rules of general international law". Similarly, a number of draft articles on the status of the diplomatic courier contained expressions between square brackets, and members of the Commission had taken a position on them in plenary. At some point, therefore, the General Assembly would have to be enlightened as to the line of argument members of the Commission had followed with respect to the expressions between square brackets. He would not press for the immediate deletion of the square brackets in article 1, but would suggest that the Commission should adopt that article as it stood, particularly since those members who were in favour of a reference to international law were divided as to its proper place.

43. Mr. BENNOUNA said he did not think that the Commission was yet in a position to resolve the problem it had encountered. Admittedly, the Drafting Committee had pin-pointed the difficulties, but it had not resolved all of them, for it considered that the task would be easier when the work was more advanced. The difficulties of article 1 were evidenced by Mr. Pawlak's proposal (para. 16 above), which, although certainly very interesting, had come too soon. In addition, the question of the universality of the code, which should command general acceptance, was still outstanding. From that standpoint, the definition of the crimes to be covered was difficult, since they were the most abominable crimes of all, which would entail the application of a rule of *jus cogens.* Article 1 was also criticized for proposing a definition that was not a definition, because it merely introduced the list of crimes that was to appear in the body of the text. In his view, however, it was a convenient solution which dispensed with the need to propose a general definition at the outset.

44. Again, article 1 raised a problem of substance which had been discussed in the Sixth Committee of the General Assembly: did it refer to crimes already recognized under international law? If so, interpretation of the code would involve referral to general international law. If not, it would be necessary to construe the provisions of the code itself.

45. In any event, the reference to international law should be included in the definition. The crimes concerned were obviously crimes under international law and whether or not they were recognized in internal law in no way changed their characterization. In other words, the crimes in question should be recognized irrespective of any convention.

46. The discussion was none the less premature. Only when the list of crimes against the peace and security of mankind had been established would it be possible to proceed on a case-by-case basis, to determine which crimes were recognized in international law, and to lay down a general definition. He therefore considered that the square brackets should be retained and that the views expressed during the session should be reflected in the Commission's report to the General Assembly. It was to be hoped that the question would give rise to a debate in the Sixth Committee which would be of benefit to the Commission.

[8] *Ibid.,* footnote 12.

47. Mr. SEPÚLVEDA GUTIÉRREZ said that he was in favour of deleting the words "under international law" for the reasons already stated by, among others, Mr. Illueca and Mr. Arangio-Ruiz. Obviously the Commission could not take a final decision for the time being. Also, the expression *crímenes de derecho internacional*, in the Spanish text of article 1, was not, in his view, the best expression to use.

48. Mr. TOMUSCHAT said that he was in favour of retaining the square brackets until such time as the Commission had the list of crimes.

49. Mr. BARSEGOV said that he endorsed the text proposed by Mr. Pawlak for draft article 1 (para. 16 above) and considered that the definition of crimes against the peace and security of mankind proposed by the Drafting Committee should be further refined. The text before the Commission gave only an idea of the direction the definition should take. When the list of the crimes in question was available, their characteristics could be analysed and a definition laid down.

50. None of the legal arguments advanced in the Commission had persuaded him to abandon the idea of defining the subject of the code right from the start, namely in article 1. For instance, the argument that the Commission should wait until the complete list of crimes was available in order to find out whether they all came under international law was not very relevant. Nobody denied that the crimes involved were indeed crimes under international law. Moreover, in the absence of an accurate definition, it was difficult to see how the provisions of the code could be implemented.

51. At its 2029th meeting, the Commission had adopted in connection with international watercourses a provision which, in his view, ran counter to international law. Some members had voiced reservations and it had been decided to reflect them in the commentary. He did not see why the Commission should do otherwise in the case of the topic under consideration.

52. Mr. REUTER said that he endorsed the general intent of article 1. The significance of the square brackets had been considered by several members and he agreed with their arguments. In his view, however, the whole expression "crimes under international law" should be placed between brackets.

53. It would be noted that article 1 and article 2 already spoke of crimes, but it was still not known whether they were crimes by individuals or crimes by States. For his own part, he agreed entirely that State crimes should form the subject of a special régime, even though that would certainly pose problems in terms of criminal law. While it was obvious that the crimes envisaged came under international law, it was not yet known who committed them—States or individuals.

54. Mr. EIRIKSSON said that he still regarded article 1 more as a scope article than as a definitional article, which could create difficulties inasmuch as the content of the articles had yet to be decided. He was not certain what effect the wide range of views that would undoubtedly be expressed in the Sixth Committee of the General Assembly would have on the continuation of the Commission's work. Personally, he found the expression "crimes under international law" somewhat political and difficult to address in legal terms, either in the Commission or elsewhere. In any event, the debate in the Sixth Committee would, in his view, be unproductive until such time as there was an indication of the actual crimes to be included in the code.

55. He would remind the Commission that the General Assembly had at its last session, in resolution 41/81 of 3 December 1986, requested the Commission to indicate the substantive issues on which the views of Governments would be particularly relevant to the continuation of the Commission's work. Perhaps the subject under consideration was one such issue. If so, the views of members of the Commission should be clearly reflected in the commentary to ensure that the debate in the Sixth Committee was not unduly political.

56. Mr. GRAEFRATH said that the words "under international law" were neither superfluous nor inappropriate, for it was difficult to see how crimes aganst the peace and security of mankind could be anything other than crimes under international law. Crimes against the peace and security of mankind, moreover, were crimes of the utmost gravity and therefore must necessarily constitute crimes under international law, irrespective of their characterization under internal law. That should be made clear from the outset, in article 1.

57. As for including a list of crimes in the code, régimes like the *apartheid* régime should not be able to argue that *apartheid* was not a crime for which individuals could be punished under international law simply because a particular country had not ratified the *Apartheid* Convention or any future code of crimes against the peace and security of mankind.

58. Mr. SOLARI TUDELA said that, if the code was to include a list of crimes, the square brackets in article 1 should be deleted. It could be assumed, however, that the list would include crimes that were not regarded as such under the internal law of States. The crime of *apartheid*, for instance, was not covered by Peruvian law. Provision for a sanction should therefore be made, something which could be done only at the level of international law. Furthermore, the 1954 draft code had already referred to international law. If that reference were now deleted, the implication would be that there had been an evolution in thinking in the interim and that the new text marked a change of approach.

59. Mr. ROUCOUNAS said that four or five categories of crimes were recognized under international law. The crimes covered by the code obviously fell under international law and the only question to be settled was the place at which the relevant reference should appear. The potential difficulties of the relationship between internal law and international law were skilfully resolved in draft article 2. If draft article 1 were adopted in its present form, it would at least have the merit of indicating the direction for the continuation of the Commission's work and the establishment of the list of crimes, in which task the Commission should be as temperate as possible. He therefore favoured deletion of the square brackets.

60. Mr. BEESLEY, associating himself with the remarks made by Mr. Eiriksson and Mr. Reuter, said that it was necessary to adopt a very frank approach in the case of crimes against the peace and security of mankind. Did the Commission, for instance, have in mind the courageous action taken by the Government of Argentina concerning the crimes committed in the so-called "dirty war", or did it have something different in mind? And what about the question of Chernobyl, in which connection a criminal trial was under way in the country concerned? He could think of no better example of an unintended action that could have jeopardized the most vital interests of mankind and violated the fundamental principles of international law. He was not suggesting that that was what had occurred, nor was he speaking against any particular country. The branch of the law which the Commission was discussing, however, concerned a very serious issue, and great care was needed in examining the implications, over both the short term and the long term, of the Commission's actions. For the time being, he would be content to accept the Commission's decision, but he agreed that there should be a list of crimes and also a definition of specific terms, particularly since no international tribunal had yet been established.

61. Mr. BARSEGOV said that it was inappropriate to place a tragic accident like Chernobyl on the same footing as a régime such as *apartheid.*

62. Mr. BEESLEY said that his remarks had perhaps been misinterpreted. The point he had wished to make was that, if a situation which developed in a particular country was treated as a crime in that country since it threatened human life, the Commission would have to take account of that situation. He had also added that there was no intention on his part to criticize any particular country.

63. Mr. Sreenivasa RAO said that the draft code had been under consideration virtually since the creation of the Commission and a number of crimes against the peace and security of mankind had been identified, including crimes of aggression, war crimes, crimes against humanity and crimes of terrorism. Some of them were far from uncommon and he therefore wondered why there was so much difficulty about deciding whether or not they constituted crimes under international law. Even though the drafting might well be difficult, there was no problem as to content. He could not subscribe to the argument that agreement should first be reached on a list of crimes, since that was mere hair-splitting. It had also been said that the whole question was political; but there was a body of rules of international law that was purely legal. That distinction was difficult to sustain in an international forum such as the Commission, which had to take account of political realities and should not seek to separate law and politics in watertight compartments. He therefore favoured the removal of the square brackets around the words "under international law" in article 1.

64. Mr. AL-KHASAWNEH said that his position was similar to that of Mr. Graefrath, Mr. Sreenivasa Rao and Mr. Roucounas, for the reasons they had given.

65. Mr. DÍAZ GONZÁLEZ said that he endorsed the wording of article 1 as proposed by the Drafting Committee but favoured the deletion of the square brackets for the reasons stated more particularly by Mr. Al-Qaysi. It was necessary to bear in mind those crimes which would not have been foreseen either at Nürnberg or in the United Nations.

66. Mr. OGISO said that it would be advisable to retain the square brackets in article 1, first because members were still divided on the issue, and also because he would prefer the Commission to revert to the question after it had concluded its consideration of the question of a list of crimes.

67. Mr. PAWLAK said that he wished, in the light of Mr. Mahiou's proposal, to record his support for the deletion of the square brackets in article 1.

68. Mr. HAYES, clarifying his position as stated earlier, said that, if the words "under international law" were retained without the square brackets, the effective meaning of article 1 would be that some acts which were already crimes under international law would be classified as crimes against the peace and security of mankind. That would imply that the definition of crimes against the peace and security of mankind did not go beyond the existing crimes under international law. The Commission might, however, wish to go further when it defined crimes against the peace and security of mankind and he was therefore opposed to the retention of the phrase in question, at least at the present stage. If, on the other hand, a final definition or list included only those acts which were generally agreed to be crimes under international law, the opening words of article 1 would not add anything to the status of those acts as crimes under international law; nor, if omitted, would they detract from that status.

69. Mr. YANKOV said that he was in favour of deleting the square brackets in article 1. The Commission was not working in an unknown field. A draft Code of Offences against the Peace and Security of Mankind, including a definition and a list of crimes, had been adopted by the Commission in 1954; moreover, the various reports submitted by the Special Rapporteur provided sufficient support for the conclusion that acts covered by the draft code constituted crimes under international law. It would be regrettable if, more than three decades after the draft code had been adopted for the first time and nearly four decades after the Nürnberg trial, the Commission were to hold that the crimes envisaged by the draft code did not constitute crimes under international law.

70. Mr. THIAM (Special Rapporteur) said that the expression "crimes under international law" did not come from him: he had taken it from earlier texts, including the 1954 draft code. He would, however, like the Commission to make its position clear, since he needed to know exactly which crimes were involved for the continuation of his work. If, for instance, he included the crime of *apartheid* in the list, an objection could be raised that some countries had not ratified the relevant convention. He therefore wondered where the dividing line between internal law and international law was to be drawn.

71. Speaking as a member of the Commission, he said that he believed in the existence of crimes under international law. In his view, the brackets should be deleted.

72. The CHAIRMAN, speaking as a member of the Commission, said that, for the reasons he had already stated, he favoured deletion of the words between square brackets in article 1. As a member of the Drafting Committee, however, he supported the text in its present form, since it would indicate to the General Assembly that there was a divergence of views on the matter.

73. Speaking as Chairman, he suggested, in the light of the discussion, that article 1 should be provisionally adopted as proposed by the Drafting Committee and that the Commission should state in its report to the General Assembly that it had decided to retain the phrase "under international law" between square brackets to indicate that members' views on that point had been sharply divided.

It was so agreed.

Article 1 was adopted.

The meeting rose at 1.10 p.m.

2032nd MEETING

Monday, 13 July 1987, at 11.40 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.412)

[Agenda item 5]

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

ARTICLE 2 (Characterization)[5]

1. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the text of draft article 2 was basically the same as that submitted by the Special Rapporteur.[6] It contained two sentences in which the words "an act or omission" were used in order to make it clear what type of conduct could constitute a criminal act. Moreover, for the sake of greater precision, the word "prosecuted" had been replaced by "punishable" in all languages and, in the French text, the words *ne préjuge pas* had been replaced by *est sans effet sur.*

2. The exclusion under "internal law" related only to the question of characterization: internal law would obviously continue to be relevant with regard to other matters. The point of that rule was to prevent accused persons from invoking characterizations under internal law in order to counter characterizations under the future code.

3. Some members of the Drafting Committee had been of the view that it was important to add the phrase "under international law" after the words "crime against the peace and security of mankind", but most members had agreed that it was unnecessary to do so and that the inclusion of that phrase might create confusion or weaken the text. Some members had expressed reservations with regard to the exclusion of the phrase.

4. Several members of the Drafting Committee who had found that the second sentence of the article was superfluous had expressed reservations to that effect, pending an opportunity to review the text of the commentary. In the end, the Committee had agreed to retain the second sentence for the time being.

5. The title of the article remained unchanged.

6. Mr. ARANGIO-RUIZ said that he could agree to the proposed text of article 2, provided it was made clear in the appropriate place in subsequent articles how the code was to be "introduced" or "otherwise implemented" in the internal law of the States parties to the instrument in which the code would be embodied. He recalled that he had already explained (1996th and 2000th meetings) the reasons for that reservation during the discussion of draft article 2.

7. Mr. BEESLEY said that he, too, agreed with the wording proposed by the Drafting Committee, since it was in keeping with the spirit of the Commission's discussions. He took the words "independent of internal law" to mean that the characterization of a crime against the peace and security of mankind was independent of its recognition or qualification in the internal law of States.

8. Mr. KOROMA said that he was not very happy with the title of the article, since the word "characterization" was not commonly used in the legal system with which he was familiar and it did not have

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

[5] For the text, see 2031st meeting, para. 2.

[6] See 1992nd meeting, para. 3.

much bearing on the content of the article. In his view, it would be better to use the title "Determination".

9. Mr. DÍAZ GONZÁLEZ said that, although he was satisfied with the text, he would prefer the words "The characterization of an offence as a crime against" to the words "The characterization of an act or omission as a crime against".

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 2.

Article 2 was adopted.

ARTICLE 3 (Responsibility and punishment)[7]

11. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 3 consisted of two paragraphs: the first was based on the text submitted by the Special Rapporteur[8] and the second was new.

12. On the basis of provisions such as article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which referred to "motive", the Drafting Committee had added the phrase "irrespective of any motives invoked by the accused that are not covered by the definition of the offence" to the former text of paragraph 1. The aim was to rule out the possibility that "motives" might be invoked as a justification for a particular type of conduct, while providing for that possibility when the motives invoked were covered by the definition of a particular crime under the code. One member of the Drafting Committee had reserved his position on the grounds that the question of "motive" belonged more to the sphere of circumstances precluding wrongfulness or exceptions to responsibility.

13. Paragraph 2 catered for the concern expressed by some members of the Commission and was intended to make it clear that, even if an individual was being prosecuted for a crime under the code, a State could not be relieved of any responsibility under international law for an act or omission attributable to it. The inclusion of that new paragraph did not, of course, prejudge the still unsettled question of the criminal responsibility of a State for crimes against the peace and security of mankind.

14. The title had been changed in all languages except French and, in English, it now referred to "punishment" rather than "penalty".

15. Mr. ARANGIO-RUIZ, noting that the Chairman of the Drafting Committee had referred to the "criminal responsibility" of a State for crimes against the peace and security of mankind, said that the concept of criminal responsibility was not—and, in his own opinion, should not be—referred to in article 3, for it was not possible to prejudge the nature of the responsibility (criminal, civil, international) of which the State could not be relieved.

[7] For the text, see 2031st meeting, para. 2.

[8] See 1992nd meeting, para. 3.

16. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the new paragraph 2 met the concern of some members of the Commission who had wanted it to be made clear that a State could not be relieved of its responsibility even if an individual was being prosecuted for a crime covered by the code. No attempt was being made to prejudge the nature of such responsibility.

17. Mr. BEESLEY said it seemed to him that the proposed text presupposed that State responsibility would be incurred. The question whether such responsibility would be of a criminal nature had been skilfully resolved by the drafters: article 3 took account of the possibility that State responsibility might exist, but did not say what the nature of such responsibility would be.

18. With regard to paragraph 1, he welcomed the reference to "motives invoked by the accused that are not covered by the definition of the offence". Any other formulation would have given rise to questions about the difference between "motive" and "intent". The remainder of the sentence ("and is liable to punishment therefor") was perhaps less clear and should be reconsidered.

19. Mr. FRANCIS said that he would have worded the last phrase of paragraph 1 ("and is liable to punishment therefor") differently. It must not be forgotten that the crimes covered by the code were the most serious of all. On the basis of similar provisions contained in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages,[9] it might have been stated that the crimes in question would be "punishable by appropriate penalties which take into account their grave nature".

20. Mr. Sreenivasa RAO said that, although he agreed with the wording of article 3, he would like some clarification concerning the exact meaning of the phrase "irrespective of any motives invoked by the accused that are not covered by the definition of the offence".

21. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee), referring to the use of the term "motives" in paragraph 1, said that some legal systems made a very clear-cut distinction between motive and intent. The point was thus to rule out the possibility that the accused might invoke motives not covered by the definition of the offence. For example, *apartheid* was a crime, irrespective of the reasons that might be invoked by those who committed it.

22. Mr. THIAM (Special Rapporteur) said that a judge who tried a crime against the peace and security of mankind would have to consider not the justifications invoked by its perpetrator, but rather the extent to which the circumstances of the crime reflected the perpetrator's intent. In short, it might be said that the motive invoked would have nothing to do with the matter and that only the real motive would be taken into account.

[9] See 1995th meeting, footnote 10.

23. Mr. EIRIKSSON said he found that the phrase "irrespective of any motives invoked by the accused that are not covered by the definition of the offence" was clearer in French than in English. He would like the Special Rapporteur to include an in-depth analysis of the question in the commentary. It might be more elegant to use the words "invoked by him", rather than "invoked by the accused".

24. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said he feared that the use of the words "invoked by him", as suggested by Mr. Eiriksson, might make paragraph 1 somewhat obscure, since they would refer to the words "Any individual", which were rather far away in the sentence.

25. Mr. DÍAZ GONZÁLEZ said that he generally supported the wording of article 3. He was nevertheless surprised that the term "offence" was used in paragraph 1, since the code dealt with "crimes against the peace and security of mankind". At the end of paragraph 2, it might also be better to use the words "for a crime attributable to it", rather than "for an act or omission attributable to it".

26. Mr. AL-BAHARNA said that he, too, would prefer to retain the words "by the accused", since the crimes in question were very serious and their perpetrator had to be the "accused" in every sense of the term.

27. Paragraph 2 seemed to consist of a sentence in abeyance. In order to bring out the point of the argument, it might be possible to add, at the end of the sentence, an expression such as "in that regard", which would not be absolutely necessary, but would make for greater clarity. It would also explain to what State responsibility related, even though it was understood that, in the circumstances, what was involved was not criminal responsibility.

28. Mr. THIAM (Special Rapporteur) said that the commentary would deal at length with the distinction between motive, intent and incentive. Once the commentary had been made available, many of the Commission's doubts about article 3 would be dispelled.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 3.

Article 3 was adopted.

ARTICLE 5 (Non-applicability of statutory limitations)[10]

30. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in accordance with the general trend of opinion expressed during the debate in plenary and following a suggestion made by the Special Rapporteur, the Drafting Committee had decided to delete the words "because of their nature". Otherwise, the text was the same as that submitted by the Special Rapporteur.[11] Some members of the Drafting Committee had reserved their final position on the text until the list of crimes had been drawn up, as they were not sure that the rule should apply to all the crimes to be included in the list. The title was unchanged.

31. The CHAIRMAN, speaking as a member of the Commission, said that he too would reserve his position until the list of crimes to be covered by the code had been drawn up.

32. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 5.

Article 5 was adopted.

ARTICLE 6 (Judicial guarantees)[12]

33. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in large measure, the Drafting Committee had retained the text submitted by the Special Rapporteur.[13] In view of the importance of judicial guarantees and the need for specific provisions based on existing conventions, it had decided to retain an indicative list of guarantees rather than attempt to draft a more general provision.

34. The introductory clause had been amended by the insertion of the words "without discrimination" and the word "minimum" before "guarantees". Those additions had been made because similar concepts were to be found in article 14, paragraph 3, of the International Covenant on Civil and Political Rights. In the English text, it had been deemed appropriate to refer to the "guarantees due to all human beings" in order to reflect the same idea of "entitlement" as in the other language versions. The commentary would explain that the words "with regard to the law and the facts" referred to the applicable law and the establishment of the facts.

35. In paragraph 1, the word "competent" had been added before "independent and impartial" in order to bring the text into line with article 14, paragraph 1, of the International Covenant on Civil and Political Rights. The words "in accordance with the general principles of law" had been deleted as being superfluous.

36. With regard to the guarantees listed in paragraph 3, the Drafting Committee had decided, with one exception, to retain the wording of the guarantees provided for in article 14, paragraph 3, of the Covenant. The commentary would explain the meaning of those guarantees and, in particular, of the words "counsel of his own choosing", in paragraph 3 (*b*), and the words "used in court", in paragraph 3 (*f*).

37. In paragraph 3 (*d*), the Committee had decided to delete the words "in any case where the interests of justice so require". It had been of the view that, since the crimes dealt with in the code were of the utmost gravity and would undoubtedly entail serious punishment for those convicted, it was only logical that the interests of justice would require that legal assistance be assigned to the accused if he himself had not provided such assistance. The commentary to paragraph 3 (*g*) would make it clear that the words "Not to be compelled" related to cases of coercion, torture and threats.

[10] For the text, see 2031st meeting, para. 2.

[11] See 1992nd meeting, para. 3.

[12] For the text, see 2031st meeting, para. 2.

[13] See 1992nd meeting, para. 3.

38. The title of the article had been changed to "Judicial guarantees" so that it would better reflect the content.

39. Mr. THIAM (Special Rapporteur) suggested that paragraphs 1 and 3 should be merged and that paragraph 2 should become paragraph 1. Article 6 would then read:

"*Article 6. Judicial guarantees*

"Any individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular:

"1. He shall have the right to be presumed innocent until proved guilty.

"2. He shall have the right:

"(*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 or by treaty;

"(*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 in any such case 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."

40. Mr. OGISO said that, since the wording of article 14, paragraph 3, of the International Covenant on Civil and Political Rights was much clearer than that of the introductory clause of article 6, which was based on that provision of the Covenant, the word "following" should be inserted before "minimum guarantees", and the words "In particular" should be deleted. As it now stood, the first sentence did not make it clear enough that the minimum guarantees in question were those listed in the paragraphs that followed.

41. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in his view, Mr. Ogiso's proposal did not add anything to the text proposed by the Drafting Committee, since it was clear that the minimum guarantees in question were those listed in the following paragraphs and, because of the use of the words "In particular", that the list was merely an indicative one.

42. Mr. YANKOV said that he agreed with the amendments proposed by the Special Rapporteur and shared Mr. Ogiso's point of view with regard to the introductory clause. The first phrase of paragraph 1, which had become part of paragraph 2 by virtue of the amendments proposed by the Special Rapporteur, should follow the wording of article 14, paragraph 3, of the Covenant and the word "criminal" should therefore be added before the word "charge". The rest of paragraph 1 would become subparagraph (*a*) and the other subparagraphs would be renumbered accordingly. Like Mr. Ogiso, he was of the opinion that the words "In particular" should be deleted, but he would not insist on that point if it would give rise to problems.

43. Mr. EIRIKSSON said that he endorsed the amendments proposed by the Special Rapporteur.

44. Mr. KOROMA said that, while he appreciated the efforts made to harmonize the different language versions, he thought that it might be preferable not to translate certain terms literally, but rather to use the equivalent terms in other legal systems. He had in mind, for example, the expression "right to a fair trial", which in common law was the equivalent of judicial guarantees. In the introductory clause, it might be advisable to replace the words "without discrimination" by "without exception". Moreover, the English text of the present paragraph 2 should be brought into line with the French by amending it to read: "He shall be presumed innocent until proved guilty."

45. The CHAIRMAN said that the English wording which had been used in article 6 and to which Mr. Koroma had just referred had been taken from the International Covenant on Civil and Political Rights. He believed that the Drafting Committee had endeavoured to follow the wording of the Covenant.

46. Mr. Sreenivasa RAO said that he could accept the amendments proposed by the Special Rapporteur, as well as Mr. Ogiso's proposals, which were designed to make it clear that the guarantees listed were minimum guarantees and that a State could grant the accused additional rights and guarantees. The wording of the present paragraph 3 (*d*) was not entirely clear, even though it was based on article 14, paragraph 3 (*d*), of the Covenant. In his own country, the idea of "legal assistance" was different from that of "counsel", and he therefore suggested that that idea should be incorporated in paragraph 3 (*d*). For the time being, however, he would not insist on that proposal.

47. Mr. AL-BAHARNA said that he agreed with the text of article 6 as amended by the Special Rapporteur. In the introductory clause, he would nevertheless prefer to use the words "with regard to the application of law and facts", but he would not press that point. With regard to the present paragraph 1, he was not sure what was meant by the words "established by law or by treaty". He agreed with Mr. Koroma that, in the present paragraph 2, it would be preferable to use the formula: "He shall be presumed innocent until proved guilty." In order to simplify the wording of the present

paragraph 3 (*d*), he suggested that it be divided into two new subparagraphs, which would read:

> "(*d*) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing and to be informed of this right if he does not have legal assistance;
>
> "(*e*) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;"

In the present paragraph 3 (*e*), he thought that the words "or have examined" were superfluous.

48. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the introductory clause referred to the applicable law and the facts. The law referred to in paragraph 1 was the *lex fori*, and the words "by treaty" meant any bilateral or multilateral treaty under which the tribunal had been established. The words "or have examined", in paragraph 3 (*e*), referred to letters rogatory, in other words to cases where witnesses were examined by a court other than the one trying the case.

49. Mr. THIAM (Special Rapporteur) said that the commentary would answer the questions raised by members of the Commission concerning draft article 6.

50. Mr. BEESLEY said that, in his opinion, the proposals made by the Special Rapporteur, Mr. Ogiso, Mr. Yankov and Mr. Sreenivasa Rao were all logical and useful. If the Commission adopted those amendments, however, he was not sure whether the word "minimum" in the introductory clause should be retained or whether it might not be better to use the words "common to all legal systems". He was also not certain whether the accused was entitled to be informed of his rights.

51. Mr. BENNOUNA said that he agreed with the changes suggested by the Special Rapporteur in order to make the text clearer and with the proposals by Mr. Ogiso and Mr. Yankov. He did not, however, see why sacrosanct terms should be used if they were ambiguous. The Commission's role should, rather, be to explain and improve on such terms. It would therefore be preferable, in the introductory clause, to use the words "with regard to the applicable law and the establishment of the facts". In the present paragraph 3 (*f*), he suggested that the words "used in court" be replaced by "during the judicial proceedings".

The meeting rose at 1.05 p.m.

2033rd MEETING

Monday, 13 July 1987, at 3 p.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam.

Draft Code of Offences against the Peace and Security of Mankind[1] (*concluded*) (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.412)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 6 (Judicial guarantees)[5] (*concluded*)

1. The CHAIRMAN invited comments on the reformulated text of article 6 proposed by the Special Rapporteur and on the various amendments to the article suggested at the previous meeting. He also invited comments on the text proposed by Mr. Yankov, which had been submitted in writing since the previous meeting and which read:

> "*Article 6. Judicial guarantees*
>
> "Any person charged with a crime against the peace and security of mankind shall be entitled without discrimination to the following minimum guarantees due to all human beings with regard to the law and the facts.
>
> "1. He shall have the right to be presumed innocent until proved guilty;
>
> "2. In the determination of any criminal charge against him, he shall be entitled:
>
> "(*a*) To a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;
>
> "(*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 in any such case 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 ex-

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

[5] For the text, see 2031st meeting, para. 2.

amination 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. Mr. THIAM (Special Rapporteur), referring to the amendment submitted by Mr. Ogiso (2032nd meeting, para. 40), said that, in his view, it would be preferable to retain the introductory clause of the article as worded to make it clear that the list of guarantees set forth in the article was not exhaustive. He agreed entirely with Mr. Yankov's proposed wording of paragraph 2 and would also have no objection to the proposal that the words "a fair and public hearing", in the new paragraph 2 (*a*), should be replaced by "a fair and public trial".

3. Mr. OGISO said that he would not insist on his proposal, provided his position was reflected in the summary record.

4. The CHAIRMAN pointed out that the proposal to replace the word "hearing" by "trial" would mean a departure from the language of the International Covenant on Civil and Political Rights on which article 6 was based.

5. Mr. GRAEFRATH said that there was no sense at the current late stage in trying to alter the text of the article. The Drafting Committee had decided after a lengthy discussion to follow the language of the Covenant, which had itself been ratified by more than 86 States after long years of consideration.

6. Mr. MAHIOU said that, although he agreed in part with Mr. Graefrath's remarks, he saw no reason why a particular text could not be improved. He did, however, have doubts about the need to amend the text of article 6. The expression "a fair and public hearing" was quite broad and covered committal proceedings as well as the trial itself; if the word "trial" were used, the result might be that the guarantees in question would apply only at the trial stage, not before.

7. Mr. AL-BAHARNA said that, while Mr. Yankov's proposed wording was a great improvement, he would prefer to retain the words "In particular" in the introductory clause. He also considered that it would be better to use the term "trial", which was, in his view, broader than the term "hearing". He found paragraph 2 (*e*) of the text proposed by Mr. Yankov somewhat confusing because of the punctuation and therefore proposed that it be amended to form two subparagraphs, reading:

"(*e*) To be tried in his presence, to defend himself in person or through legal assistance of his own choosing, and to be informed of this right if he does not have legal assistance;

"(*f*) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;"

Paragraph 2 (*f*) to (*h*) would then become paragraph 2 (*g*) to (*i*). He further proposed that the words "or have examined", in paragraph 2 (*f*) of the text proposed by Mr. Yankov, should be deleted.

8. The CHAIRMAN noted that the words "to examine, or have examined" were taken from the Covenant.

9. Mr. BARSEGOV said that there was a discrepancy between the French and English texts of the introductory phrase to the new paragraph 2. In his view, the two texts should be consistent.

10. The CHAIRMAN said that, once again, the difference stemmed from the Covenant.

11. Mr. PAWLAK proposed that the word "person", at the beginning of article 6, should be replaced by "individual", in line with article 3, paragraph 1.

It was so agreed.

12. He also thought that the words "In particular", in the introductory clause of article 6, should be retained.

13. In the new paragraph 2 (*a*), he favoured the word "trial", which was much broader than the word "hearing" and therefore preferable even if it did not appear in the Covenant. In any case, there was no reason why the Commission should not improve on the language of the Covenant.

14. Lastly, he proposed that the title of the article, "Judicial guarantees", should be amended to read "Guarantees for a fair trial".

15. Mr. THIAM (Special Rapporteur) said that the title of the article had been discussed at length in the Drafting Committee, which had decided against any change. He considered that it would be better not to insist on the word "trial", rather than "hearing", but would have no objection to replacing the word "person" by "individual". Subject to that one change, he suggested that the Commission should adopt his reformulated text of article 6 (2032nd meeting, para. 39). Mr. Yankov's proposal had substantive implications and it would perhaps be better not to pursue it.

16. Mr. KOROMA said that the language of the code, as an instrument of criminal legislation, necessarily had to be more narrowly drawn than that of an instrument on human or political rights. The Commission could use the Covenant as a guide, but should not feel bound by it, and there was no reason why it could not improve on the language of the Covenant.

17. In the circumstances, he considered that "trial" rather than "hearing" was the proper word. In addition, he failed to understand the expression "the right to be presumed innocent" in the new paragraph 1, which should, in his view, be amended to provide that an accused should be presumed innocent until proved guilty.

18. Mr. CALERO RODRIGUES said that some of Mr. Al-Baharna's suggestions could have been useful if the Commission had had time to discuss them. He agreed, however, that for the time being the Commission should not try to improve on the language of the Covenant. He therefore proposed that the Commission should accept the text proposed by the Special Rapporteur, which was very similar to Mr. Yankov's text,

with the deletion of the first phrase of paragraph 2, "In the determination of any criminal charge against him".

19. Mr. EIRIKSSON proposed that those words should be transferred to paragraph 2 (*a*) of the new text, in line with the text proposed by the Special Rapporteur.

It was so agreed.

20. Mr. REUTER said that, in his view, the Commission should for the time being adopt the text of article 6 as proposed by the Special Rapporteur. It would, however, have to revert to the article later, first, because it had followed the language of the Covenant without trying to bring the English and French texts into line, and secondly, because a question not only of human rights, but also of the rights of other States was involved, which meant that the list of guarantees was not sufficient. He had in mind, for instance, the position of an extraditing State, which would require certain guarantees regarding the course of the proceedings.

21. Mr. AL-KHASAWNEH said he, too, considered that it was preferable for the time being to adopt the Special Rapporteur's proposal.

22. Mr. HAYES said that he supported the introductory clause of the original text of article 6,[6] as largely retained in the Special Rapporteur's reformulation (2032nd meeting, para. 39), since it was important to have a non-exhaustive list of judicial guarantees. He agreed that the phrase "In the determination of any criminal charge against him" should be transferred to paragraph 2 (*a*) of the new text.

23. He favoured the retention of the language used in the Covenant, since any departure from that language would raise the presumption that the Commission meant something different, and that would not make for an effective provision. Moreover, the relevant provisions of the Covenant were concerned with the exercise of domestic criminal jurisdiction and were therefore relevant to the code.

24. A "hearing", as he understood the word, was wider than a "trial", since it could include pre-trial procedures which involved the determination of a criminal charge but did not actually amount to a trial.

25. Mr. KOROMA said he maintained the view that paragraph 1 of article 6 as reformulated should be brought into line with the French text. He would not insist on that point at the current stage in the work, but none the less thought that there was no harm in rectifying an error: mistakes could slip into a convention and become part of that convention.

26. The CHAIRMAN said that the discrepancy between the French and English texts could be considered at a future date. On that understanding, he suggested that the Commission should provisionally adopt the text of article 6 as amended by the Special Rapporteur (*ibid.*) and as further amended by the proposals of Mr. Pawlak (para. 11 above) and Mr. Eiriksson (para. 19 above).

It was so agreed.

Article 6 was adopted.

[6] See 1992nd meeting, para. 3.

The law of the non-navigational uses of international watercourses (*concluded*)* (A/CN.4/399 and Add.1 and 2,[7] A/CN.4/406 and Add.1 and 2,[8] A/CN.4/L.411)

[Agenda item 6]

Draft articles proposed by the Drafting Committee (*concluded*)

Title of part II of the draft

27. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Drafting Committee recommended that part II of the draft should be provisionally entitled "General principles", on the understanding that the title would be reviewed when all the articles of part II had been prepared.

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the title of part II of the draft on that understanding.

The title of part II of the draft was adopted.

Article 6 [6 and 7] (Equitable and reasonable utilization and participation)[9]

29. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 6 combined the texts of articles 6 and 7 as submitted by the previous Special Rapporteur and reflected the underlying concepts of article 5 as provisionally adopted in 1980. The latter article, which dealt with the concept of a "shared natural resource", had been criticized on the grounds that it lacked legal precision. It had, however, been recognized that effect could be given to the legal principles underlying that concept without using the expression itself in the body of the article.[10] The Drafting Committee had therefore prepared an article based on the principles of equitable and reasonable utilization and participation in the belief that such an article would more appropriately reflect the principles to be embodied in the draft. The new text did not use the word "share" and it did not refer to the relativity aspect of the uses of a watercourse, a matter which was covered by the provisional working hypothesis and would eventually be covered by the definitional article. Certain members had regretted that the concept of "sharing", which had appeared in earlier texts, had been dropped.

30. Paragraph 1 began with a statement of the basic obligation applicable to all watercourse States, namely that they should in their respective territories utilize a watercourse in an equitable and reasonable manner. That principle had been reflected in the former article 7. The second sentence of the paragraph then explained that that concept meant that a watercourse should be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits

* Resumed from the 2030th meeting.

[7] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[8] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[9] For the text, see 2028th meeting, para. 1.

[10] See *Yearbook . . . 1986*, vol. II (Part Two), p. 62, para. 237.

therefrom consistent with adequate protection of the watercourse. Attaining optimum utilization and benefits did not mean achieving "maximum" use or the most technologically efficient use or that the State capable of making the most efficient use of the watercourse should have a superior claim to it. It meant the attainment of the best possible uses and benefits for all with a minimum of harm, in the light of all relevant circumstances and in a manner consistent with the adequate protection of the watercourse in terms, for instance, of flood or pollution control. Some members of the Drafting Committee had stressed that, at some future stage, consideration should be given to the possibility of defining "optimum utilization and benefits" in the article on the use of terms. Equitable utilization did not mean the equal sharing of a watercourse: there might well be cases of "unequal" sharing in the utilization of a watercourse which constituted equitable utilization. That basic concept would be fully explained in the commentary.

31. With regard to the terms used in paragraph 1, the expression "in an equitable and reasonable manner" would, of course, have to be interpreted on a case-by-case basis and the factors that were relevant in that regard were set forth in the new article 7. The words "adequate protection" covered not only measures of conservation, but also measures of "control" in the sense of measures to control floods, pollution or erosion. Although those words referred primarily to measures taken by individual States, they did not exclude co-operative measures or activities undertaken by States jointly.

32. Paragraph 2 provided for the consequences of equitable utilization, namely the equitable and reasonable participation by watercourse States in the use, development and protection of a watercourse. Equitable utilization by each State would necessarily lead to equitable participation by all the States concerned. An important element in that new paragraph was that equitable participation included both the right to equitable utilization, as provided in paragraph 1, and the duty to co-operate in the protection and development of the watercourse. The latter duty was linked to the future article on the general obligation to co-operate which was to be prepared on the basis of draft article 10 as submitted by the Special Rapporteur.[11] Article 6 therefore no longer spoke only of an entitlement, but also of a duty, which did not imply the creation of a collective management scheme but was, rather, linked to the general duty to co-operate. Since the future article 10 would contain references to such general principles as good faith, the Drafting Committee had not deemed it necessary to include them in paragraph 2 of article 6.

33. Doubts had been expressed in the Drafting Committee about some of the terms used in article 6, particularly the word "benefits" in the second sentence of paragraph 1 and the word "includes" in the second sentence of paragraph 2, which, it had been suggested, should be replaced by "shall be based on". It had also been noted that the use in some languages of similar words, such as "use" and "utilize" in English, would have to be reconsidered.

[11] See 2001st meeting, para. 33.

34. Lastly, the title of article 6 was new and reflected the new content of the provision.

35. Mr. KOROMA said that he accepted the principle of equitable and reasonable utilization, but had serious doubts about extending that principle in such a way as to impose an obligation on States to participate in the use, development and protection of an international watercourse. He therefore proposed that the words "and participation" should be deleted from the title of the article and that the words "shall participate", in the first sentence of paragraph 2, should be replaced by "may participate" or "may decide to participate".

36. Mr. ROUCOUNAS recalled that, at the Commission's thirty-eighth session, it had been agreed that the draft articles should reflect the idea of a "shared natural resource" without actually using that expression.[12] Article 6 as drafted, however, did not seem to reflect the idea that the waters of a watercourse were, by their very nature, shared among the States concerned.

37. Mr. AL-KHASAWNEH said he thought that the first sentence of paragraph 2 should be couched in less mandatory terms as he was not certain that the duty for which it provided really existed. He also had doubts about the second sentence of paragraph 2, which was lacking in legal precision. Did the word "includes", for instance, mean that there were rights other than the right to use the international watercourse system? In any event, the corollary of that right was not the duty to co-operate in the protection and development of a watercourse system, but rather the duty not to cause injury to other States.

38. The CHAIRMAN, speaking as Special Rapporteur, said that article 6 had been the subject of a detailed discussion in the Drafting Committee, which had taken the view that the concept of equitable participation would convey the notion that States had a duty to co-operate and, in so doing, to achieve and maintain equitable utilization within the meaning of paragraph 1 of the article. The Drafting Committee, as he understood the position, had regarded the second sentence of paragraph 2 not as stating two corollaries, but rather as referring to two aspects of the specific duty of equitable participation. Determining the precise contours of that duty might, of course, have to await the further development of the draft.

39. Mr. AL-KHASAWNEH said that, as it now stood, the second sentence of paragraph 2 none the less gave the impression that the right and the duty referred to were corollaries—and he did not think that that had been the intention of the Drafting Committee. He would, however, not stand in the way of the adoption of article 6.

40. Mr. KOROMA said he was still not convinced that there was a rule of law which required watercourse States to participate in the use, development and protection of a watercourse system.

41. Mr. ARANGIO-RUIZ said that, in his view, the mandatory term "shall" applied not so much to participation in the use, development and protection of an

[12] See footnote 10 above.

international watercourse as to the requirement that such participation should be equitable and reasonable. The effect of the word "may", if it were to replace "shall", as suggested by Mr. Koroma, would be virtually to destroy the intent of the article, which was to ensure that the States which made use of a watercourse did so in an equitable and reasonable manner. It should also be borne in mind that, even if a State made no use whatsoever of a watercourse that flowed through its territory, that watercourse inevitably affected the territory of that State. Those considerations might dispel some of Mr. Koroma's doubts.

42. Mr. GRAEFRATH said that he shared Mr. Koroma's concern. "Participation" referred not to a shared watercourse system, but to the use a State made of the waters within its territory and its co-operation with other watercourse States under specific agreements.

43. Mr. CALERO RODRIGUES said that, in purely theoretical terms, he agreed with Mr. Koroma that paragraph 2 should not be interpreted as imposing on a State a strict obligation to participate in the use of a watercourse. However, he read article 6 not as Mr. Koroma did, but rather as Mr. Arangio-Ruiz did. He understood paragraph 2 to mean that, where each State along a given watercourse used the waters of that watercourse in its own territory, there was participation in the uses, and such participation should be equitable and reasonable. What was stated in the article was only a general principle of co-operation that would have to be developed later in the draft.

44. Mr. BARSEGOV said that he, too, shared Mr. Koroma's concern on a matter which involved the sovereign competence of States. As he saw it, the Commission's task was to draw up a set of recommendations to assist States in concluding agreements on specific uses of watercourses.

45. Mr. BEESLEY said that he could accept the text of article 6 as worded on the understanding that it was interpreted to mean that watercourse States participating in the use, development and protection of a watercourse system should do so in an equitable and reasonable manner and not as imposing any obligation on watercourse States.

46. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 6 [6 and 7] as proposed by the Drafting Committee.

Article 6 [6 and 7] was adopted.

47. Mr. EIRIKSSON said that he had two proposals which he was making following the adoption of article 6 to ensure that they did not give rise to any debate. The first was that the word "respective", in the first sentence of paragraph 1, and the word "both", in the second sentence of paragraph 2, should be deleted and the second was that the second sentence of paragraph 1 should be couched in the active, not the passive, voice.

48. Mr. ARANGIO-RUIZ said that he could not agree to the deletion of the word "respective", which clarified the meaning of the provision.

ARTICLE 7 [8] (Factors relevant to equitable and reasonable utilization)[13]

49. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 7 was based on article 8 as submitted by the previous Special Rapporteur in 1984. As indicated in its title, article 7 was concerned with factors relevant to the equitable and reasonable utilization of international watercourses and thus provided States with guidance as to the meaning and application of article 6. The introductory clause of paragraph 1 provided that the utilization of a watercourse in an equitable and reasonable manner within the meaning of article 6 required that account be taken of all relevant factors and circumstances, including those listed in paragraph 1 (*a*) to (*f*). In its new version, that clause did not include the words "In determining whether the use . . . is exercised in a reasonable and equitable manner", which had appeared in the previous Special Rapporteur's draft. The Drafting Committee had decided, in order to achieve a more widely acceptable text, to delete any reference to "determining", which, in the view of some members, implied third-party determination.

50. Article 7 as it now stood recognized that, in the first instance, it was for States to make the necessary assessments in weighing the various factors. The cross-reference to article 6 made it clear that watercourse States were the primary actors in equitable and reasonable utilization and participation. The article did not, of course, preclude the possibility that technical commissions, joint bodies or third parties might be involved in such assessments under any arrangements or agreements accepted by the States concerned.

51. The word *implique*, in the French text of paragraph 1, was meant to convey the idea of the need to ensure that the relevant factors were taken into account. Article 7 did not, of course, deal with the question of the weight to be accorded, in the first instance by States, to the various factors or with the extent to which individual factors were to be taken into account in any given situation.

52. With regard to the list of factors and circumstances, the Drafting Committee had agreed with the conclusion by the Special Rapporteur indicated in the Commission's report on its thirty-eighth session, namely that the Commission should strive for a flexible solution and confine the factors to a limited indicative list of more general criteria.[14] The Drafting Committee had accordingly decided not to adopt the detailed list proposed by the previous Special Rapporteur. The list contained in article 7, paragraph 1 (*a*) to (*f*), was therefore only of a general nature and was not intended to be exhaustive or to establish any order of priority. Each factor had to be viewed in relation to the particular watercourse concerned.

53. Subparagraph (*a*) concerned physical or natural factors and included the factor of "contribution", which was referred to in the 1984 text. Subparagraph (*b*), which was new, combined several elements of the

[13] For the text, see 2028th meeting, para. 1.

[14] *Yearbook . . . 1986*, vol. II (Part Two), p. 63, para. 239.

former text. Subparagraph (*c*) related to the possibility of conflicting uses. Subparagraph (*d*), which was also new, spelt out a factor implicitly covered by subparagraphs (*b*) and (*c*). It should be noted, however, that "existing uses" were but one factor to be taken into account, and again no priority was assigned among any of the factors. Subparagraph (*e*) combined various elements of the former text. The expression "economy of use" referred to the avoidance of unnecessary waste and the cost of measures taken for that purpose was also highlighted. Subparagraph (*f*) provided for the availability of alternatives to a planned or existing use, but only where such alternatives were of a "corresponding value". "Corresponding" referred to equivalence in the broadest sense, meaning equally convenient, economical and, on the whole, of the same value, "value" being interpreted in a broader sense that a simple "cost" figure to include elements of convenience and practicability as well. Indeed, "cost-effectiveness" was the element implicitly stressed. Moreover, the alternatives envisaged related not only to alternative uses of the watercourse, but also to alternative means of achieving the desired objective, even without utilizing the watercourse.

54. The new paragraph 2 was linked to the application of article 6, as well as to that of article 7, and it no longer referred to "determining", for the reasons already stated in connection with paragraph 1 (para. 49 above). In addition, the requirement now involved an obligation to enter into consultations, rather than negotiations, in a spirit of co-operation. It had been considered that a reference to negotiation might be interpreted to imply the commencement of a procedure for the settlement of a dispute, when in fact, very often, a dispute as such did not exist. States might simply wish to exchange information or commence discussions. Paragraph 2 therefore aimed at dispute avoidance rather than dispute settlement and, at the present stage, the shaping and encouragement of co-operation was the objective being sought.

55. The phrase "when the need arises" was meant to serve as a "triggering" mechanism which was based on objective criteria and would bring paragraph 2 into play. It was not intended to mark the start of a formal dispute-settlement procedure to be invoked at the request of one State. In practical terms, if States applied the provisions of the draft articles in good faith and in a spirit of co-operation, a request by one State for consultations should not be ignored by the other States concerned.

56. The second sentence of paragraph 2 as proposed by the previous Special Rapporteur, which referred to the procedures for peaceful settlement to be provided for in the later parts of the draft, had been deleted. As the content of those provisions had not yet been discussed by the Commission, it had been considered premature to mention them at the present stage.

57. The title of article 7 had been adjusted in the light of the new wording.

58. Mr. BENNOUNA said that the text of article 7 was entirely satisfactory to him. He would, however, suggest that the word "or", in the first part of paragraph 2, should be replaced by "and" or by "and/or" to make it clear that articles 6 and 7 could be applied together.

59. Mr. MAHIOU, referring to the French text, suggested that the word *les* should be added at the beginning of paragraph 1 (*a*) to bring that subparagraph into line with the other subparagraphs.

60. The CHAIRMAN, speaking as Special Rapporteur, said that, in the English text at any rate, the absence of the definite article was a matter of euphony, not of substance, and did not mean that any particular factor carried less weight.

61. Mr. AL-BAHARNA said that he could accept article 7 as drafted. Without wishing to reopen the debate on article 6, however, he considered that, for the sake of consistency, the words "conservation and" should be added before "adequate protection" in the second sentence of paragraph 1 of article 6, in order to bring that provision into line with the wording of paragraph 1 (*e*) of article 7.

62. Mr. OGISO said that he, too, read article 7 in conjunction with article 6. He noted in that connection that article 6 consisted of two elements: equitable and reasonable utilization, as dealt with in paragraph 1, and equitable and reasonable participation, as dealt with in paragraph 2. The factors referred to in article 7, paragraph 1 (*e*), were particularly important with regard to participation. To make the relationship between the two articles clearer, he therefore proposed that the words "and participation" be added at the end of the title of article 7 and also after the word "utilization" in paragraph 1 of the article. He would not insist on his proposal if the Commission was reluctant to consider it at the present stage.

63. The CHAIRMAN, speaking as Special Rapporteur, said that personally he would have no objection to Mr. Ogiso's proposal. The response to the same proposal in the Drafting Committee had, however, been that article 7 did in fact cover participation inasmuch as participation was involved in equitable utilization, as was apparent from article 6, paragraph 2. The only element not covered in article 7 was thus co-operation, which would be dealt with in a separate article.

64. Mr. AL-KHASAWNEH proposed that, in paragraph 2 of article 7, the words "paragraph 1 of" should be inserted before "the present article".

It was so agreed.

65. He questioned the value of paragraph 1 of article 7, which was very ambitious and seemed to say that every case should be decided on an *ad hoc* basis and on its own merits. That would make the position of those responsible for taking a decision in such matters very difficult indeed, particularly since the paragraph laid down an imperative rule rather than a guideline.

66. The CHAIRMAN, speaking as Special Rapporteur, said that the Drafting Committee had endeavoured to comply with the Commission's wish to provide States with some guidance in the form of a non-exhaustive list of factors applicable to the utilization of an international watercourse.

67. Mr. BEESLEY said that, in his view, the list of factors would be more complete and accurate if it contained the word "biological" at some point. He could, however, accept the article as drafted, since the list was only indicative and the Commission would presumably revert to it.

68. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 7 [8] as proposed by the Drafting Committee, with the amendment proposed by Mr. Al-Khasawneh (para. 64 above).

It was so agreed.

Article 7 [8] was adopted.

69. Mr. EIRIKSSON said that, had time allowed, he would have liked to introduce a number of amendments. For instance, he noted that the word "circumstances", in the introductory clause of paragraph 1, did not appear in the title of the article and he wondered whether it was really necessary. He would have preferred to delete the word "concerned", in paragraphs 1 (*b*) and 2. He did not like the use of both the singular and the plural in paragraph 1 (*c*) ("use or uses") or the use of the word "particular" in paragraph 1 (*f*). He would like to have an explanation of the expression "economy of use" in paragraph 1 (*e*) and, in that context, would have preferred to speak merely of "protection and development". In his view, the word "corresponding", in paragraph 1 (*f*), should be replaced by a term such as "comparable". He would also have liked to amend paragraph 2 to read:

> "Watercourse States shall, at the request of any watercourse State, enter into consultations with respect to the application of article 6 or paragraph 1 of the present article."

70. Lastly, he thought it should be explained in a footnote that the numbers between square brackets were the original numbers of the articles, to avoid giving the impression that the Drafting Committee had been in doubt.

71. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and expressed appreciation for the patience and skill with which he had discharged his task.

The meeting rose at 6.05 p.m.

2034th MEETING

Tuesday, 14 July 1987, at 10.05 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its thirty-ninth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter I.

CHAPTER I. ***Organization of the session*** (A/CN.4/L.413)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

2. Mr. PAWLAK (Rapporteur) proposed that the words "and sets out the five articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session" should be added at the end of the second sentence and that the words "and sets out the six articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session" should be added at the end of the third sentence.

3. Mr. BARSEGOV said that the Commission had not yet seen the commentaries referred to in those amendments.

4. The CHAIRMAN said that the commentaries would appear in documents to be submitted to the Commission shortly and would form part of the relevant chapters of the draft report.

5. Mr. BARSEGOV said that he could not agree to the approval of commentaries he had not yet seen. Moreover, because of the lack of time, those commentaries were likely to be approved in great haste.

6. Mr. PAWLAK (Rapporteur) explained that the amendments he had proposed were intended to show that commentaries would be attached to the articles which the Commission had provisionally adopted on two of the topics on its agenda. The content of those commentaries would, of course, be considered by the Commission at a later stage.

7. Mr. MAHIOU, noting that past reports had contained wording such as that proposed by the Rapporteur only when a set of draft articles had been adopted on first reading, proposed that the amendments should be left in abeyance until the Commission had approved the commentaries to which they referred.

8. The CHAIRMAN suggested that the Commission should adopt paragraph 2 on the understanding that it would consider the amendments proposed by the Rapporteur when it approved the commentaries to which they referred.

Paragraph 2 was adopted on that understanding.

Paragraphs 3 to 8

Paragraphs 3 to 8 were adopted.