Document:-

A/CN.4/L.433

Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Draft Committee: articles 13, 14 and 15 - reproduced in A/CN.4/SR.2134 to SR.2136

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1989, vol. I

countries, and it was essential for the future of the United Nations and other international organizations of a universal character that the study of the second part of the topic be successfully completed. He therefore urged—as he would in the Sixth Committee of the General Assembly—that at its next session the Commission should devote all the necessary time to consideration of the topic.

The law of the non-navigational uses of international watercourses (*concluded*)* (A/CN.4/412 and Add.1 and 2,[8] A/CN.4/421 and Add.1 and 2,[9] A/CN.4/L.431, sect. C, ILC(XLI)/Conf.Room Doc.4)

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

PARTS VII AND VIII OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

and

ARTICLE 25 (Regulation of international watercourses)[10] (*concluded*)

23. Mr. McCAFFREY (Special Rapporteur), continuing his introduction of chapters II and III of his fifth report (A/CN.4/421 and Add.1 and 2), containing draft articles 24 and 25 respectively, said that chapter II related to a question that would be dealt with in the final clauses, namely the relationship between non-navigational and navigational uses. It came before chapter III because it was the last of the chapters dealing with fundamental questions. Chapter III dealt with the regulation of international watercourses, one of the "other matters" which, as indicated in the outline proposed in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7), could be covered in the draft articles themselves or in annexes, since they were not fundamental questions.

24. At the next session, in accordance with the schedule for submission of remaining material set out in his fourth report (*ibid.*, para. 8), he would introduce questions relating to the management of international watercourses, the security of hydraulic installations and the settlement of disputes.

25. With regard to draft article 24—which was, of course, a provisional number—he observed that the Commission had already recognized the interrelationship between navigational and non-navigational uses in article 2, on the scope of the draft, as provisionally adopted, paragraph 2 of which—quoted in his fifth report (A/CN.4/421 and Add.1 and 2, para. 121)—showed the course to be followed. The basic point was that there was no longer any absolute priority of uses, and he referred members in that connection to the account given in his report (*ibid.*, paras. 122-124) of the demise of the priority formerly accorded to navigation.

26. Accordingly, article 24, paragraph 1, provided that neither navigation nor any other use enjoyed an inherent priority over other uses. The Commission could, of course, consider indicating, if not priorities, an order of preference in that paragraph. There was general recognition that protection of the environment and of the quality of water was assuming a particular urgency and the Commission might wish, for example, to provide some indication in the article that domestic and agricultural uses should not be foreclosed by other uses.

27. Turning to chapter III of the report, he explained that, in the context of the present topic, the expression "regulation of international watercourses" had a specific meaning, namely the control of the water in a watercourse, by works or other measures, in order to prevent harmful effects and maximize the benefits of the watercourse (*ibid.*, para. 129). That subtopic was therefore broader than that of water-related hazards and dangers, dealt with in chapter I of the report, which was concerned only with measures designed to prevent the harmful effects of water. State practice, as described in the report (*ibid.*, paras. 132-138), demonstrated the importance States attached to regulation.

28. Draft article 25 was a very modest provision—perhaps even too simple—and the Commission might at its next session consider the insertion in paragraph 1 of a provision requiring watercourse States to consult with each other, at the request of any one of them, for the purpose of regulation.

29. Paragraph 2 stated an obligation which reflected actual practice. On that point he referred members to the 1961 Treaty between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River basin.[11] That instrument was typical of the trends in that area.

30. Lastly, it was desirable that, at its next session, the Commission should allocate a sufficient number of meetings for consideration of the topic, both in plenary and in the Drafting Committee. The Drafting Committee had not in fact been able to consider the topic at the present session, although four draft articles had already been referred to it. If sufficient time were not allocated, the Commission would not be able to complete the first reading of the draft, as planned, before the end of the term of office of its current members in 1991.

The meeting rose at 11 a.m.

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* Resumed from the 2126th meeting.

[8] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[9] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[10] For the texts, see 2126th meeting, para. 81.

[11] United Nations, *Treaty Series*, vol. 542, p. 244.

2134th MEETING

Tuesday, 11 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: 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. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, 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.

Co-operation with other bodies (*concluded*)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Leoro Franco, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. LEORO FRANCO (Observer for the Inter-American Juridical Committee) said that it was once again a privilege for him to address the Commission on behalf of the Inter-American Juridical Committee: the Commission's outstanding work in the progressive development and codification of international law had gained world-wide recognition and would help to place international relations on a firm foundation of fairness and justice.

3. The Committee placed great value on the regular exchange of observers with the Commission and it was to be hoped that that exchange would be maintained, enabling the two bodies to keep abreast of each other's activities. Owing to the financial difficulties of its parent body, the Organization of American States, the Committee's activities had been curtailed by a half. It had had to give up one of its two annual sessions and hold only one session in August. As a result of those circumstances beyond its control, the Committee's work had experienced some inevitable delays.

4. In addition to the close ties of co-operation between the two bodies, valuable personal relations had been established between the members of the Commission and the Committee. Thus, like other past chairmen of the Commission, Mr. Díaz González had been invited to lecture in the course on international law which the Committee held annually for young professors of international law, judges and foreign-service officials from various American countries. He expressed the hope that the present Chairman of the Commission, whose writings he had had occasion to read and admire, would agree to give a lecture during the course to be held in August 1989.

5. In 1988, the Committee had dealt with 7 of the 12 items on its agenda. The first was that of guidelines relating to extradition in cases of drug trafficking. In April 1986, an Inter-American Conference had been held at Rio de Janeiro to consider the alarming problem of the production and consumption of, and illicit traffic in, narcotic drugs and psychotropic substances. The programme of action adopted by the conference contained numerous suggestions and recommendations to the various OAS organs, including the Inter-American Juridical Committee. In turn, the OAS General Assembly had on 15 November 1986 adopted a declaration condemning drug trafficking as an international crime.

6. The Committee and its Rapporteur, Mr. Manuel Vieira, had prepared a draft resolution for submission to the OAS General Assembly on judicial co-operation with regard to extradition. In view of the difficulty of framing multilateral instruments and the time required for them to be ratified, the proposed resolution was directed at ensuring the best possible interpretation for the expeditious granting of extradition under the provisions of domestic legislation or those of the relevant inter-American extradition treaties. The resolution also safeguarded the observance of human rights and of due legal process. Again, where domestic legislation left extradition to the discretion of the executive, the resolution specified that, in the event of refusal of extradition, the reasons should be stated.

7. The Committee had considered the difficulties involved in applying the terms of that resolution in the light of the provisions of national legislation and extradition treaties. It had accordingly decided to prepare two drafts, namely a draft American convention on extradition and preventive measures against drug trafficking and a draft declaration on the same subject. Both texts characterized drug trafficking as an "international crime", a term which had a clear meaning in the international legal order and which provided a legal basis for the broadest judicial co-operation. For the purposes of extradition, article 2 of the draft convention defined narcotics offences as acts which were basically identical to those listed in article 36 of the 1961 Single Convention on Narcotic Drugs.

8. The draft convention also sought to facilitate compliance with the so-called "dual incrimination" requirement, i.e. the rule whereby extradition was granted only when the act in question was an offence under both the law of the requesting State and that of the requested State. The draft convention specified that, in order to meet the requirement in question, it sufficed for the acts concerned to be basically similar to those listed in article 2—in fact those envisaged in article 36 of the 1961 Single Convention. In the event of evidence of an offence being discovered subsequent to the request for extradition, the requesting State could inform the requested State of its intention to prosecute the extradited person for the offence in question. Failing a reply within 60 days, the proceedings could go ahead. Arrangements were made so that it would be easier to obtain evidence of drug-trafficking offences and the parties to the future convention were also required to facilitate the execution of preventive measures in respect of property connected with drug-trafficking offences ordered by the judicial authorities of other parties.

9. Article 11 of the draft convention required the parties to interpret, or if necessary amend, their domestic legislation in order to establish that their courts had jurisdiction to try any person accused of drug-trafficking offences when, for any reason, that person could not be surrendered to the State in whose jurisdiction the offence had been committed. That was a provision intended to deal, among other things, with the problem of States whose domestic law prohibited the extradition of nationals. The draft convention had been adopted unanimously by the Committee, subject to some reservations expressed by the Rapporteur because of the failure to include some of his suggestions.

10. The second item examined by the Committee concerned the reasons for the failure of a great number of States to become parties to the 1948 American Treaty on Pacific Settlement (Pact of Bogotá). The OAS General Assembly, at its 1987 session, had assigned the topic to

* Resumed from the 2128th meeting.

the Committee, which had appointed as its Rapporteurs Mr. Luis Herrera and himself (Mr. Leoro Franco). The topic was largely political in character. Moreover, since the adoption of the Pact of Bogotá, a considerable number of new member States that had joined OAS had not subscribed to the Pact. In the circumstances, the Committee had adopted a suggestion by the Rapporteurs to request the Secretary-General of OAS to write to the member States concerned, asking them to explain their reasons for not acceding to the Pact. It would not be easy to obtain replies to that enquiry.

11. The law of the environment was the third item. In that connection, the Committee's observer at the Commission's previous session had referred to the draft American declaration on the environment.[1] The topic was one on which the Committee had been working for the past five years and on which he himself had submitted three reports as Rapporteur. So far, the Committee had adopted 12 articles on first reading on various aspects of the protection of the environment, which was characterized as the common heritage of mankind. Transboundary air pollution was treated as a matter of international concern. In the event of planned activities that could materially affect the environment, preventive measures as well as remedial action were proposed. The liability of the State causing the transboundary pollution was specified and involved the obligation to make reparation by restoring the pre-existing situation and compensating the injured State or States. The responsible State would in turn be able to claim a refund of the reparation from the actual polluters, including transnational corporations.

12. The sovereign right of States to exploit their own natural resources and to produce goods derived from human activities in accordance with their respective development plans was not affected. It was also proposed that, when a State was notified of works being planned by another State that could have harmful transboundary effects and did not reply within three months of the notification, it would be assumed to have no objection. Should an objection be formulated and no solution be found through the diplomatic channel, either of the parties could request the establishment of a mixed commission which would be purely a negotiating body without any mediating—or, still less, judicial—functions. The mixed commission would endeavour to work out a settlement on the basis of the relevant technical factors. Only in the event of failure of that machinery would the methods of peaceful settlement under international law be used.

13. The fourth item examined by the Committee was that of the draft additional protocol to the 1969 American Convention on Human Rights (Pact of San José). The purpose of the protocol was to deal with the protection of economic, social and cultural rights, to which the Pact of San José devoted only one article: article 26. The Rapporteur for the topic, Mr. Emilio Rabasa, had submitted a valuable study on economic, social and cultural rights, as well as on the rights of peoples, such as the right to solidarity. In his report, Mr. Rabasa had proposed possible mechanisms for the promotion and protection of the rights in question. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, with quasi-judicial and judicial functions respectively, already existed to defend civil and political rights. Moreover, mechanisms were available under the International Covenant on Economic, Social and Cultural Rights. Bearing those facts in mind, the Rapporteur had suggested that the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture should—through *ad hoc* commissions—receive reports from member States on the application and development of the rights in question. Further to the examination of those reports, recommendations could be made for more effective application of the human rights involved. The two bodies would in turn report to the OAS General Assembly, the Inter-American Commission on Human Rights and agencies interested in certain matters, such as the Pan American Health Organization. The Committee had requested the Rapporteur to continue his work on the topic.

14. The fifth item was the improvement of the administration of justice in the Americas. The subject was one which had been studied mainly in inter-institutional meetings, which had led to suggestions for an open seminar on problems that were stubborn, and it was bound to be a long time before that work had an impact on domestic legislations. The work in question had benefited from the active co-operation of a number of bodies, such as the Inter-American Bar Association, the OAS General Secretariat and the American Society of International Law. Financial support had been provided by the United States Agency for International Development. At its 1988 session, the Committee had decided to keep the topic on its agenda and to include the following subtopics: exchange of information and research; alternative forms of settlement of disputes (conciliation, mediation, arbitration); the judicial career; and access to justice.

15. The principle of self-determination and its scope of application was the sixth item examined by the Committee, on the basis of a report submitted by Mr. Policarpo Callejas Bonilla. The report had explained that the principle of self-determination had been a fundamental tool in the decolonization process and was thus only of limited application in the Americas. The Rapporteur had also expressed the view that the right freely to choose the economic, political and social model of the State had one major limitation, namely that the model not only should not be in conflict with democracy, but also should tend to establish or improve on democracy. The idea was an interesting one, but the Committee had not been able to reach a conclusion, particularly since the Rapporteur had now been appointed a judge at the Inter-American Court of Human Rights.

16. The seventh item concerned the revision of the inter-American conventions on industrial property. The rapporteurs for the topic, bearing in mind the work on the protection of industrial property being carried out by WIPO and in the GATT Uruguay Round, had felt that it would not be appropriate at the present stage to submit any proposals for a new convention or for the revision of older instruments. The Committee had accepted that recommendation, reserving the right to take up the topic again if later developments so justified.

17. The Committee had held a special session from 12 to 14 October 1988 at the request of the OAS Permanent Council to study the problem of the privileges and immunities of the persons referred to in article 140 of the

[1] See *Yearbook . . . 1988*, vol. I, p. 30, 2047th meeting, para. 55.

OAS Charter and to consider the request of the Permanent Council for an opinion on the question whether the provisions of the 1975 Bilateral Agreement between the United States of America and the OAS relating to privileges and immunities of representatives to the Council of the Organization and other members of delegations were compatible with those of articles 78, 138 and 140 of the OAS Charter. The question was a complicated one and the Committee had had only three days to examine the various problems stemming from the lack of harmony between the texts in question. In response to the request made by the Permanent Council, the Committee had expressed the view that the provisions of the 1975 Agreement were not incompatible with articles 78, 138 and 140 of the OAS Charter.

18. The Committee had also been called upon to state whether the 1975 Agreement adequately developed the above-mentioned provisions of the OAS Charter, in which connection it had been of the opinion that the Agreement was not adequate to determine the content of "prerogatives of residence" or the method of settlement of any disputes which might arise from its application. Moreover, article 1 of the Agreement did not cover all the categories of persons referred to in article 140 of the OAS Charter. In addition, article 2 could be applied in such a way as to hinder the normal operation of the representation to OAS of a State whose Government was not recognized by the host State. The Committee took the view that the Agreement should have contained some provision for a procedure for consultation, both with the sending State and with OAS itself, in those cases in which the host State requested the departure from the country of a representative to OAS on the basis of article 3 of the Agreement. To that end, the procedures provided for in the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations could serve as a basis for future negotiations on the subject. Whatever the procedure that might be adopted, the Committee had concluded by stressing the need to safeguard the independence of OAS organs and of the representatives of member States and, as far as the host State was concerned, the imperative need to bring to an end as speedily as possible situations which affected its security or its public order.

19. The Inter-American Juridical Committee also had the task of preparing the forthcoming Fourth Inter-American Conference on Private International Law, to be held at Montevideo to mark the hundredth anniversary of the treaties on private international law signed in that city in 1889.

20. Lastly, he wished to mention the possibility of a proposal being made to the General Assembly of the United Nations for the declaration of a Decade of International Law, to begin in 1990, so as to mark the hundredth anniversary of the 1899 Hague Convention for the Pacific Settlement of International Disputes. The proposal was expected to be the outcome of the meeting of the Ministers of Foreign Affairs of the Movement of Non-Aligned Countries held from 26 to 29 June 1989 at The Hague. If adopted, such a declaration would no doubt involve the United Nations in a series of activities in the field of the progressive development of international law in which the International Law Commission would play its customary role, thereby strengthening the search for peace under law and justice.

21. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his interesting and comprehensive statement and for the kind invitation to attend the Committee's next session. Close co-operation with the Committee had always been most rewarding for the members of the Commission. Many of the topics on the Committee's agenda were directly connected with the Commission's work. To mention only one example, the convention against drug-trafficking now in preparation would be of the utmost interest to the Commission. In that connection, members of the Committee might be interested to learn that the Commission had discussed drug-trafficking as a crime against humanity in the context of its work on the draft Code of Crimes against the Peace and Security of Mankind.

22. Mr. ILLUECA, speaking on behalf of members of the Commission who were also from countries members of OAS, thanked the Observer for the Inter-American Juridical Committee for his valuable in-depth statement. The important work being done by the Committee was greatly appreciated, as were its continuing relations with the Commission. Besides the issue of drug trafficking, which, as the Chairman had just pointed out, came within the Commission's purview as a crime against humanity, the environmental issue currently under consideration by the Committee was also of great interest to the Commission because of its similarity with the topic of the law of the non-navigational uses of international watercourses. In conclusion, he congratulated the Observer on pointing out the importance of the contribution of the Americas to contemporary international law.

23. Mr. McCAFFREY said that he, too, wished to stress the parallel between the work being done by the Inter-American Juridical Committee on international environmental law and the Commission's consideration of the topic of the law of the non-navigational uses of international watercourses, for which he was Special Rapporteur. An opportunity to study the draft declaration currently under consideration by the Committee, and particularly the section on the settlement of disputes, would be extremely valuable to him in preparing his report for the Commission's next session. It would be regrettable if interaction between the two bodies were confined to a single statement delivered annually in plenary session; ongoing collaborative efforts during the year should also be encouraged. Having represented the Commission at the Committee's session at Rio de Janeiro two years earlier, he wished to recommend that future representatives of the Commission should adopt the practice of addressing the Committee's seminar on international law on the subject of the Commission's current work, especially in areas of interest to Latin America. The Commission owed a debt of gratitude to the Committee for its work in exploring uncharted legal territory which, as it were, prepared the ground for its own activities.

24. Mr. KOROMA, speaking also on behalf of members of the Commission from African countries, associated himself with the previous speakers in expressing appreciation for the statement made by the Observer for the Inter-American Juridical Committee. The breadth of the Committee's range of activities was truly impressive. The process of cross-fertilization produced by the continuing close contact between the Committee and the Commission not only

benefited the work of both bodies, but also enhanced the rule of law in international relations as a whole. The long-standing solidarity between Latin America and Africa covered many fields, including that of law. Africa acknowledged with pride and gratitude that it had borrowed from Latin America the principle *uti possidetis* and had used it extensively to defuse border and territorial problems which had arisen in African countries directly after independence. The African countries looked forward to new developments in the Committee's work, and wished it every success in its future endeavours.

Statement by the Observer for the European Committee on Legal Co-operation

25. The CHAIRMAN invited Mr. Harremoes, Observer for the European Committee on Legal Co-operation and Director of Legal Affairs of the Council of Europe, to address the Commission.

26. Mr. HARREMOES (Observer for the European Committee on Legal Co-operation), having recalled that the Council of Europe had recently celebrated the fortieth anniversary of its establishment, said that, with the accession of San Marino and Finland in November 1988 and May 1989, respectively, the Council's membership now included all the 23 pluralist parliamentary democracies in Europe. That development gave additional impetus to the Council's work towards the creation of a true "European legal space" for all its members, whether or not they were engaged in co-operation in other European contexts.

27. On the occasion of the Council's anniversary, the Committee of Ministers had adopted a declaration dealing, *inter alia*, with future relations with the States of Eastern Europe, in which it welcomed the policy of reform embarked upon by several of those countries and declared its willingness to engage in a dialogue with them on the observance and practical implementation, at both the national and the international levels, of the principles of human rights and democracy. In particular, the Council was ready to consider possibilities of organizing meetings and information exchanges among experts on all matters pertaining to its activities, of facilitating accession to Council conventions, and of more structured co-operation with some of the countries concerned. In that connection, it was to be noted that Hungary had already been invited to accede to three conventions and had asked to be invited to accede to 10 others, while Poland had been invited to accede to one convention. The Council of Europe welcomed those developments, which had found striking confirmation in Mr. Gorbachev's visit to the Parliamentary Assembly at Strasbourg the previous week.

28. The European Ministers of Justice had met in formal conference at Lisbon in 1988 and at an informal meeting at The Hague in 1989. One of the topics discussed at the Conference had been that of penal and criminological issues arising from the propagation of contagious diseases, including AIDS. The Ministers of Justice had placed emphasis on preventive measures and research, taking the view that criminal law in that field should intervene only as a last resort. Principles for a common policy, relating particularly to measures to be taken in prisons, were to be elaborated by the European Committee on Crime Problems. Other topics considered had been that of sexual exploitation, pornography, prostitution and traffic in children and young adults, and also that of the primacy of the interests of the child in the sphere of private law. The informal meeting, for its part, had considered the question of legal problems arising from the use of modern systems of payment, particularly that of liability and proof in cases of electronic transfers of funds, and the issue of co-operation between the public and private sectors in crime-control measures.

29. Over the previous 12 months, two new conventions, on "insider" trading and on transboundary television broadcasting and retransmission, had been opened for signature by member States and by the European Community. Both contained a so-called "disconnection" clause establishing the precedence of Community rules in governing relations between Community members.

30. Since the previous year, various committees of government experts had continued their activities in the field of civil and administrative law. The committee of experts on public international law had examined certain matters relating to the privileges and immunities of international organizations, in particular those of a commercial or technical nature, and had drawn up a draft recommendation on the subject which was to be considered by the Committee of Ministers later in the year. The European Committee on Legal Co-operation had transmitted to the Committee of Ministers an opinion prepared by the same committee of experts on the subject of the draft European convention for the protection of the underwater cultural heritage, whose adoption had unfortunately been prevented by lack of agreement on the delimitation of maritime territories in the Aegean. In the field of modernization of private and public law, the European Committee had considered the problem of multiple nationality in families. A special meeting on dual-nationality problems held in 1988 had, in particular, discussed issues connected with the application of the 1963 Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality. On the basis of the meeting's report, the Committee of Ministers had decided to set up a committee of experts on multiple nationality. The experts had already met once during the current year and their work was expected to lead to the adoption of a new legal instrument in 1990.

31. The Council of Europe had continued its activities in the environmental sphere, in particular by considering the legal consequences of threats to public health and to the environment resulting from major accidents or from discharges connected with the day-to-day operations of certain enterprises. A new committee of experts on reparation for harm to the environment was currently endeavouring to harmonize the law of civil liability through the generalization of no-fault liability in the case of operators engaged in dangerous activities, to be supplemented by the establishment of financial guarantee mechanisms in each country. The committee proposed subsequently to tackle the question of reparation for harm in cases where one or more operators could not be held responsible, such as the case of acid rain, where mechanisms outside the scope of civil liability, such as indemnification funds financed by potential polluters, had to be envisaged. Those activities were not expected to lead to the adoption of a convention, but, rather, to recommendations to Governments to incorporate certain principles in national legislation.

32. A draft agreement on responsibility for the consideration of applications for asylum had been submitted to the Committee of Ministers in 1988. However, important problems still had to be settled before that instrument could be opened for signature by member States.

33. Lastly, the committee of experts on medical research on humans had prepared a draft recommendation on the wholly new topic of bio-ethics, with the object of inviting member States to enact legislation or take other appropriate steps to give legal force to the principles annexed to the recommendation.

34. The pioneering activities of the Council of Europe in problems of criminal law had included the adoption of a recommendation concerning the liability of enterprises for offences committed in the exercise of their activities and the publication of a report on extraterritorial jurisdiction in penal matters, containing proposals designed to prevent conflicts of jurisdiction and to resolve allied difficulties.

35. The committee of experts on computer crime had continued its work, which involved analysis of the various types of computer crime (fraud, sabotage, hacking, etc.); drawing up an obligatory list and an optional list of computer-related offences which could or should be incorporated in national legislation in order to harmonize European law in that area; and examining the extent to which the European conventions on various aspects of criminal law made it possible to combat such new forms of crime in Europe and, if necessary, working out proposals to supplement those conventions. The committee had formulated principles for incorporation in the criminal legislation of member States, thereby filling a gap in existing laws and ensuring maximum concordance.

36. The select committee of experts on sexual exploitation, pornography, prostitution and the traffic in children and young adults had continued to collect data on those problems by using official statistics and research findings. It would elaborate a draft recommendation and consider the advisability of formulating a European convention on the prevention and punishment of those phenomena. The problems involved offered an opportunity for co-operation between the countries of Europe, and with other countries as well.

37. A select committee of experts on international co-operation in the detection, seizure and confiscation of criminal proceeds had begun its work in 1988. It was studying methods of depriving offenders of the proceeds of their crimes, particularly drug trafficking, and thereby making criminal activities unprofitable. A preliminary draft European convention on the subject was being elaborated, in close co-operation with the United Nations.

38. The Council of Europe, through its many activities in the legal field, was thus contributing to the evolution of law on an international scale. Although its work was done in the European context, nearly all of its achievements—its conventions, recommendations, publications and so on—were open and available to States, institutions and individuals outside the territories of its 23 member States. The Council hoped in that way to serve the entire world, so that it might become a safer, happier and more democratic place, a place more respectful of human rights and of the rule of law.

39. The CHAIRMAN said that the experience of the European Committee on Legal Co-operation in drafting legislation on liability was of direct relevance to the Commission's work. It was of particular interest that the Committee's approach emphasized aspects of liability relating to civil law, rather than State responsibility. The Commission had a long tradition of fruitful co-operation with the Committee and attached great importance to that co-operation.

40. Mr. REUTER, speaking on behalf of members of the Commission from the Western European and other States, said that the Commission had always been highly appreciative of the work of the European Committee on Legal Co-operation and was all the more so now, when the fact that Europe was destined to become a continent without borders had been thrown into relief by a number of recent events, including the profound changes and new spirit of openness in Eastern Europe. After all, what were large confederations like the United States of America and Argentina if not proof of how a European confederation might be made to work?

41. Europe was now an area of demographic depression: it operated only with the help of manpower from foreign countries, workers who initially wanted merely to make some money and return home but then grew accustomed to their host country and wished to remain. They were often prepared to take on the responsibility that went with residence in a country, yet were not always met with corresponding generosity from the country's citizens. The account just given of the European Committee's activities was highly relevant to those problems, and he thanked the Committee's Observer for it.

42. Mr. DÍAZ GONZÁLEZ, speaking also on behalf of members of the Commission from Latin-American countries, said that, as the Commission's designated participant for the current year in the work of the European Committee on Legal Co-operation, he had listened with special interest to the statement by the Committee's Observer. Many of the subjects mentioned were closely related to matters under study by the Commission. Another similarity between the two bodies was that they were both celebrating their fortieth anniversary in 1989. The Committee, like the Commission, had done highly commendable work, and it was to be hoped that it would continue in its endeavours.

43. Referring to the Committee's activities relating to refugees and émigrés, he said that the situation now was the opposite of what it had been in the past. Once it had been Latin-American States that had received numerous émigrés from Europe: Italian immigrants, for example, had helped Argentina and Venezuela prosper. Now the children of European refugees who had settled in Latin America were returning to their parents' native lands.

44. He thanked the Observer for the European Committee and expressed the hope that the co-ordination between the two bodies would continue as a means of promoting respect for the law and for democratic principles throughout the world. A Europe without borders might ultimately lead to the achievement of a world without borders.

45. Mr. BARSEGOV, speaking on behalf of members of the Commission from the Eastern European countries, thanked the Observer for the European Committee on Legal

Co-operation for a fact-filled report on the international legal aspects of the Committee's multifaceted work. Soviet jurists were studying with growing interest the Council of Europe's efforts in creating rules of law and considered the achievements of their colleagues most impressive. The Committee's emphasis on restructuring, on humanistic values and on the rule of law opened up new prospects for interaction among all of the residents of the great European house. He thanked the Committee's Observer for his outstanding report and said that he hoped the co-operation between the two bodies would continue.

46. Mr. KOROMA, speaking on behalf of members of the Commission from the African countries, expressed warm appreciation for the very interesting presentation by the Observer for the European Committee on Legal Co-operation. He agreed that the efforts being made in Europe to promote the evolution of law beyond national borders would have positive repercussions throughout the world. Africa, too, stood to benefit from those efforts, although the main trends of European legal tradition were already present on the continent and were often better preserved there than in Europe itself. It was to be hoped that the principles of reliance on the rule of law, international solidarity and humanism would continue to attend European legal development, thereby benefiting not only Europe but mankind as a whole. He expressed his thanks to the Observer for the European Committee and, through him, to all of the Commission's colleagues in that body.

47. Mr. Sreenivasa RAO, speaking on behalf of members of the Commission from the Asian countries, thanked both of the observers who had just briefed the Commission on the wide range of subjects being discussed in their organizations.

48. The activities of the European Committee on Legal Co-operation in relation to émigrés, refugees and liability would go a long way towards finding appropriate solutions to problems encountered in those areas and towards articulating policy options, not only for Europe but for all countries. It was especially interesting that not only the civil-law aspects of liability were being studied, but that prevention, co-operation and methods of compensation, including liability of potential polluters and public funding, were also areas in which the Committee was working. The Commission's endeavours could only be advanced by the Committee's efforts, and he thanked the Committee's Observer for his statement.

Draft Code of Crimes against the Peace and Security of Mankind[2] (*continued*)* (A/CN.4/411,[3] A/CN.4/419 and Add.1,[4] A/CN.4/L.433)

[Agenda item 5]

Draft articles proposed by the Drafting Committee

Articles 13, 14 and 15

49. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report, as well as draft articles 13, 14 and 15 adopted by the Committee (A/CN.4/L.433).

50. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, in his sixth report (A/CN.4/411, part III), the Special Rapporteur had submitted a revised draft article 11 entitled "Acts constituting crimes against peace", which the Commission had referred to the Drafting Committee at its fortieth session, in 1988. The article had consisted of seven paragraphs, each dealing with a specific crime. As stated in the Commission's report on its fortieth session,[5] a consensus had taken shape within the Commission that each of the crimes was to form the subject of a separate article.

51. If all the Special Rapporteur's proposals were adopted, part I (Crimes against peace) of chapter II (Acts constituting crimes against the peace and security of mankind) of the draft code would thus comprise seven articles: on aggression; the threat of aggression; intervention; breach of obligations under treaties designed to ensure international peace and security; breach of obligations under treaties prohibiting the emplacement or testing of weapons in certain areas; subjection of a people to colonial domination or, as an alternative, to alien subjugation, domination or exploitation; and mercenarism.

52. The Drafting Committee had intended to take up all those articles at the present session and thereby complete the part on crimes against peace. Yet despite its efforts, it had not attained that goal. It could propose only three articles: article 13 (Threat of aggression), article 14 (Intervention) and article 15 (Colonial domination and other forms of alien domination). The Drafting Committee had also considered incorporating an additional article dealing with the preparation of aggression, an issue that had been discussed by the Commission in 1988.[6] Mr. Shi and Mr. Barsegov had presented a proposal suggesting the possible content of an article on the planning and preparation of aggression. After very preliminary consideration, the Drafting Committee had reached the conclusion that the matter would require more extensive examination, which would not be possible at the present session. It had therefore decided to take up that proposal at the forty-second session, in 1990. In a spirit of co-operation, the authors of the proposal had not objected to that decision.

53. The Committee had prepared articles 13, 14 and 15 in what it believed should be the standard drafting style for all the articles of chapter II of the code on specific crimes. The title of each article indicated the crime, and the text described the act which characterized the crime. For instance, article 15 was entitled "Colonial domination and other forms of alien domination": that was the crime. The text read: "Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations." Those were the acts which characterized or constituted the crime, and that was highlighted in the French text, which began: *Le*

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* Resumed from the 2107th meeting.

[2] 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.

[3] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[4] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[5] *Yearbook ... 1988*, vol. II (Part Two), p. 65, para. 277.

[6] *Ibid.*, pp. 58-59, paras. 224-228.

fait d'établir ou de maintenir . . . The same method was used in articles 13 and 14.

54. Article 12 (Aggression), provisionally adopted by the Commission at its fortieth session, in 1988,[7] had a different and more complicated structure, owing in part to the fact that the acts characterizing the crime of aggression had already been indicated by the General Assembly in the 1974 Definition of Aggression,[8] and the Commission had not wished to depart from that text, except to the extent necessitated by considerations related to the legal nature of the code. Another reason was that paragraph 1 had been introduced in article 12 only provisionally and might well disappear in the future, as stated in paragraph (1) of the commentary to the article. Hence article 12 could not be viewed as setting drafting standards for the other articles in chapter II: the Drafting Committee would have to deal in future with the question of a coherent formal presentation. Unfortunately, no time had been available to go into the matter at the present session, and the Committee had limited itself to preparing articles 13, 14 and 15 using a model which might possibly be adopted for all the articles in that chapter of the code.

ARTICLE 13 (Threat of aggression)

55. The text proposed by the Drafting Committee for article 13[9] read:

Article 13. Threat of aggression

Threat of aggression consisting of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

56. The Drafting Committee had decided that threat of aggression, though not easy to define, should be included in the draft code, as recommended by the Special Rapporteur and in accordance with the precedent set by the 1954 draft code (art. 2, para. (2)). In drafting article 13, the Committee had been concerned, first, to describe as specifically as possible the forms that threat of aggression might take, and secondly, to distinguish between actual threats of aggression and mere verbal excesses.

57. The Committee had singled out, as possible forms of threat of aggression, declarations, in the sense of public messages in verbal or written form; communications, in the sense of expressions of intention, not broadcast publicly but contained in correspondence or orally manifested, even by telephone; and demonstrations of force, such as troop concentrations or displays of military strength. That was only an illustrative list, however, as was apparent from the words "or any other measures".

58. With regard to the distinction between an actual threat of aggression and mere verbal excesses, the phrase "which would give good reason to the Government of a State to believe" had been included to provide an objective criterion, in so far as possible, in determining whether a particular course of conduct or expression of intention amounted to a threat of aggression. Such a determination would naturally depend on the circumstances of each case and could only be made *post facto* by the judge in the light of those circumstances. The Drafting Committee none the less believed that the criterion of reasonableness served a useful purpose in that context.

59. Mr. ILLUECA said that article 13 was of particular importance for the Latin-American region, where countries were still engaged in the struggle initiated by Simón Bolívar against local despotism and foreign domination.

60. While he agreed with the purpose of the article, which was to treat threat of aggression as a separate crime, he considered that the phrase "or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" was not satisfactory. It introduced a subjective element, so that, in the case of measures other than declarations, communications and demonstrations of force, a threat of aggression would apparently be a crime only if the State which was the object of such a threat believed that aggression against it was being prepared. The determination of the constituent elements of a crime, however, was a matter for the judge, subject to the principle *nullum crimen nulla poena sine lege*. Threat of aggression, as defined in article 13 was not to be confused with so-called indirect aggression and ideological aggression, involving hostile propaganda attacks of such magnitude as to endanger the security of the State concerned, nor with the concept of economic coercion as embodied in article 32 of the Charter of Economic Rights and Duties of States[10] and reflected in article 19 of the Charter of OAS.[11]

61. Furthermore, although the draft code was designed to apply to individuals, States should not escape responsibility for criminal acts committed by individuals acting on their behalf. It sufficed in that respect to recall article 5, paragraph 2, of the 1974 Definition of Aggression[12] and, more particularly, article 52 of the 1969 Vienna Convention on the Law of Treaties,[13] whereby:

> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

62. Mr. McCAFFREY said that he had great difficulty with all three of the articles before the Commission (arts. 13, 14 and 15), since they did not make it at all clear for which individual actions a criminal could be indicted and punished under the code. It had been decided that individuals rather than States were to be the subjects of the code, yet article 13, for example, suggested the contrary. He therefore wondered whether a provision along the lines of paragraph 1 of article 12 (Aggression), provisionally adopted by the Commission in 1988,[14] could not be formulated for each of the three articles, or possibly a general introductory clause for part I (Crimes against peace) of chapter II of the draft.

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[7] For the text and commentary, *ibid.*, pp. 71 *et seq.*

[8] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[9] For the corresponding text (art. 11, para. 2) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 57-58, footnote 268 and paras. 217-221.

[10] General Assembly resolution 3281 (XXIX) of 12 December 1974.

[11] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 324).

[12] See footnote 8 above.

[13] United Nations, *Treaty Series*, vol. 1155, p. 331.

[14] See footnote 7 above.

63. The principle *nullum crimen nulla poena sine lege*, which called for great specificity in the drafting of criminal law provisions, must be borne constantly in mind. For instance, article 13—a vague provision in his view—could, if implemented by national courts rather than by an international court, give rise to a welter of inconsistent decisions, as could other provisions of the code, unless it was couched in very precise terms. The main problem with article 13, however, was that it did not require any specific intent to threaten aggression on the part of the alleged aggressor, whereas under most systems of penal law such intent was required, particularly for the most serious crimes such as those contemplated under the code.

64. The other difficulties stemmed from the wording of article 13. Quite apart from the fact that, in his opinion, threat of aggression was too vague an offence to be included in the code, what precisely was covered by the expression "demonstrations of force"? Did it include military exercises or war games, for example? He did not know, but it seemed to him that the article in general would lend itself to—if not actually encourage—accusations by States that another State, or an official of another State, had committed the crime of threat of aggression.

65. Lastly, under some systems of law it was possible to try an individual *in absentia*—a fact which seemed to magnify the potential for using article 13 for political or other purposes and hence to heighten the danger posed by the article itself. For instance, an official could be accused of having committed the threat of aggression, be tried *in absentia* and be sentenced, all in the name of securing some kind of political advantage. He did not think that that was what the Commission intended with respect to the code and, for that and other reasons, he was unable to accept article 13 as currently drafted. Indeed, he had serious doubts that such an article could be drafted in any way that would be acceptable in a code of crimes against the peace and security of mankind.

66. Mr. FRANCIS, agreeing with Mr. McCaffrey that article 13 was vague, said that not only article 13 but also article 14 should be fleshed out somewhat to take account of the relevant elements of the 1974 Definition of Aggression[15] and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[16] As had already been noted, one concept which was fundamental to both provisions was that of acts which constituted a threat to international peace and security. Since a threat of aggression was, from the very outset, directed against international peace and security, he would suggest that, to put teeth into article 13, the phrase "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" should be replaced by "which would constitute a threat to international peace and security".

67. Mr. MAHIOU said that, by comparison with article 2, paragraph (2), of the 1954 draft code, article 13 undeniably represented progress, for it was important to pin-point in precise terms those elements—declarations, communications and demonstrations of force—which would enable a threat of aggression to be identified. The words "or any other measures" had, of course, been included to avoid too narrow a definition, but were qualified by the requirement that there must be good reason to believe that aggression was being seriously contemplated. One point of concern, however, was that, under the terms of the article, it would be left to the Government of a State which believed that aggression was being contemplated against it to determine whether there was a threat of aggression. As Mr. McCaffrey had observed, it was the intent of the State that was the subject of such a threat, rather than that of the State that made the threat, which seemed to matter according to the present wording. That was a point the Chairman of the Drafting Committee might wish to clarify.

68. In any event, he wondered whether it was necessary to retain the words "to the Government of a State", which were not only restrictive in that they limited the requirement of intent to the Government of a State which believed it was threatened, but could also give rise on that account to problems of interpretation. It might perhaps be advisable to find some more general form of wording which would avoid any reference to the intent of the State threatened and would provide simply for an objective determination of certain acts and measures. Accordingly, he would suggest that the words "to the Government of a State" be deleted and that the words "that State", at the end of article 13, be replaced by "a State".

69. Mr. OGISO said that he wished to enter a reservation with respect to article 13. Notwithstanding the introductory remarks by the Chairman of the Drafting Committee, he was not convinced that it was appropriate to include in the draft code a separate provision on threat of aggression, particularly before the Commission had decided the question of an international criminal jurisdiction.

70. Two hypothetical cases could be considered. The first was a threat of aggression followed by actual aggression. Obviously, in such a case, the individual who committed the crime of aggression would be punished for that crime and would receive the most severe penalty. Even if he was further punishable for the separate crime of threat of aggression, the penalty would not be greater than for the aggression.

71. The second case was that in which an individual committed the crime of threat of aggression but did not carry out an act of aggression. Under the draft code, such an individual would be subject to punishment even though no act of aggression had occurred. But it must be remembered that an individual who committed the crime of threat of aggression did not expressly state, in declarations or communications, that he would commit aggression. In the second case, therefore, situations would probably arise in which certain acts of a State, such as military exercises or warning declarations directed at another State, were regarded as a threat of aggression. Sometimes, of course, warning declarations or communications were made or military exercises were carried out to discourage another State from committing a politically undesirable act, and it might not always be easy to differentiate between a threat of aggression and a legitimate act of warning. Theoretically, it might be possible to punish an individual for a crime of threat of aggression separately from a crime of actual ag-

[15] See footnote 8 above.

[16] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

gression. However, if the State to which the warning was addressed interpreted it as a threat of aggression and insisted that such act be punished, the political dispute might escalate.

72. Lastly, he considered that it was for an international criminal court to decide whether there had been a threat of aggression. National courts were not the appropriate forum for such a decision.

The meeting rose at 1 p.m.

2135th MEETING

Wednesday, 12 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419 and Add.1,[3] A/CN.4/L.433)

[Agenda item 5]

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

ARTICLE 13 (Threat of aggression)[4] (*concluded*)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), noting that several members had doubts about article 13, said that the Drafting Committee had no set opinion in the matter and considered that it had performed its task, which was not to consider the need for a particular article but to draft a text.

2. Mr. AL-QAYSI said that article 13 was necessary, since it completed article 12, which the Commission had provisionally adopted at the previous session[5] and which defined aggression as a crime against the peace and security of mankind. The proposed text was perhaps the best solution the Drafting Committee could produce. Admittedly, the concept of "threat" was not easy to define, but in the present case it was a matter of defining "threat of aggression", a far more specific expression.

3. His answer to the question whether article 13 was acceptable was in the affirmative, inasmuch as it established a relationship with the concept of aggression, as already defined. The Drafting Committee had none the less allowed a subjective element to remain, as reflected in the phrase "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated". That involved an element of intent on the part not of the State, but of its Government, which was composed of individuals. That was in fact an extension of the criminal responsibility of individuals, which was the essence of the draft code.

4. The object of the article was to define a process of thinking which led to concrete facts, in which connection it had already been said that it approached the matter solely from the standpoint of the threatened State, not from that of the State which made the threat. It thus provided for an escape route, which could be dangerous.

5. Mr. Francis (2134th meeting, para. 66) had proposed that the qualifying clause "which would give good reason to the Government of a State to believe . . ." should be deleted and the reasons he had cited merited consideration. Such an amendment would, however, at the same time have the effect of removing the material element constituted by the reaction of the threatened State. In that case, only the Security Council would be in a position to determine whether or not there had been a threat of aggression.

6. For all those reasons, he considered that, for the time being, it would be best to accept article 13 as proposed by the Drafting Committee and to include in the commentary an explanation of the details of its provisions in order to leave no doubt as to its meaning. In particular, it should be stressed that the article must be read in conjunction with article 12.

7. Mr. BENNOUNA said that, in his view, the text of article 13 proposed by the Drafting Committee had the fewest drawbacks. In any event, it was an improvement over the 1954 draft in that the Drafting Committee had tried to arrive at a definition which was as objective as possible.

8. Contrary to what had been said, there was no question of leaving it to the Government of a State to determine whether or not it was threatened, since the requirement introduced by the words "which would give good reason to the Government of a State to believe . . ." enabled third parties to decide whether or not "declarations, communications, demonstrations of force . . ." constituted a threat.

9. Mr. Reuter had wanted to go further and add the concept of blackmail to that of intent. It was true that a threat was always designed to obtain something, for example a certain conduct on the part of the State that was threatened. Although the Drafting Committee had decided not to endorse that idea, a reference to blackmail might perhaps be included in the commentary, something which could only enhance the content of article 13.

10. Mr. McCaffrey (2134th meeting) had wondered whether intent was adequately represented in the concept of threat. The wording of article 13 left no doubt on that score, but in the interests of clarity a qualification could

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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 . . . 1988*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the text, see 2134th meeting, para. 55.

[5] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

be added, for example by saying "which would *intentionally* give good reason to the Government of a State to believe . . .".

11. Mr. BEESLEY, stressing the importance of article 13, said that threat of aggression could not be excluded, since it could have many practical implications. A powerful State could, for example, achieve its objectives without actually committing aggression. Thus, in cases where there was no actual military action, such a State—and therefore the individuals who directed it—would be exempt from blame, and that was precisely what had to be avoided. The situation was similar to preparation of aggression. Indeed, some national systems of law also differentiated between the threat and the act itself, as, for example, in the distinction between assault and battery.

12. In the case of threat, intent had to be present. If it were left to the victim to determine intent, however, a problem would arise with regard to third States, which could also take action on the basis of such threats. A more objective criterion should therefore be incorporated in article 13 to replace the phrase "which would give good reason . . . to believe", which seemed to be unduly subjective.

13. However, he did not think that any solution would be the right one. Acceptance of the text proposed by the Drafting Committee might be a source of uncertainty, yet rejection of it would pave the way for misleading interpretations.

14. Mr. Sreenivasa RAO said that the main problem with regard to article 13 was one of application, which ideally should be entrusted to an international court, since the difficulties would begin as soon as a national court had to determine whether there had been a threat of aggression. In some instances, as had been the case with the Nazi Government's preparations for war, the threat was fairly easy to determine. Recent history, however, revealed situations which were far more involved and called for a determination by a third party. Threat was essentially subjective and there were many ways of bringing it into play: it was enough to recall, for example, the gunboat politics of yore. Depending on individual judgment, the threat might or might not be seen as genuine. Once the Security Council was entrusted with the task of determining whether there had been a threat, the situation became much clearer.

15. Whether or not it was applied, however, article 13 was in keeping with the ultimate objective of the code, which was prevention. In his view, therefore, the text should remain as drafted and the reservations voiced by members should be reflected in the commentary. It must be recognized that the Commission had not altogether achieved the objective sought.

16. Mr. RAZAFINDRALAMBO said he agreed in principle that the text proposed by the Drafting Committee should be adopted and he appreciated the difficulties in that connection. As already noted, however, the text was still imbued with subjectivity. Were "declarations", for instance, enough to characterize a threat of aggression? That subjective element would acquire still greater significance if article 13 were applied by national courts. The subjective elements in the definition should therefore be supported by more specific elements: other concrete elements such as "military preparations" could be added to the "demonstrations of force" already referred to in the article.

17. As to drafting, the phrase "which would give good reason to the Government of a State to believe . . ." suggested that it qualified only "other measures". It should therefore be amended accordingly.

18. Mr. BARSEGOV said that, in deciding whether or not article 13 was necessary, it must be borne in mind that threat of aggression was a reality, that it was a reprehensible act of State, and that the future code should therefore provide for sanctions against individuals guilty of it.

19. Several members had already said that the proposed text was woolly. That was due to the approach peculiar to the Drafting Committee, which avoided being too specific and sought solutions that were as general as possible. There were, therefore, gaps in the text: for instance, it made no direct reference to the Charter of the United Nations or to the Security Council, whose role in the matter would be decisive. Indeed, the decision of the Security Council would be even more important in the case of threat than in that of actual aggression, since aggression was all too evident.

20. Mr. Sreenivasa Rao had said that, even if article 13 was not applied, it would retain its deterrent character, which would be in keeping with the spirit of the code. In any event, it was conceivable that in practice there would be an overall pronouncement on various aspects of the general situation, such as threat, preparations and actual acts of aggression.

21. As to the court which would have jurisdiction, he was prepared to envisage the establishment of an international criminal court, as indeed the Commission had promised to do. For the time being, he considered that the text, though not perfect, should be accepted as drafted and that efforts should be made to improve it gradually on the basis of all the views that would be expressed on it.

22. Mr. THIAM (Special Rapporteur) said he was surprised that some members questioned the need for the code to include threat of aggression, which was expressly referred to in Article 2, paragraph 4, of the Charter of the United Nations and which the Commission was consequently bound to deal with. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[6] which had been adopted unanimously, also contained a number of provisions proscribing threat of aggression. Furthermore, in its judgment in the *Nicaragua* case,[7] the ICJ had held that threat of aggression was included among crimes against the peace and security of mankind, even if it was a less serious crime.

23. The problem could be approached in two ways, either by referring to threat without defining it and leaving it to the court to determine the facts—as was the method under internal law—or, as advocated by those who adopted a restrictive approach to the draft code, by enumerating the various possible forms of threat. The Drafting Committee and he, in his capacity as Special Rapporteur, had endeav-

[6] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

oured to give satisfaction to those who favoured the second solution. It was not the time for reopening the debate, but rather for making specific proposals if members so wished.

24. Mr. KOROMA suggested that, in the case of the draft code, the Commission should follow the method adopted at the present session during the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, when the Special Rapporteur had been invited to comment on each article after it had been introduced by the Chairman of the Drafting Committee. It would also be helpful if the Chairman of the Drafting Committee and the Special Rapporteur could intervene in the discussion more frequently to provide explanations, which would shorten the debate. However, since it had taken nearly 20 years to formulate the definition of aggression, it was not surprising that the definition of threat of aggression was being discussed at length. Indeed, he welcomed the detailed analysis to which the Drafting Committee's work had given rise, but would invite the Special Rapporteur to draft a commentary to article 13 which was as comprehensive as possible.

25. Article 13 was not perfect, of course, but in the circumstances it was satisfactory. It should be read in the light of the Charter of the United Nations and of the historical context, in other words in the light of the development of the law on the prohibition of the use of force and of article 19 of part 1 of the draft articles on State responsibility.[8] Threat of aggression was unfortunately a reality, which had in the past already had the effects anticipated by the States concerned. The draft code should not remain silent in that regard.

26. When it came to crimes such as threat of aggression, it was pointless to stipulate that specific damage must have occurred: it sufficed to establish the existence of an objective intent in order for threat of aggression to be made an international crime. In other words, it was enough for a State to perceive the threat of aggression against it for that State to have grounds for complaint.

27. Threat of aggression could be imputed both to an individual and to a State, even if, for the time being, only acts attributable to individuals fell under the code. An introductory clause should, however, be inserted before articles 13 *et seq.*, to read: "The following crimes constitute a threat against the peace".

28. With regard to a point made by Mr. Francis at the previous meeting, there was a difference between article 19 of part 1 of the draft articles on State responsibility, which he had already mentioned, and article 13 under consideration. Article 19 laid down an *erga omnes* rule and, if applied in the present case, an *erga omnes* rule would mean that not only the threatened State, but any member or collective body of the international community could allege that an international obligation had been violated. In the case of article 13 the position was different, since it was for the victim to make the allegation.

29. The text before the Commission was, for the time being, the best the Drafting Committee could produce. Nevertheless, an extensive commentary was needed in view of the observations and criticisms to which it had given rise. The Commission could try to improve the article on second reading, or even at a later stage.

30. Mr. TOMUSCHAT said that the Drafting Committee had done its very best to produce a reasonable text that could be implemented, although the text did call for some improvement. The Drafting Committee believed, for instance, that it had introduced a sufficiently objective element into article 13 with the words "which would give good reason", since they would mean that determination of the facts was not left to the threatened State alone. Given the number of members of the Commission who had criticized the subjective character of the article, however, the text might need some strengthening.

31. It had rightly been said that some link should be established between article 12 (Aggression), provisionally adopted at the previous session,[9] and article 13. In particular, the Commission should not exclude the role of the Security Council, whose decisions should have binding force, as provided in paragraph 5 of article 12. A similar provision would be required in article 13.

32. Article 13 was one of the provisions in the draft code that could not be applied by national courts. It was therefore comforting to note an emerging consensus on the idea of establishing an international criminal court to try crimes like the threat of aggression. Two categories of crimes were covered by the draft code, one consisting of crimes in the more or less traditional sense of the term, such as war crimes, where individual acts were at issue, and the other requiring an analysis of a complex historical situation involving a whole pattern of acts which national courts were not in a position to determine. That was why an international criminal court must be established at all costs.

33. Mr. BARBOZA said that he appreciated the difficulties of the Drafting Committee, which had merely performed the task entrusted to it by the Commission. An article on the threat of aggression had its place in the draft code for the reasons given by the Special Rapporteur. Moreover, although aggression as such was the most serious of the crimes against peace, the fact remained that, generally, when a criminal code was drawn up, a legal interest was enveloped in a series of protective rings. In the present case, the legal interest was peace, and aggression and threat of aggression were the evils against which it had to be protected. In general, national criminal codes prohibited the mere possession of weapons even if they were not used to commit a crime and, in so doing, they strengthened protection against the actual crime. In the present case, threat of aggression was one of the additional elements in an even more serious crime against which the international community wished to protect itself.

34. Obviously, it was more difficult to discern intent in some cases than in others. The problem was the same, however, in that intent to commit a crime had to be inferred from the facts. The wording of article 13 proposed by the Drafting Committee was not bad: it could perhaps be amended slightly, but it was sufficiently objective. Whether there was in fact a threat of aggression had to be inferred from the general context in which it occurred,

[8] See 2096th meeting, footnote 19.

[9] See footnote 5 above.

namely from a set of circumstances that would provide the court having jurisdiction with an idea of the intent involved.

35. He, too, considered that threat of aggression, and indeed other crimes covered by the draft code, such as aggression itself and genocide, could not be tried by national courts. Yet the fact that that question had still not been settled was no reason for not having an article on the threat of aggression, the inclusion of which would strengthen the educational and illustrative value of the code.

36. The text itself should, in his view, be cast in more "dramatic" terms and should refer, for example, to "serious" rather than "good" reason and to the "imminence" of the aggression.

37. Mr. ARANGIO-RUIZ said that the arguments put forward in support of article 13 were convincing, since the article was wholly in keeping with the Charter of the United Nations, which prohibited not only the use of force, but also threat of the use of force. The adoption of such an article was, however, an added reason for dealing with the statute of an international criminal court as soon as possible. The draft code would become a living reality in international law only if there were a means of implementation other than national courts, which could provide the solution only in the case of war crimes in the narrow sense of the term, namely in cases of violation of the law of land, sea and air warfare. For all other crimes covered by the code, whether they were crimes against peace—which included the threat of aggression—or against mankind, an international court would be essential. He would lay particular emphasis on the point, as he had the impression that many members shared that view.

38. Although it was not easy to improve the drafting of article 13, some terms, which were rather weak, should be re-examined. For instance, the words "good reason" could perhaps be replaced by "sufficient reason", which would be more objective. Also, what was to be understood by the expression "seriously contemplated"? It would be better to speak of a "planned" threat, which would bring out more sharply the reality of the threat.

39. Mr. THIAM (Special Rapporteur), noting the concern members had again expressed with respect to the court having jurisdiction in the matter, said that, while he intended to submit a draft statute for an international criminal court to the Commission, he first had to deal with the crimes. It was precisely to prevent possible mistakes by national courts that he had endeavoured, with the Drafting Committee's assistance, to determine as precisely as possible the various constituent elements of threat of aggression. In that way, if in the end national courts had to apply the code, they would know which specific elements had to be borne in mind in determining whether there was a threat of aggression.

40. As to the remarks made about the author of the act, he had started by defining the acts but would later concentrate on establishing the link between the act, as defined, and the author of the act. In any event, the author could only be an individual, since the topic did not cover the criminal responsibility of the State. Individuals, inasmuch as they committed crimes against peace, were usually, if not always, persons vested with political power. The Commission would see later how that aspect of the matter was to be reflected in the draft code. The 1954 draft code had referred to the authorities of the State, an expression which had attracted criticism from a number of members. For the time being, it was enough to know that the code would apply to individuals and that, in the case of crimes against peace, it could only apply to individuals vested with the authority of the State.

41. Mr. McCAFFREY observed that the main argument put forward by the Special Rapporteur and other members in support of article 13 derived from the fact that threat of aggression was prohibited under, in particular, the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[10] The Commission could not, however, reproduce at random in the code all the elements which appeared in the applicable international instruments. It had to make a choice on the basis of the seriousness of the acts and of how the code would be implemented. Leaving aside the question of the seriousness of the acts—threat of aggression was undoubtedly a serious act—and concentrating on the question of the implementation of the code, it was difficult to imagine that States could entrust to national courts the task of determining whether a threat of aggression had occurred unless that crime was defined with great precision and objectivity. The text proposed by the Drafting Committee failed on that score, for it laid down a general definition which would perhaps suffice for the Security Council or an international criminal court but certainly not for national courts. He would in fact favour an express reference in article 13 to the role of the Security Council, although that role might not always be decisive.

42. While some members were not opposed to including an article on threat of aggression, most of them had serious reservations about the text of article 13 proposed by the Drafting Committee. How then could that text be referred to the General Assembly as a text coming from the Commission? The best solution would probably be to state in the Commission's report, and not just in the summary records, that the Drafting Committee had proposed an article on threat of aggression to the Commission—the text of which would be reproduced in a footnote—and that the discussion in the Commission had been inconclusive and would be resumed at the next session.

43. Mr. REUTER said he considered that an article on threat of aggression was necessary. Also, he could support the text of article 13 proposed by the Drafting Committee, on the understanding that the expression "Government of a State" was taken to mean "any responsible Government of a State", in other words a Government that appreciated the seriousness of its task.

44. Mr. JACOVIDES said that the best course in the circumstances would be to leave article 13 as proposed by the Drafting Committee, subject to possible reconsideration in the context of the draft code as a whole. Whatever the differences about the need for and the wording of the article, the fact remained that the Charter of the United Nations made express reference to threat of aggression.

45. He attached importance to the expression "good reason", which he interpreted as referring not only to the opinion of the threatened State, but also to objective criteria,

[10] See footnote 6 above.

and considered that an international criminal court should determine whether a threat of aggression had occurred.

46. Mr. EIRIKSSON said that, although he too believed that an article on threat of aggression was necessary, he considered that the text proposed by the Drafting Committee could lead to confusion. Was it trying to define threat of aggression or to establish thresholds—in hierarchical order, apparently—beyond which threat of aggression would be covered by the draft code? For his own part, he discerned two thresholds in article 13, one as reflected by the supposedly objective criterion of "good reason" and the other by the words "seriously contemplated". Like other members, he had reservations about both expressions.

47. In his opinion, the article on threat of aggression should be viewed in the context of the confidence-building measures that were familiar to the Conference on Security and Co-operation in Europe, and it should be designed to prevent any possibility of anticipatory self-defence. For that reason, and to remove any impression that the acts constituting threat of aggression were graded in any way, article 13 could be worded as follows:

> "Threat of aggression consisting of any measure, including declarations, communications and demonstrations of force, which would give good reason for a State to believe that aggression is being seriously contemplated against that State."

48. Mr. THIAM (Special Rapporteur), noting that the Commission had discussed the matter thoroughly, said that interesting proposals had been made to improve the text of article 13 proposed by the Drafting Committee, but almost all members seemed to agree on the need for an article on threat of aggression. His intention was to reflect all those drafting proposals in the commentary to the article, something which would assist the Commission at the second-reading stage.

49. He was none the less concerned at the attitude of some members to the draft code as a whole. In the first place, it was at the request of the General Assembly that the Commission had resumed work on the topic, and that decision should be respected. Secondly, if only one member of the Commission had to oppose a particular text in order for it not to be transmitted to the Sixth Committee of the General Assembly, the Commission would never refer anything to the Sixth Committee again. The code was what it was; it might or might not be acceptable, but the Commission must fulfil the mandate it had received from the General Assembly.

50. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) noted that the discussion centred on two main questions, namely jurisdiction (i.e. national courts or an international criminal court), and the relationship between the acts of the State and the responsibility of individuals. Those two questions, however, arose in connection with other articles in the draft code and certainly could not be resolved by the Drafting Committee in the context of article 13.

51. In response to Mr. Barsegov's point, he explained that the need for article 13 was a matter for the Commission to decide, not the Drafting Committee, which was only a subsidiary body. The Drafting Committee had worked on an article on threat of aggression because it had believed that that was the wish of the Commission.

52. With regard to Mr. Razafindralambo's point, it was not only the "other measures", but also the declarations, communications and demonstrations of force which must "give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State". That was clear from the text of the article, but the Special Rapporteur might wish to confirm it in the commentary.

53. In short, there were relatively few proposals for change. Mr. Eiriksson's suggestion (para. 47 above) might have been useful during the Drafting Committee's consideration of the article, but in any case it was not essential and might have some flaws. With regard to Mr. Mahiou's concern (2134th meeting) that the Government of the potential victim State might have too dominant a role in determining whether threat of aggression had occurred, logic dictated that it should be the State which felt threatened that made the allegations of threat of aggression. It would then be for the court having jurisdiction to decide whether that was, or was not, the case. If the State concerned did not itself feel threatened, it would seem difficult to hold that the crime of threat of aggression had occurred. As to Mr. McCaffrey's suggestion, it would further delay the work of the Commission. Moreover, it was very unlikely that, at the Commission's next session, the Drafting Committee would be able to submit a text that differed significantly from the one under consideration. No doubt article 13 was far from perfect and should be carefully reviewed, perhaps at a third-reading stage, which, in the particular case of the code, seemed advisable. For the time being, however, the article could be adopted as drafted.

54. Mr. BEESLEY suggested, in the light of the various proposals, that reference should be made in a footnote to the role of the Security Council—although the Special Rapporteur was probably thinking of doing that. Also, he would suggest—without dwelling on the point—that article 13 be amended to read:

> "Threat of aggression, including declarations, communications, demonstrations of force or any other measures threatening aggression."

55. The CHAIRMAN said that, in his view, the discussion had been necessary, for it had shown that the Commission was well aware of the inevitable problems and difficulties of substance and drafting, that article 13 must be read in conjunction with the other articles in the draft code, and that the question of the introductory clause still had to be settled. He therefore recommended that the Commission should adopt article 13 as proposed by the Drafting Committee and that the commentary should state that the article would be reviewed in the light of the observations made in the Sixth Committee of the General Assembly and of the articles outstanding in the same chapter.

56. Mr. ARANGIO-RUIZ reiterated that he could agree to article 13 only if a statute for an international criminal court was envisaged.

57. Mr. FRANCIS, stressing that the threat of aggression endangered international peace and security, proposed that the phrase "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" be placed between square brackets for the time being. There was nothing unusual about that proposal and it was his intention

to submit amendments to article 13 at the Commission's next session.

58. Mr. McCAFFREY said that he was not opposed to the Chairman's recommended course of action, provided the commentary reflected the fact that article 13 had given rise to serious reservations on the part of many members.

59. The CHAIRMAN noted that the Special Rapporteur had already stated that those reservations would be reflected in the commentary.

60. Mr. BENNOUNA pointed out that there was a difference between the Commission's report, which reflected the views of members, and the commentaries to articles, which were a collective interpretation of the texts adopted. To refer to reservations in a commentary could only lead to confusion.

61. The CHAIRMAN, noting that Mr. Francis did not insist on his proposal, said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 13 as proposed by the Drafting Committee, on the understanding that the commentary would indicate that the article would be examined further in the light of the observations made by Governments in the Sixth Committee of the General Assembly and of the articles outstanding in the same chapter.

It was so agreed.

Article 13 was adopted.

ARTICLE 14 (Intervention)

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 14,[11] which read:

Article 14. Intervention

1. Intervention in the internal or external affairs of a State by fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

2. Nothing in this article shall in any way prejudice the right of peoples to self-determination in accordance with the Charter of the United Nations.

63. The text proposed by the Drafting Committee for paragraph 1 of article 14 combined elements taken from each of the two alternatives submitted by the Special Rapporteur. Like the first alternative, it included the element of impairment of the sovereign rights of a State—which the ICJ, in its judgment in the *Nicaragua* case,[12] had deemed to be an essential element of intervention; and, like the second, it spelt out which concrete acts amounted to intervention. The formula "Intervention in the internal or external affairs of a State" already appeared in those two alternatives as well as in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[13] (third principle).

64. Members would recall that, in the second alternative, the Special Rapporteur had followed the model of the 1954 draft code and, in two separate subparagraphs, had singled out as acts of intervention "civil strife or any other form of internal disturbance or unrest", on the one hand, and terrorist activities, on the other. The text proposed by the Drafting Committee dealt in a single sentence with armed subversive or terrorist activities. In that connection, the Drafting Committee had based itself on the third principle (second paragraph) of the 1970 Declaration, which provided that no State "shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State". The Committee had thought it preferable, however, to refer to "subversive activities" rather than to "civil strife or any other form of internal disturbance or unrest"; in its opinion, the concept of subversion was more comprehensive and more appropriate for the purposes of article 14.

65. The Drafting Committee had been careful to retain only those acts whose gravity warranted inclusion in the code as crimes against peace. That was why some members of the Committee had supported the inclusion of the word "armed" before "subversive or terrorist activities", although others had taken the view that any subversive activity which resulted in impairment of the sovereign rights of States should be regarded as a crime against peace, whether or not it involved the use of armed force. The word "armed" had therefore been placed between square brackets. The word "seriously" had likewise been placed between square brackets to reflect another divergence of views.

66. Paragraph 2, which was in the nature of a saving clause and was based on article 7 of the 1974 Definition of Aggression,[14] was self-explanatory. Its placement in article 14 was provisional, since a similar clause might prove necessary in relation to other crimes against peace. Lastly, members would note the difference between the last part of paragraph 2 and the similar wording at the end of article 15. It might be useful to harmonize the texts, but the Special Rapporteur felt that that should be done after article 15 had been considered.

67. Mr. MAHIOU said that the word "armed" should be deleted so that paragraph 1 did not duplicate paragraph 4 (*g*) of article 12 (Aggression) already provisionally adopted by the Commission.[15] The word "seriously" was necessary to qualify intervention and should be retained.

68. Mr. McCAFFREY said that he had already expressed serious reservations about article 14 when it had been considered in the Drafting Committee and he did not think it should have a place in the code. Although the Drafting Committee had improved the text, the crime of intervention was still not defined sufficiently precisely for the purposes of implementation of the article by national courts or indeed by an international court.

69. Furthermore, he did not understand what was meant by "intervention in . . . external affairs". Even if that kind of intervention existed, he wondered whether it could be sufficiently serious to be included among "the most serious

[11] For the corresponding text (art. 11, para. 3) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 59 *et seq.*, footnote 276 and paras. 231-255.

[12] See footnote 7 above.

[13] See footnote 6 above.

[14] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[15] See footnote 5 above.

of the most serious" crimes. Moreover, because the code should include the most serious crimes, the word "armed" ought to be retained, for the concept of subversive activities was too subjective unless it was qualified. A State might very well argue, for instance, that making a contribution to a political party in opposition amounted to intervention.

70. With regard to Mr. Mahiou's point, he did not think that paragraph 1 of article 14 could duplicate paragraph 4 (*g*) of article 12, which dealt with a different situation, namely the sending of armed bands or groups by a State. The word "seriously" should be retained, first of all because the forms of intervention involved were the most serious and also because, strictly speaking, the word "undermining" was not a legal term and should therefore be clarified.

71. He welcomed the introduction of a saving clause in paragraph 2, although he would have preferred a reference to human rights. In that connection, he noted that, in a recent article, Lori Fisler Damrosch had concluded, after studying State practice in the matter, that:

> . . . a State violates the non-intervention norm when its non-forcible political activities prevent the people of another State from exercising the political rights and freedoms that form part of the evolving body of international human rights law.[16]

If that was true, the converse must also be true, and non-forcible political activities which enabled a people to exercise those freedoms and rights should not be regarded as constituting intervention.

72. Mr. HAYES said that he favoured deletion of the word "armed", because subversive activities—in the sense of unconstitutional activities—might not be armed. He was also in favour of omitting the word "seriously", because there were no degrees when it came to undermining the free exercise of the sovereign rights of a State and the word might provide an escape clause for those who perpetrated the crime of intervention. Furthermore, it would be preferable to replace the word "undermining", at the end of paragraph 1, by the words "with the purpose of undermining", for in its present form the text suggested that the activities covered could be sanctioned only if they actually resulted in undermining the free exercise of the State's sovereign rights. Such activities should, however, be sanctioned even if they did not have the expected effect. The objection that a reference to the purpose would provide those charged with the crime of intervention with an escape clause was not well founded, since it would be for the court to take a decision in each case, and the judge could take intent into account. In principle, a person who committed an act was assumed to intend the normal consequences of that act.

73. Mr. ARANGIO-RUIZ said that he recognized the importance of the concept of intervention and appreciated the work done by the Special Rapporteur and the Drafting Committee. He was, however, still too perplexed by the wording of article 14 to be able to comment on it and therefore reserved his position until the second reading of the article.

74. Mr. BENNOUNA said that examples of intervention in external affairs were to be found in State practice, although only some countries were in a position to engage in that kind of intervention, the object of which was to make a State change its international policy. He had in mind, for example, what had taken place in the Mediterranean in connection with the delimitation of the maritime zone of a State, and the activities conducted against the diplomats and representatives of a State to make it alter its policy.

75. He, too, favoured deletion of the two sets of square brackets in paragraph 1 of article 14.

76. Mr. AL-QAYSI said he considered that the words "armed" and "seriously" in paragraph 1 should be deleted, and endorsed Mr. Hayes's suggestion that the word "undermining" should be replaced by the words "with the purpose of undermining". Also, to limit the risk of abuse, it would perhaps be advisable to indicate in the commentary that the "free" exercise of the sovereign rights of a State must be taken to mean "in accordance with international law".

77. Mr. Sreenivasa RAO said that he supported the proposal to delete the words "armed" and "seriously", for the reasons already stated. He also agreed with Mr. Al-Qaysi's suggestion regarding the word "free".

78. Mr. TOMUSCHAT said that the word "armed" should be retained, since the word "subversive" had no legal meaning. Freedom of speech, for instance, was sometimes regarded as subversive, and deletion of the word "armed" would open the door to violations of the most elementary principles of human rights. The word "seriously" was also necessary, at least in the French text: the expression *porter atteinte* was not enough, as there could be different degrees of *atteinte*.

79. Mr. FRANCIS said that he favoured deletion of both of the words between square brackets. Free exercise of the sovereign rights of a State was the quintessence of the existence of a State and anything that might impair it should be regarded as serious. No condition, therefore, should be laid down with respect to the means, namely "armed", or the result, namely "seriously", of undermining such free exercise.

80. At the previous meeting (para. 66), he had pointed out that there was a missing element in article 13, to which Mr. Reuter had referred in the general debate. He thought in that connection, and independently of the position taken by Mr. Reuter, that the Commission should consider adding the words "and endangering international peace and security" at the end of paragraph 1 of article 14. Any act from an external source which undermined the free exercise of the sovereign rights of a State threatened international peace and security. If, in addition, external relations could also be affected, a threat to international peace and security would seem to be an essential component of article 14.

81. Mr. THIAM (Special Rapporteur) said that all the crimes covered by the draft code were included precisely because they were a threat to international peace and security. There did not seem any point in recalling that fact in article 14.

82. He had used the word "armed" because it appeared in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

[16] L. Fisler Damrosch, "Politics across borders: Non-intervention and non-forcible influence over domestic affairs", *American Journal of International Law* (Washington, D.C.), vol. 83, No. 1 (January 1989), p. 6.

States.[17] He was not, however, opposed to deleting it, for he was fully aware that activities did not need to be "armed" in order to be "subversive". In Africa, for instance, there had been a case of a State using the national radio to incite the population of a neighbouring State to rebellion. The best course would perhaps be to leave the word between square brackets and let the Sixth Committee of the General Assembly decide the matter.

83. With regard to the word "seriously", he would point out that the ICJ, in its judgment in the *Nicaragua* case,[18] had held that coercion was a criterion in determining whether intervention had occurred. Did that mean coercion of any kind, or should its seriousness be taken into account? He had no preference in that connection.

84. Mr. RAZAFINDRALAMBO said that he, too, favoured deletion of the words "armed" and "seriously". Since some members would prefer to retain them, however, the best course would perhaps be to leave them between square brackets. As for paragraph 2, the last part should be brought into line with the last part of article 15.

85. Mr. AL-BAHARNA said that the words "armed" and "seriously" should be retained and the square brackets deleted. The concept of subversion was lacking in legal precision and the difference in nature between the 1970 Declaration on Principles of International Law and the draft code also had to be borne in mind. Furthermore, as he had pointed out in the Drafting Committee, the expression "intervention in . . . external affairs" should be clarified, for instance in the commentary, since it reflected a concept that was not very clear. Lastly, he agreed that the end of paragraph 2 of article 14 should be brought into line with the end of article 15.

86. Mr. ILLUECA said that he agreed with those members who were in favour of deleting the word "armed".

87. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he noted from the discussion that there was no strong objection to the text of article 14 proposed by the Drafting Committee. Personally he would have liked to delete either the square brackets or the words placed between them, but there was apparently no change in the positions in that respect. The decision with regard to a possible amendment to the end of paragraph 2 could be taken when article 15 was considered.

88. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 14 as proposed by the Drafting Committee.

Article 14 was adopted.[19]

The meeting rose at 1.05 p.m.

[17] See footnote 6 above.

[18] See footnote 7 above.

[19] See 2136th meeting, paras. 28-41.

2136th MEETING

Thursday, 13 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

Draft Code of Crimes against the Peace and Security of Mankind[1] (*concluded*) (A/CN.4/411,[2] A/CN.4/419 and Add.1,[3] A/CN.4/L.433)

[Agenda item 5]

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

ARTICLE 15 (Colonial domination and other forms of alien domination)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 15,[4] which read:

Article 15. Colonial domination and other forms of alien domination

Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations.

2. Colonial domination had been the subject of the first alternative submitted by the Special Rapporteur and alien subjugation, domination or exploitation the subject of the second. The Drafting Committee had agreed, however, that article 15 should deal not only with colonial domination, but also with other forms of domination in the modern world.

3. The first limb of the article was the "establishment or maintenance by force of colonial domination", a phrase which appeared in article 19 of part 1 of the draft articles on State responsibility[5] (para. 3 (*b*)). In the Drafting Committee's view, the notion of "establishment or maintenance by force of colonial domination" had acquired a sufficiently precise legal content in United Nations practice to warrant inclusion as a crime under the code.

[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 . . . 1988*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the corresponding text (art. 11, para. 6) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 63-64, footnote 294 and paras. 262-267.

[5] See 2096th meeting, footnote 19.

4. The second limb was "any other form of alien domination", an expression which had the advantage of being all-embracing and of ruling out restrictive *a contrario* interpretations. It would be made clear in the commentary that it encompassed the concept of "alien occupation" in so far as the latter was not already covered by paragraph 4 (*a*) of article 12 (Aggression), provisionally adopted by the Commission at the previous session.[6]

5. The Drafting Committee further considered that the scope of the notion of foreign domination, which was somewhat elusive, should be narrowed, first, by linking it to the denial of the right of peoples to self-determination—again on the basis of paragraph 3 (*b*) of article 19 on State responsibility—and secondly, by defining the content of that right by reference to the Charter of the United Nations. The words "as enshrined in the Charter of the United Nations" made it clear that the right of peoples to self-determination pre-dated—and might even exist outside—the Charter.

6. Lastly, he would suggest that, if the Commission adopted article 15, the same form of language—"as enshrined in"—should be used in paragraph 2 of article 14, provisionally adopted at the previous meeting.

7. Mr. ILLUECA said that, while he agreed with the content of article 15, which laid down an essential legal principle, he noted a certain inconsistency between the English text, which used the expression "contrary to" in reference to the right of peoples to self-determination, and the Spanish and French texts, which used the expressions *en violación* and *en violation* (in violation of). Moreover, the Special Rapporteur had explained that the word "colonialism" was a political term which had no legal significance; that was why he had replaced it by the expression "colonial domination", which now appeared in article 15. At the outset of the discussion on the draft code, however, some members had also proposed that the word "colonialism" should be replaced by "violation of the right to self-determination". Although that proposal had not been accepted—the words "maintenance by force of colonial domination or any other form of alien domination" being used in the article instead—the words "contrary to the right of peoples to self-determination" none the less now appeared in the article alongside the expression "colonial domination". His concern was that the juxtaposition of those two expressions, which in his view were synonymous, could expose the article to the absurd interpretation that the crime of colonial domination would be punishable only if it were committed in violation of the right to self-determination. For those reasons, he considered that it would be preferable to replace the words "contrary to" by "because it is a violation of" (*por ser una* ... in Spanish). Colonial domination in all its forms and manifestations would then be punishable under article 15 where such domination constituted a denial of human rights, was contrary to the Charter of the United Nations and was prejudicial to the cause of world peace and co-operation.

8. Many United Nations and other declarations recognized the right of peoples to self-determination and the corresponding duty of States to respect that right, but he would draw attention in particular to Principle VIII (Equal rights and self-determination of peoples) contained in the Helsinki Final Act of 1 August 1975,[7] which stated:

...

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

...

9. By a happy coincidence, article 15 was being considered on the eve of the two-hundredth anniversary of the French Revolution. That Revolution, which had left a deep imprint on all freedom-loving peoples, had had an influence both on Latin-American emancipation from colonialism and on the anti-colonialist revolution of the twentieth century. For the Commission to agree on the anniversary of that epoch-making event that colonial domination should be treated as an international crime would be a tribute to the French people and to French values. It would also be a contribution to the Commission's work to promote recognition of the equal and inalienable rights of all members of the human family.

10. Mr. McCAFFREY said that, as one who had consistently expressed reservations about the use of the term "colonialism", he believed that the Commission would be better advised to focus on contemporary manifestations of that phenomenon rather than use a term that was charged with emotion and bore very little relation to what was going on in the modern world. Such contemporary manifestations could take the form, for instance, of the subjection of peoples to alien subjugation, domination and exploitation, as stated in paragraph 1 of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,[8] or of the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind, as stated in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[9] (third principle, second paragraph). By contrast with the provisions of those Declarations, the terms of article 15 were very weak and seemed to shrink from recognition of the real problems that existed in the contemporary world.

11. He also believed that article 15 should refer to human rights, as did the 1960 Declaration, since they were as important in the modern world as was the denial of self-determination. Such a reference could easily be added by inserting the words "fundamental human rights and" after the words "contrary to".

12. He agreed with the suggestion by the Chairman of the Drafting Committee (para. 6 above) that the words "as enshrined in the Charter of the United Nations" should also appear in paragraph 2 of article 14.

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[6] *Yearbook ... 1988*, vol. II (Part Two), pp. 71-72.

[7] See the Declaration on Principles Guiding Relations between Participating States contained in the chapter of the Final Act on "Questions relating to security in Europe" (*Final Act of the Conference on Security and Co-operation in Europe* (Lausanne, Imprimeries Réunies, [n.d.]), pp. 77 *et seq.*, sect. 1 (*a*)).

[8] General Assembly resolution 1514 (XV) of 14 December 1960.

[9] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

13. Mr. TOMUSCHAT said that, in his opinion, article 15 was a good provision. It had always been his view that the draft articles should be narrow in scope, and every effort had been made to achieve that object. He also considered that the words "alien domination" were appropriate, since he assumed that they were merely a shortened form of the expression "alien subjugation, domination and exploitation" contained in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. The numerous General Assembly resolutions which had been adopted over the past five years and in which violation of the prohibition of the use of force was mentioned alongside violation of the right of peoples to self-determination were enough to show how often article 15 would apply in the future.

14. He did not share the view of those who preferred the words "as enshrined in" to "in accordance with". The principle of self-determination as originally laid down in the Charter of the United Nations was very weak and had only been strengthened in the course of time, first by the General Assembly in the 1960 Declaration mentioned above and in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, and then by the ICJ, which had affirmed the existence of a genuine right of self-determination in its advisory opinions in the *Namibia* case[10] and the *Western Sahara* case.[11] It would therefore be preferable to speak of the right to self-determination "in accordance with" the Charter, since that reflected the present state of the law.

15. Mr. DÍAZ GONZÁLEZ said that, as a member of the Drafting Committee, he naturally agreed with the content of article 15. Certain remarks had, however, been made and he could not allow them to be passed over in silence.

16. In the first place, it had been said that colonialism was no longer a real problem in the modern world. Nothing could be further from the truth. The twentieth century had recently witnessed a colonial war waged by one of the major world Powers, with all the technological resources at its disposal, against a Latin-American people struggling to recover their territory. In Latin America, therefore, as in other parts of the world, colonialism was very much a reality and not just an emotional concept.

17. Furthermore, he did not agree that the words "as enshrined in the Charter of the United Nations" should be discarded. Self-determination was not a principle but a right, and a right laid down not only in the Charter, but also in a number of General Assembly resolutions, including the Declaration on the Granting of Independence to Colonial Countries and Peoples. The wording of article 15, which had been the subject of lengthy discussion in the Drafting Committee, should be retained.

18. Mr. REUTER said that article 15 was a compromise article agreed on by the Drafting Committee and, as such, required no further comment.

19. Mr. Illueca had, however, paid tribute, on the eve of 14 July, to the French Revolution, which had been a major event in the history of France and indeed of the world. While he thanked Mr. Illueca for his thought, he felt obliged, as a Frenchman, to add one small rider, for although France was entitled to take pride in the Revolution, he would point out that revolutions also gave birth to tyrants. It was particularly regrettable that slavery, though abolished under the French Revolution, had been restored fairly rapidly by a tyrant and had not been finally abolished in France until 1848—11 years after its abolition by England.

20. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 15 reflected in a few words concepts that were more or less universally accepted and, as drafted, was in his opinion a good article. The introduction of the concept of exploitation instead of alien domination, for instance, could have caused difficulty, since the term "exploitation" was sometimes used in a very wide sense.

21. While Mr. Illueca had certainly raised a valid point with which all members would agree, he did not think that any wording could be found to express that point more clearly than the phrase "or any other form of alien domination contrary to the right of peoples to self-determination". In the circumstances, he would suggest that the point be clarified in the commentary.

22. Mr. McCaffrey had suggested that the article should refer to human rights. It was a matter of settled humanitarian law, however, that violation of the human rights of individual members of a people was implicit in the violation of the collective right of that people to self-determination. But the former was a second-tier violation and, as such, need not be mentioned in the article.

23. Mr. ILLUECA said that the suggestion by the Chairman of the Drafting Committee that the point he had raised should be clarified in the commentary was acceptable.

24. Mr. THIAM (Special Rapporteur) said that article 15 embodied the two elements which had previously been the subject of two alternative provisions he had submitted. The first of those elements was condemnation of colonial domination in its traditional form, which, contrary to what had been suggested, had not disappeared. It had to be remembered, moreover, that the expression "establishment or maintenance by force of colonial domination" had been used in article 19 of part 1 of the draft articles on State responsibility.[12] The Commission could not adopt a certain expression only to reject it a few years later on the ground that the phenomenon in question had disappeared.

25. The second element in article 15 was condemnation of what some members of the Drafting Committee had termed "neo-colonialism". Yet that term could not be used in a legal text and the wording of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which covered not only the traditional form of colonialism but also other forms of alien domination, had therefore been used.

26. Mr. EIRIKSSON said that he supported article 15 and its commendable economy of language. In his view, the link between alien domination and the right of peoples to self-determination was essential, given the vagueness of the expression "alien domination". He also agreed that "colonial

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[10] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16

[11] Advisory Opinion of 16 October 1975, *I.C.J. Reports 1975*, p. 12.

[12] See 2096th meeting, footnote 19.

domination", though perhaps an outdated concept, was the appropriate expression.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 15 as proposed by the Drafting Committee.

Article 15 was adopted.

28. The CHAIRMAN asked whether the Commission also wished, as suggested by the Chairman of the Drafting Committee (para. 6 above), to replace the words "in accordance with", in paragraph 2 of article 14 as provisionally adopted at the previous meeting, by "as enshrined in".

29. Mr. KOROMA said he supported that suggestion, but also considered that Mr. Tomuschat's very interesting point should perhaps be considered further at an appropriate time.

30. Mr. EIRIKSSON said that he, too, agreed with the suggestion made by the Chairman of the Drafting Committee. It would none the less seem that Mr. Tomuschat's point was concerned not so much with the difference between the expressions "as enshrined in" and "in accordance with" as with the need to expand the scope of certain terms in the Charter of the United Nations.

31. Mr. McCAFFREY suggested that the Special Rapporteur might wish to explain in the commentary that the words "enshrined in the Charter of the United Nations" were used not in the sense in which they had originally been used in that instrument, but rather in the sense in which the right of self-determination was currently interpreted and as it had developed since the Charter had been adopted. To cite an example, the "due process" clause under the Constitution of the United States of America had not perhaps at the outset had the importance it had since acquired.

32. Mr. FRANCIS said that he supported the proposal by the Chairman of the Drafting Committee. Mr. Tomuschat had raised an important point, but not everyone would attach the same authority to General Assembly resolutions. Article 15 must be understood, as Mr. McCaffrey had suggested, from the standpoint of the current state of international law in the United Nations system. He favoured the expression "as enshrined in" because it conveyed the "sanctity" conferred by the development of the law.

33. Mr. AL-QAYSI said that he did not endorse the proposal by the Chairman of the Drafting Committee. As the substance of article 14 was essentially dynamic, the phrase "in accordance with" was entirely appropriate there, but the words "as enshrined in" were more suitable in article 15, which was mainly conceptual in nature. He would, however, be guided by the will of the Commission.

34. Mr. Sreenivasa RAO said that he agreed with the proposal by the Chairman of the Drafting Committee and also with Mr. Koroma's suggestion that the point raised by Mr. Tomuschat should be discussed further.

35. Mr. TOMUSCHAT suggested that a sentence be incorporated in the commentary to indicate that the expression "as enshrined in" referred to the state of the law today, and should not be construed by using the meaning given during an earlier historical period to the right to self-determination. The Chairman of the Drafting Committee was right to propose that article 14 should be brought into line with article 15.

36. Mr. THIAM (Special Rapporteur), replying to Mr. McCaffrey's request for a sentence in the commentary explaining the use of the expression "as enshrined in", recalled that self-determination had been expressly mentioned among the purposes of the United Nations in Article 1, paragraph 2, of the Charter. As to the choice between the expressions "in accordance with" and "as enshrined in", he did not believe there was a substantive difference, and thought it was merely a question of nuance. He had no objection to the suggestion that article 14 should be aligned with article 15, but such alignments were not desirable in all cases: the Commission should not make a practice of it. Lastly, he undertook to reflect Mr. Tomuschat's comment in the commentary.

37. Mr. DÍAZ GONZÁLEZ said that he would oppose incorporation of Mr. Tomuschat's comment in the commentary. While it was true that slavery had, to all intents and purposes, been abolished, colonialism still existed in the world today.

38. Mr. BARSEGOV said that he did not endorse the proposal by the Chairman of the Drafting Committee and did not believe Mr. Tomuschat's comment should be reflected in the commentary. The right to self-determination was essentially the same now as it had originally been: it had two aspects, external and domestic, which had been reflected in many instruments, including the Helsinki Final Act. No one denied that that right had become better defined over time, but the elaborate counter-position of historical understanding to contemporary conceptions would create more problems than it solved.

39. Mr. HAYES said that he endorsed the proposal by the Chairman of the Drafting Committee. When they had been trying to decide on the wording for article 15, members of the Drafting Committee had been greatly concerned not to link the right to self-determination exclusively to its appearance in the Charter of the United Nations: it was important not to exclude the way in which it had developed since, or imply that it had not existed before, the adoption of the Charter.

40. He, too, wished to congratulate Mr. Reuter as France prepared to celebrate the anniversary of its Revolution. The French Revolution had probably affected no country more deeply than it had Ireland, whose strivings for independence had been inspired and sustained by the French example.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend paragraph 2 of article 14 as provisionally adopted at the 2135th meeting (para. 88), as suggested by the Chairman of the Drafting Committee (para. 6 above), by replacing the words "in accordance with" by "as enshrined in", it being understood that the expression "as enshrined in" referred to the right of peoples to self-determination as it existed in international law today.

It was so agreed.

Draft article 16

42. The CHAIRMAN invited the Chairman of the Drafting Committee to report on the Committee's consideration of draft article 16, which it had not been able to complete.

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that paragraphs 4 and 5 of the revised draft article 11 referred to the Drafting Committee in 1988 (see 2134th meeting, para. 50)[13] had stipulated that breaches of certain treaty obligations were crimes under the code.

44. Paragraph 4 had spoken of a breach of the obligations of a State under a treaty "designed to ensure international peace and security, in particular by means of: (i) prohibition of armaments, disarmament, or restriction or limitation of armaments; (ii) restrictions on military training or on strategic structures or any other restrictions of the same character". The source of the paragraph had been article 2, paragraph (7), of the 1954 draft code. "Prohibition of armaments" and "disarmament" had been added to "restrictions or limitations on armaments", which had been placed in the singular—"restriction or limitation"—and the words "strategic structures" had replaced the word "fortifications". Paragraph 5 had referred to a breach of obligations under a treaty "prohibiting the emplacement or testing of weapons in certain territories or in outer space".

45. Early on, the Drafting Committee had come to the conclusion that, if they were both retained, paragraphs 4 and 5 should be combined in a single article, as had been suggested at the previous session. After long discussions, the Committee had seemed prepared, despite the reservations of some members, to agree that such an article should be included in the draft code in order to deal with breaches of obligations deriving from certain treaties, on the understanding that: the breach should be a serious breach; the obligation violated should be one of essential importance for the maintenance of international peace and security; the obligation should be in the field of disarmament, arms control or arms prohibition; and restrictions on military preparation or installations, prohibition of the emplacement or testing of weapons and prohibition of the manufacture of certain types of weapons should all be mentioned.

46. The Drafting Committee had been well aware that any breach of any obligation of essential importance for the maintenance of international peace and security could be characterized as a crime against peace under the code. The purpose of draft article 16 would be a limited one, however. The article should cover only breaches of treaty obligations, and only in the field of disarmament, in other words those concerning "disarmament, arms control or arms prohibition", with some examples being given to underline matters which, for the purpose of the code, should be included in that field. Breaches of other obligations, either treaty or non-treaty obligations, would not come within the scope of the article and would be covered by other provisions, the principal example being aggression.

47. He believed it would have been possible for the Drafting Committee to have agreed on a text along the lines he had just mentioned. The article none the less raised some very essential questions, which would subsist no matter how adequate the indication of the obligations whose breach constituted a crime under the code. Reference had already been made to those questions at the previous session. As the Commission had stated in its report on that session:

> Some members stressed that care should be taken to ensure that States not parties to a treaty on the maintenance of peace and security should not be placed in an advantageous position in relation to States which signed such a treaty. One member, in particular, pointed out that, if a State had adopted wide-ranging disarmament measures well beyond what other States were ready to agree to, the agents of that State should not incur international responsibility for a breach of its commitments. According to another opinion, paragraph 4 should not provide encouragement to a potential aggressor or give the impression that the inherent right of self-defence under the Charter of the United Nations was being impaired.[14]

48. The Drafting Committee had felt that those questions should be addressed, and that to that effect a second paragraph was necessary. The Special Rapporteur and members of the Committee, either individually or in small *ad hoc* drafting groups, had worked on a number of proposals which had been thoroughly considered by the Committee. They had dealt essentially with the situation which would arise when a State, bound by a treaty, deemed it had to take measures that could be considered as breaches of the treaty in preparation for self-defence against another State not bound by the treaty, and they had involved matters related to the law of treaties and international responsibility. Near the end of its work, the Drafting Committee had been considering a text for the second paragraph which had sought to synthesize the elements contained in several proposals. It had read:

> "The provisions of paragraph 1 are without prejudice to any measure of self-defence taken by a State bound by the treaties referred to in paragraph 1 against a State not bound by those treaties and shall be construed in conformity with the general rules of the law of treaties and State responsibility."

49. It had been recognized that that text was not entirely satisfactory and that further clarifications were necessary. Under pressure of time, the Drafting Committee had come to the conclusion that draft article 16 should not be submitted to the Commission at present and that the issues involved should be looked into again at the next session. It had been suggested that the Commission itself might wish to re-examine the issues in plenary before the Drafting Committee took them up again.

50. The Drafting Committee had also had before it a proposal for a third paragraph for article 16, reading:

> "A State Party to this Code cannot invoke the breach of obligations by another State under a treaty to which the former State is not itself a party."

It had been possible to give only preliminary consideration to that proposal, which should also be more fully examined at the next session.

51. Mr. BENNOUNA said he fully agreed that, at its next session, the Commission must hold a serious and thoroughgoing discussion in plenary on draft article 16, which was among the most difficult in the entire draft, as well as on the advisability of including such an article in the code.

52. Mr. THIAM (Special Rapporteur) said that there had been broad agreement in the Drafting Committee on the advisability of incorporating such an article. He did not believe a discussion in plenary would be productive and

[13] For the texts of paragraphs 4 and 5 and a summary of the Commission's discussion on them at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 62-63, footnote 289 and paras. 256-261.

[14] *Ibid.*, p. 63, para. 259.

thought it would be better for the Drafting Committee to continue to try to solve the outstanding problems, which were primarily of a drafting nature.

53. Mr. McCAFFREY said he took issue with the Special Rapporteur's statement that article 16 had generated majority support in the Drafting Committee. Like Mr. Bennouna, he believed a full discussion of the article in plenary was necessary before the Drafting Committee could resume its work on it.

54. Mr. KOROMA said that the Commission was entering into a substantive discussion, which would be better carried out when it took up the matter at the next session. He proposed that coverage of the discussion be expunged from the summary record.

55. Mr. BARSEGOV said he agreed with the Special Rapporteur that the Drafting Committee should continue its work on the article at the next session: a discussion in plenary would only slow down progress.

56. Mr. BARBOZA said that it was for the Drafting Committee to decide whether or not its work could be furthered by a debate in plenary.

57. Mr. BEESLEY said that he would like to know from the Chairman of the Drafting Committee whether it had been lack of time alone, and not active opposition by a number of members, that had prevented the Drafting Committee from reaching agreement on article 16.

58. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, in his introduction, he had stated that "after long discussions, the Committee had seemed prepared, despite the reservations of some members, to agree that such an article should be included in the draft code" (para. 45 above).

59. Mr. TOMUSCHAT said that the present discussion was extremely useful and he would oppose Mr. Koroma's proposal that coverage of it be expunged from the summary record.

60. Mr. REUTER said that he fully endorsed the comments made by Mr. Barsegov and the Special Rapporteur.

61. Mr. AL-QAYSI said that he could not agree to Mr. Koroma's proposal.

62. The CHAIRMAN suggested that the Commission should take note of the report by the Chairman of the Drafting Committee on the Committee's consideration of draft article 16, and that only a brief account of the ensuing debate should be incorporated in the summary record of the present meeting.

It was so agreed.

63. The CHAIRMAN said that sincere thanks were due to the Chairman of the Drafting Committee, the members of the Committee and the secretariat for all the intensive and productive work they had done during the session.

64. Mr. KOROMA said that he, too, wished to pay tribute to the Chairman of the Drafting Committee and the secretariat, without whose support not nearly as much work would have been accomplished.

The meeting rose at 11.30 a.m.

2137th MEETING

Friday, 14 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

Bicentenary of the French Revolution

1. The CHAIRMAN said that the celebration of the bicentenary of the French Revolution of 1789 was an important event, not only for France, but for the entire world, including the international community of lawyers, in which the Commission must be in the vanguard. The Revolution had been a decisive stage in world history and had also accelerated the process of human emancipation; no one today would dispute the influence it had had on the progressive development of international law. The Commission was privileged to have with it, in the person of Mr. Reuter—the doyen and most experienced of its members—a perfect incarnation of the virtues and spirit of that Revolution.

2. Mr. REUTER thanked the Chairman and pointed out that, at an earlier meeting, he had emphasized the limitations of the French Revolution by noting that it had taken the doctrine of human rights and the ideal of a more just and peaceful world from America, from what had then been an English colony. Like other countries, France had not always acted well in the course of its history, and that was why French patriotism should remain humble and respectful of the homelands of others. The horrifying ordeals of world history had left him personally without any hate whatsoever in his heart: it was in that spirit that each individual could celebrate the 14th of July in perfect equality, perfect liberty and perfect fraternity.

Draft report of the Commission on the work of its forty-first session

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

CHAPTER VI. ***Jurisdictional immunities of States and their property*** (A/CN.4/L.439 and Add.1 and 2)

A. Introduction (A/CN.4/L.439)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

Paragraph 4 was adopted subject to a correction in footnote 2 bis.