Document:-

A/CN.4/L.455

Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: articles 16, 18 and X - reproduced in A/CN.4/SR.2196 to SR.2198

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:-

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said that, if priority had ever been assigned to navigation in State practice, as a general rule that was no longer the case today. He proposed that he and the Rapporteur should try to recast the paragraph in a form satisfactory to the Commission and submit a text in due course.

57. Mr. KOROMA suggested that the Rapporteur and the Special Rapporteur could consider wording such as: "There was general support for the article, which was said to reflect in a balanced way the fact that any priority which was once assigned to navigation was no longer considered automatic among modern uses."

58. Mr. CALERO RODRIGUES said that it might be stated in paragraph 18 that, if there had ever been a rule of international law giving priority to navigation, it no longer existed today, or could no longer be accepted as a rule of general international law.

59. Mr. MAHIOU said that it should be left to the Rapporteur and the Special Rapporteur to find a satisfactory form of words. The solution might perhaps be to replace the words "no longer" by "not always".

60. Mr. BARSEGOV said that the revised text should indicate, in substance, that there was no rule of general international law giving priority to navigation, or to any other particular use.

61. Mr. RAZAFINDRALAMBO said that the revised text should specify that the article in question was article 24.

62. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished the Rapporteur and the Special Rapporteur to review paragraph 18 in the light of the comments made and to submit a revised text in due course.

It was so agreed.

The meeting rose at 1.05 p.m.

2196th MEETING

Monday, 16 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, 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. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/429 and Add.1-4,[2] A/CN.4/430 and Add.1,[3] A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1, A/CN.4/L.455)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (*concluded*)

CHAPTER III (The Commission's discussion of the question at the present session) (*concluded*)

1. The CHAIRMAN pointed out that one question still pending in regard to the report of the Working Group was the possible addition of a reference to international criminal trial mechanisms other than an international court. A small working group had been formed to study that question, and he invited the Rapporteur to report on the results of its work.

Paragraph 23 (concluded)**

2. Mr. EIRIKSSON (Rapporteur) said that paragraph 23, adopted at the 2189th meeting, had been redrafted to give a better idea of what followed. The new text read:

> "Paragraphs 24 to 29 below contain a general discussion of the advantages and disadvantages, for the trial of crimes against the peace and security of mankind, of the possible establishment of an international criminal court as compared, in particular, to the system of universal jurisdiction based on prosecution before national tribunals. Paragraphs 31 to 58 contain an overview of possible options and the main trend evidenced in the Commission with regard to some very specific and significant areas related to the creation of an international criminal court. Paragraphs 59 to 61 deal with other possible international mechanisms for the trial of crimes against the peace and security of mankind."

3. It was also proposed that the title of section 6 of chapter III, "Other jurisdictional mechanisms", should be amended to read: "Other possible international trial mechanisms".

4. Mr. TOMUSCHAT said that the word "very" before the words "specific and significant areas", in the second sentence of the proposed new text of paragraph 23, was unnecessary.

5. Mr. BEESLEY asked whether the references to "crimes against the peace and security of mankind" covered crimes against humanity.

6. Mr. BENNOUNA said that he preferred the existing title of section 6. The words "other jurisdictional mechanisms" had been deliberately chosen to include

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* Resumed from the 2194th meeting.

** Resumed from the 2189th meeting.

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

[2] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[3] *Ibid.*

other international courts, such as the International Court of Justice, referred to in paragraph 60, and national courts with judges from other legal systems (para. 61). If the new text of paragraph 23 were adopted, its last sentence should refer to "other jurisdictional or trial mechanisms", to reflect the subject-matter of paragraphs 59 to 61.

7. Mr. EIRIKSSON (Rapporteur) explained that the working group had had in mind both an international criminal court and other mechanisms. A national court with judges from other legal systems would, it was thought, be an international mechanism. It had been decided to use the same wording as in General Assembly resolution 44/39, to show that the various options had been fully considered. What was actually in contemplation was a mixed international trial mechanism.

8. Mr. KOROMA suggested amending the second sentence of the new text to begin: "Paragraphs 31 to 58 contain an overview of the possible options and main trends . . .".

It was so agreed.

9. Mr. THIAM (Chairman-Rapporteur of the Working Group), replying to Mr. Beesley's question, said that the court was expected to try crimes against the peace and security of mankind, and not only crimes against humanity.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the new text of paragraph 23 proposed by the Rapporteur, as amended by Mr. Koroma, and to amend the title of section 6 of chapter III as further proposed by the Rapporteur.

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraph 25 (concluded)*

11. Mr. ROUCOUNAS said that, in the last sentence of paragraph 25, adopted at the 2189th meeting, the word "objective" should be deleted, since it implied a value judgment concerning the decisions of national courts.

12. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he could accept the proposed amendment.

13. Mr. BARSEGOV observed that the application of the law in some national courts might not be objective, for instance where the State was itself a party to an international crime. An international court, however, would have jurisdiction in respect of all States, having different legal systems. It would be best to delete the word "objective", but the court's special status should be clear.

14. Mr. THIAM (Chairman-Rapporteur of the Working Group) suggested that Mr. Barsegov's point could be met by substituting the word "impartial" for "objective".

15. Mr. BEESLEY said he thought that the word "objective" should be deleted, but that it did not necessarily imply a value judgment concerning national courts.

16. Mr. ROUCOUNAS withdrew his proposal.

17. Mr. BENNOUNA said that the Commission was rehearsing the same arguments as 30 years before: the question of an international criminal court had, indeed, arisen as early as 1945. Inevitably, the idea of such a court touched upon national sovereignty, and might offend national sensibilities. The word "objective" could perhaps be misinterpreted, but he agreed with Mr. Barsegov that some reference to objectivity was necessary, since States or their leaders might be implicated in the commission of a crime. He suggested that the last sentence of paragraph 25 be amended to read: "A recognized advantage of an international court is the uniform application of the law with the best guarantees of objectivity to try these kinds of crimes."

18. Mr. BARSEGOV suggested using the words "additional or better guarantees of objectivity".

19. Mr. PAWLAK said that he preferred the Working Group's formulation: the reference to uniformity was essential. The word "best" in Mr. Bennouna's proposal should be deleted: guarantees could not be qualified.

20. Mr. THIAM (Chairman-Rapporteur of the Working Group), referring to the French text of Mr. Bennouna's proposal, pointed out that there was a slight, but significant, difference in meaning between the words *juger* and *juger de* as applied to crimes. He preferred the former.

21. Mr. TOMUSCHAT said that the guarantees referred to should be defined as the "best possible".

22. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the last sentence of paragraph 25 as proposed by Mr. Bennouna and Mr. Tomuschat, using the word *juger* rather than the words *juger de* in the French text.

It was so agreed.

Paragraph 25, as amended, was adopted.

Paragraph 54 (concluded)*

23. Mr. EIRIKSSON (Rapporteur) said that the Working Group proposed that subparagraph (*b*) of paragraph 54, adopted at the 2194th meeting (para. 111), should be further amended to read: "(*b*) if the acts were tried as ordinary crimes although they corresponded to one of the crimes falling under the jurisdiction of the court [see, for example, paragraph 3 of article 7 of the draft code]".

24. The new wording was based on Mr. Bennouna's view that the question of ordinary crimes had a bearing not only on the code, but also on the jurisdiction of the court. Since that jurisdiction might extend to crimes other than those covered by the code, the structure of the court should be independent of the code.

* Resumed from the 2189th meeting.

* Resumed from the 2194th meeting, para. 111.

25. Mr. CALERO RODRIGUES suggested that the words in square brackets were unnecessary.

26. Mr. EIRIKSSON (Rapporteur) said that, in the original text, those words had appeared in parentheses. They should be retained, because paragraph 3 of article 7 of the draft code was the basis for subparagraph (*b*).

27. Mr. KOROMA said that he was not satisfied with the new wording, which implied that a judgment by a national court could be subject to appeal or review. That was not the same as saying that an international court would have jurisdiction in respect of acts corresponding to crimes under the code.

28. Mr. BARSEGOV said that he preferred the original text. The new wording tended to alter the meaning of the reference to paragraph 3 of article 7, which was about the erroneous characterization of a crime.

29. Mr. BENNOUNA withdrew his proposed amendment.

30. Mr. KOROMA suggested that the subparagraph would serve its purpose if amended to read: "(*b*) if the acts were tried as ordinary crimes although they were deemed to be crimes falling under the jurisdiction of the court". That text would provide a basis for review.

31. Mr. BENNOUNA said that the discussion turned on a question of substance. The danger was that subparagraph (*b*) would contradict what preceded it. Because of the link envisaged between the international court and the code, the impression was being given that only crimes covered by the code fell within the jurisdiction of the court. It had been pointed out, however, that the court could exist independently of the code and could try international crimes not covered by the code. The Working Group's proposal attempted to reflect that position. Mr. Koroma had raised a point of terminology which could be resolved provided there was no dissent on the substantive issue.

32. Mr. BEESLEY said that the problem turned on the characterization of the crime. He agreed, however, that the international court was not tied to the code. The issue seemed to be one of drafting.

33. Mr. CALERO RODRIGUES suggested that, in order to avoid describing the crimes as "corresponding" to the code, the phrase "although they are characterized as crimes falling under the code" should be used.

34. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he preferred the text proposed by the Working Group, which ensured that the code would not be referred to in an inappropriate context.

35. Mr. MAHIOU said that he agreed.

36. Mr. BARSEGOV said that the wording proposed by Mr. Calero Rodrigues was closer to the meaning of paragraph 3 of article 7 of the draft code, with its reference to the incorrect characterization of a crime. However, he would not object to the Working Group's proposal.

37. Mr. BEESLEY proposed the following text: "(*b*) if the acts were tried as ordinary crimes although they are also characterized as one or more of the crimes falling under the jurisdiction of the court". He agreed that the term "corresponded" was too vague.

38. Mr. CALERO RODRIGUES supported Mr. Beesley's proposal, but suggested that the words "one or more of the" could be omitted.

39. Mr. BARSEGOV said that the word "also" should also be omitted, since the characterization of crimes must be either correct or incorrect.

40. Mr. CALERO RODRIGUES said that he agreed.

41. Mr. KOROMA suggested that, for clarity's sake, the word "they" should be replaced by the words "such acts".

42. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following text for subparagraph (*b*) of paragraph 54: "(*b*) if the acts were tried as ordinary crimes although they are characterized as crimes falling under the jurisdiction of the court . . .".

It was so agreed.

Chapter III, as amended, was adopted.

The report of the Working Group as a whole, as amended, was adopted.

Draft articles proposed by the Drafting Committee

Articles 16, 18 and X

43. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 16, 18 and X as adopted by the Committee, and the text of draft article 17 discussed by the Committee (A/CN.4/L.455).

Article 16 (International terrorism)

44. Mr. MAHIOU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 16, which read:

Article 16. International terrorism

1. The undertaking, organizing, assisting, financing or encouraging or tolerating by the agents or representatives of a State of acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

2. The participation by individuals other than agents or representatives of a State in the commission of any of the acts referred to in paragraph 1.

45. He recalled that, in his sixth report, submitted in 1988, the Special Rapporteur had proposed two alternatives for a definition of the crime of intervention.[4] The first had served as a basis for what had become article 14 (Intervention); [5] the second had contained a definition of terrorist acts and a list of activities constituting terrorist acts. In elaborating article 16, the Drafting Committee had drawn on those texts, as well as on article 2, paragraph (6), of the 1954 draft code.

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

[5] *Yearbook . . . 1989*, vol. II (Part Two), p. 69.

46. Article 16 covered terrorist acts in which States were directly or indirectly involved, but not terrorist activities directed against a State by persons having no connection with the State authorities, or terrorist activities taking place entirely within one State and having no international aspect. Article 16 was not redundant, since article 14 mentioned terrorist activities only in passing, as a means that might be used to commit the crime of intervention defined in that article. Article 16 focused primarily on terrorist acts viewed independently of any links they might have with intervention, and highlighted the main characteristic of such acts, namely the state of terror they created in society. The Drafting Committee had concluded that terrorist acts in which States were involved and which were directed against other States had consequences so serious that they must be treated as crimes under the code.

47. Paragraph 1 of article 16 related to agents or representatives of a State, and paragraph 2 to individuals having no official connection with a State, but who were commissioned by agents or representatives of the State to commit acts of terrorism.

48. For paragraph 1, the Drafting Committee had drawn on article 2, paragraph (6), of the 1954 draft code, but the text under consideration was more explicit. The verbs "organizing", "assisting" and "financing" identified forms of involvement in terrorist activities that had not been expressly mentioned in the 1954 draft.

49. The words "or tolerating" had been the subject of a long discussion in the Drafting Committee. Several members had pointed out that the concept of tolerance lent itself to unduly broad interpretations, which might, for example, include the failure by agents of a State to take action in regard to terrorist activities of which they were unaware. But the Drafting Committee had eventually decided in favour of including "tolerating", a concept that appeared to be particularly pertinent in the context of terrorism, where the participation of State authorities probably consisted more often in looking the other way than in active intervention. The commentary would specify that the concept of tolerance implied knowledge of the criminal activities in question.

50. The scope of the text *ratione personae* was defined by the reference to "agents or representatives of a State"—wording that the Drafting Committee had adopted to replace the concept of "authorities of a State" used in the 1954 draft. Thus article 16 dealt with the question of attributing the crime to individuals. The Committee was aware that, on that particular point, the articles so far adopted in chapter II of the draft (Acts constituting crimes against the peace and security of mankind) were not completely consistent. Whereas articles 13, 14 and 15 made no mention of attribution, article 12 did, and draft article 16 referred to the "agents or representatives of a State". As had been pointed out at the previous session, problems relating to the attribution of crimes would be dealt with later in the framework of a general provision. In article 16 it was hardly possible to avoid a reference to the "agents or representatives of a State", because paragraph 2 extended the scope of the article *ratione personae* beyond such agents or representatives. The question would be reconsidered later to ensure the internal consistency of chapter II.

51. The Drafting Committee had added a reference to property, several members of the Commission having pointed out that terrorism could be directed against nuclear power plants, irrigation networks, reservoirs of drinking-water, weapons stores or any other vital location in the State.

52. The Drafting Committee had replaced the words "calculated to" by "of such a nature as to", so as to bring the English text into line with the French: that phrase constituted a key element of the text.

53. As in articles 13, 14 and 15, the wording of article 16 presupposed the inclusion at the beginning of part 1 of chapter II of a phrase introducing the list of crimes; that explained the incomplete nature of paragraph 1 as it stood.

54. Paragraph 2 took into account the fact that the agents or representatives of a State might use the services of individuals to commit the acts referred to in paragraph 1. But the text was provisional in its principle and in its wording. There was no unanimity of views on the need to include such a provision in article 16. Some members considered that the persons in question might be covered by the provision on complicity, whereas others wondered whether the real perpetrator of an act of terrorism—for example, someone who placed explosives in a nuclear power plant—should not be considered the main author of the crime rather than a mere accomplice. In view of that difference of opinion, the Drafting Committee had decided to indicate in a footnote to paragraph 2 that the paragraph would be reviewed when the provision on complicity had been completed. Hence it had not dwelt on drafting problems.

55. He reminded the Commission that article 16 would contain a paragraph 3 listing terrorist acts. As the list could only be illustrative, the Drafting Committee had preferred to confine itself, for the time being, to the definition in paragraph 1.

56. Mr. BENNOUNA suggested that it might be necessary to insert the words "of another State" after the words "public figures" in paragraph 1, since it might not be clear that that was the meaning implied. He was also dissatisfied with the word "tolerating"—an ambiguous term not commonly used in legal instruments.

57. Mr. JACOVIDES suggested that perhaps a comma was missing in paragraph 1 after the word "financing".

58. Mr. MAHIOU (Chairman of the Drafting Committee) agreed and said that the phrase should read: "financing, encouraging or tolerating". The word "or" after "financing" should be deleted.

It was so agreed.

59. He did not think it was necessary to add the words "of another State", as Mr. Bennouna had suggested. The expression "acts against another State"

made it clear that the rest of paragraph 1 referred to other States.

60. Mr. McCAFFREY said he was not sure that the uninformed reader would know that the provision on complicity referred to in the footnote to paragraph 2 had not yet been adopted. He therefore suggested adding the words "to be considered at the next session" or similar wording.

61. Mr. PELLET said he was concerned that the inclusion of such concepts as intervention, terrorism and mercenarism would weaken the code. He pointed out that, in its judgment in the *Nicaragua* case,[6] the ICJ had considered that the United States of America had organized, assisted, financed, encouraged or tolerated acts that could be likened to terrorist acts against another State. If the code were taken literally, it would mean that public figures of the United States had violated that instrument. That was probably not the Commission's intention.

62. He shared Mr. Bennouna's dissatisfaction with the word "tolerating".

63. He did not understand the effect of paragraph 2. If officials of a transnational corporation or of a national liberation movement were responsible for an international terrorist act, had they violated the code only if they were accomplices in acts committed by agents or representatives of a State?

64. Mr. TOMUSCHAT raised the same point as the previous speaker in regard to the inconsistency between article 16 and article X. Paragraph 1 of article X spoke of "other individuals". Clearly, if a national liberation movement committed a terrorist act, that was just as abhorrent as when such acts were committed by the agents or representatives of a State and should have the same consequences; hence such a possibility should also come within the scope of article 16. He doubted whether that was covered in paragraph 2 of article 16, because that paragraph did not refer to private groups or individuals initiating terrorist acts themselves.

65. Mr. NJENGA said that he agreed with Mr. Pellet and Mr. Tomuschat. International terrorism could be committed not only by States, but also by individuals, groups of individuals, liberation movements, etc.

66. Mr. MAHIOU (Chairman of the Drafting Committee) said that the topic under discussion covered only crimes against peace and security. A terrorist act, though barbaric, was not necessarily a threat to peace; it was so only when committed by agents or representatives of a State. The question of terrorism by individuals could be taken up in other provisions.

67. Mr. KOROMA said that he, too, had reservations about the word "tolerating", but on balance he thought that it should be retained, since the crimes in question could occur as a result of omission.

68. He was somewhat unhappy about the tautological definition of terrorism as creating a "state of terror" and suggested the words "state of fear". He wondered, however, whether it could be assumed that the intention was to create a state of fear and how it would be possible to prove it.

69. Lastly, he asked whether the bombing of military barracks would be an example of terrorism carried out against "groups of persons".

70. Mr. RAZAFINDRALAMBO suggested that, if the Commission decided that questions remained in regard to the word "tolerating", that word could be placed in square brackets.

71. For the sake of symmetry, he suggested that, in the French text of paragraph 2, commas should be inserted after the words *fait* and *État*, so as to bring it into line with paragraph 1.

It was so agreed.

72. Mr. THIAM (Special Rapporteur) said that he approved of the text of article 16. With regard to the word "tolerating", he pointed out that the 1954 draft code had used the term "toleration" (art. 2, para. (6)). The crime of omission was recognized in law. "Tolerating" meant that a State knowingly allowed terrorist activities to take place in its territory. Perhaps that should be stated clearly in the text.

73. Mr. CALERO RODRIGUES also supported the text of article 16, but shared some of the doubts expressed by other members. Many questions remained to be settled. Drawing a distinction between crimes against peace and crimes against humanity had posed problems for the Drafting Committee. It was difficult to imagine how an individual could commit a crime against peace, and it had therefore been assumed that two States must be involved.

74. Mr. NJENGA said that the peace and security of mankind could very well be endangered by groups of individuals, not only by States. Article 16 omitted cases of international terrorism not committed by States. He could support the idea of such cases being dealt with in other articles, but if article 16 was to cover international terrorism, perhaps it should refer to "international State terrorism" or "State terrorism", to show that other forms of terrorism were not covered.

75. Mr. MAHIOU (Chairman of the Drafting Committee) said that there must be some provision in the code concerning States that tolerated such serious acts as international terrorism. With regard to Mr. Koroma's remark, the problem of intention arose in other areas of law as well: a judge often had to decide whether there had been premeditation in the commission of a crime.

76. Mr. Sreenivasa RAO said that, as he saw it, article 16 was very clear. It identified the category of acts constituting international terrorism, and that was important both for the development of international law and for the prevention of acts of terrorism after the code was adopted.

77. Some doubts had been expressed about the reference in paragraph 1 to the "tolerating" of certain acts against another State. He felt strongly that tolerance had a place in article 16, for tolerance of certain acts was an important feature of international

[6] *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.

terrorism and should not be underestimated or discounted. It was significant that the issue of tolerance had come very much to the fore in the discussions that had led to the adoption of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. A State whose territory was being used for the training and organization of bands of mercenaries might claim that the persons concerned were not committing any crime in its territory and were simply exercising their right to personal freedom.

78. He welcomed the suggestion that the words "state of terror" be replaced by "state of fear". The suggestion was a good one, not only because it avoided using the term "terror" to define "terrorism", but also because the expression "state of fear" was used in many international documents which attempted to define "terrorism".

79. Mr. BENNOUNA said that he had not been fully convinced by the explanations given by the Chairman of the Drafting Committee. The principle stated in article 16 was based on the distinction between crimes against peace and crimes against humanity, the former being crimes committed in inter-State relations. But he had serious doubts about such a distinction. A multinational company, or even a lobby, could destabilize a country, thereby committing a crime against international peace and security. The distinction was therefore unsatisfactory and, if article 16 were to be placed before the General Assembly, difficulties were bound to arise.

80. There were two possible ways of solving that problem. One was to insert the words "or by private individuals" in paragraph 1, after the words "agents or representatives of a State"; the other was to extend the scope of paragraph 1 to both commission and participation.

81. He proposed that the footnote to paragraph 2 be amended to read: "Paragraph 2 will be reviewed in the light of the provision on complicity and of the final adoption of the provisions relating to crimes against humanity." Article 16 as it stood was incomplete. If it was desired to establish a connection between that article and the Commission's later action on crimes against humanity, it should be made clear that the Commission would revert to the matter in the future. That was the purpose of his proposed amendment.

82. In conclusion, he stressed that the distinction between crimes against peace and crimes against humanity was artificial. He would have occasion to revert to that point in connection with article X on illicit traffic in narcotic drugs.

83. Mr. MAHIOU (Chairman of the Drafting Committee) said that the fact that certain acts were not characterized by the code as crimes against the peace and security of mankind did not prevent them from being punished as crimes, either under the terms of international conventions or under national law. It was undesirable to broaden unduly the concept of international terrorism. An unduly broad definition might cover an act of terrorism committed by only two persons, and the result would be to devalue the very concept of international terrorism. Several members of the Commission had found article 16 much too broad as it was, and had urged a more restrictive approach.

84. It was also essential that the code should not invade the area of national jurisdiction of States. When a crime was committed in the territory of a State, it was normally for that State to try the alleged offenders and, if they were found guilty, to sentence and punish them. No other State was entitled to interfere in that process and any action in that direction would constitute unwarranted intervention in the internal affairs of the State concerned.

85. Clearly, an international element had to be present for crimes against peace, but not for crimes against humanity. The essential criterion was the role played by the agents or representatives of another State. If acts of terrorism took place without the participation of such agents or representatives, they would constitute ordinary crimes with which the State concerned would have to deal. It was the element of extraneousness which brought terrorism under the provisions of article 16.

86. With regard to the footnote to paragraph 2 proposed by Mr. Bennouna, he saw no reason to refer to crimes against humanity. There was no automatic connection between international terrorism and such crimes. It was quite possible that no provision on terrorism would be included in the part of the draft code on crimes against humanity, although a provision on international terrorism was included in the part on crimes against peace. The footnote should simply state that paragraph 2 would be reviewed in the light of the provision on complicity to be considered shortly by the Commission.

87. He strongly urged the Commission not to broaden the definition of international terrorism, as that would reduce the effect of the whole code. It should be remembered that the draft code covered only the most serious crimes. He knew of no example in history of international terrorism being carried on without its being backed in one way or another by a State.

88. Mr. TOMUSCHAT said that he had not been convinced by the explanations given by the Chairman of the Drafting Committee. The title "International terrorism" did not correspond to the substance of article 16. There could be no doubt that international terrorism included more than just inter-State terrorism. There were other forms of international terrorism. There were even organizations which dominated certain territories without any State supporting them; they could act independently and had even made attacks. He found the terms of article 16 much too narrow.

89. Mr. AL-QAYSI said that treating international terrorism as a crime against peace meant subsuming it under another title.

90. Mr. PELLET said that, in addition to his general reservations on article 16, he was opposed to the suggestion that the word "terror" should be replaced by "fear", which would extend the scope of the article beyond all reason.

91. On the fundamental problem raised by article 16, he had not been convinced by the arguments of the

Chairman of the Drafting Committee. He saw a clear contradiction between the desire of some members to restrict the scope of the article and the desire of others to go beyond the concept of inter-State terrorism. One example outside the limits of that concept was that of the activities of a multinational company in a small State, which were claimed to constitute acts of terrorism and breaches of the peace. It could be argued, from an economic or sociological standpoint, that there was a foreign State behind the company in question, but such a proposition would be untenable from the legal standpoint.

92. Article 16 should be confined to acts which constituted actual threats to peace or breaches of the peace, and acts of aggression. Two solutions were possible. One was to frame paragraph 1 so as to require that the act in question could constitute a threat to peace or breach of the peace on the part of the agents or representatives of a State. With such a formulation the reference to tolerance would be more acceptable. The other solution—which he preferred—would be for the Commission to formulate, at its next session, a general article to be placed at the beginning of the articles dealing with crimes against peace, specifying that the offences in question constituted crimes against peace only if they were a threat to peace or a breach of the peace.

93. He could not support article 16 as proposed.

94. Mr. THIAM (Special Rapporteur) stressed that article 16 was not confined to the concept of inter-State terrorism. It also covered terrorism committed by private individuals. There was, of course, the question whether those individuals should be treated as principal perpetrators or as accomplices. Judgments could be cited in support of both views.

95. There had been much discussion in the Commission on the question whether the code should cover the crimes of individuals. The prevailing view had been that the code should cover crimes committed by persons vested with State powers. It was significant that, in the 1954 draft code, paragraph (6) of article 2 referred to the undertaking or encouragement "by the authorities of a State" of terrorist activities in another State. The 1954 draft dealt differently with crimes against humanity, in respect of which paragraph (10) of article 2 referred to acts "by the authorities of a State or by private individuals".

96. The division into three categories—war crimes, crimes against peace and crimes against humanity—went back to the Nürnberg Trial, but the Commission was not obliged to adhere to that division.

97. Mr. CALERO RODRIGUES said that on such a complex subject the Commission could only proceed by trial and error. It could not expect to prepare a complete and final text for article 16 at the present session. He therefore recommended that the article be accepted as a first effort, on the understanding that it would be improved later.

98. As to the scope of the definition of international terrorism, he agreed with those who had stressed that the code should not cover acts of a purely national nature. At the same time, it was not easy to determine what acts by individuals should be covered by the code. The task was a difficult one, but he felt sure that the Commission would be able to carry it out.

99. Mr. BEESLEY said that he shared the doubts which had been expressed about the use of the word "tolerating", but it would be difficult to find a better word. One possibility was to say "permitting". He thought that article 16 should also refer to "harbouring" terrorists.

100. He agreed with those who believed that the Commission had concentrated unduly on State terrorism. Article 16 should go beyond that concept.

101. Mr. PAWLAK said that he accepted the explanations given by the Chairman of the Drafting Committee and the Special Rapporteur. It should be remembered that article 16 was now being discussed on first reading; there would be an opportunity to improve it later.

102. He supported Mr. Bennouna's proposal for a footnote indicating the Commission's thinking on a difficult problem.

103. A satisfactory definition of international terrorism would not be easy to frame. As he saw it, article 16 was a step in the right direction; the Commission could expect to improve on it later.

104. Mr. NJENGA also supported the proposed footnote.

105. Mr. KOROMA stressed that the acts envisaged in article 16 must be acts committed against another State.

106. Mr. MAHIOU (Chairman of the Drafting Committee) suggested that the footnote to paragraph 2 proposed by Mr. Bennouna should be modified to read: "Paragraph 2 will be reviewed in the light of the provisions on complicity and on crimes against humanity which will be examined by the Commission at a later stage."

It was so agreed.

107. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 16 with the amendments by the Chairman of the Drafting Committee to paragraph 1 (para. 58 above) and to the footnote to paragraph 2 (para. 106 above), and with Mr. Razafindralambo's amendment to the French text of paragraph 2 (para. 71 above).

It was so agreed.

Article 16 was adopted.

ARTICLE 17 (Breach of a treaty designed to ensure international peace and security)

108. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Drafting Committee intended to revert at a later stage to an article, provisionally numbered 17, which it had discussed at length, but on which it had been unable to reach agreement at the pre-

sent session.[7] Paragraph 4 in particular was at a less advanced stage than the first three paragraphs.

109. It would be recalled that, in his sixth report, submitted in 1988, the Special Rapporteur had proposed two revised texts defining breaches of the obligations of a State under a treaty designed to ensure international peace and security as crimes against peace.[8] The Special Rapporteur had taken the idea from the 1954 draft code, which contained a similar provision in article 2, paragraph (7).

110. In 1989, the Drafting Committee had discussed those texts at length but, due to lack of time, had not been able to complete its work. During the present session, the Committee had again discussed them at length, but despite all its efforts it had not been able to agree on a text. He was grateful to all the members of the Drafting Committee and to the other members of the Commission who had participated in its meetings for their co-operative attitude. Despite the serious reservations which many of them had expressed as soon as the Drafting Committee had begun consideration of draft article 17, all the members had participated in the work in a constructive spirit, helping to formulate the article and improve its wording and proposing safeguard clauses in order to obviate some of the problems of substance that arose.

111. The special efforts made by the Drafting Committee to render article 17 practicable could be explained by the conviction of members that, if a State violated the obligations incumbent on it under a treaty designed to ensure international peace and security, then peace and security would obviously suffer gravely. As a general rule, the purpose of treaties of that kind was to prohibit or restrict to the greatest possible extent the use of violence, and any breach of their provisions would indicate that violence was permissible or that it could be resorted to. It was therefore necessary to envisage some means of discouraging breaches of such treaties. The difficulty for many members of the Drafting Committee had been to decide whether the best way of achieving that object was to include the offence in question among crimes against peace. He would therefore explain briefly why many members had found it difficult to accept a provision of that kind, while others were in favour of article 17 and wanted it to be included in the draft code.

112. The problems which many members of the Drafting Committee saw in article 17 concerned both its approach to treaty relations and the effect which it could have in discouraging States from concluding treaties or becoming parties to the code. With regard to the first problem, they believed that the draft code treated crimes from a universal viewpoint, considering that a crime remained a crime irrespective of its perpetrator. That viewpoint was in conformity with the penal philosophy of internal law and with that of the code itself. Besides, treaty relations between States were governed by the principle of reciprocity, and the validity of the rules laid down was in many respects confined to the treaty partners—in the relations between a limited number of parties, bilateral or trilateral, for example, the narrowness of the field of application was still more evident. In addition, the law of treaties, as laid down by the 1969 Vienna Convention on the Law of Treaties and by customary international law, was designed to settle cases of various types of violation of such treaties.

113. It was all the more obvious that it would not be advisable to apply the code to treaty relations, because signatories of a treaty and other States would have to be treated differently. There would then be no equality of treatment between States, since an act of a State party to a treaty could be treated as a crime under the code, whereas the same act committed by a non-party State could not. That inequality of treatment was fundamentally incompatible with the universal viewpoint adopted for the code.

114. With regard to the long-term consequences of the inclusion of a provision such as article 17 in the code, many members had been worried by the fact that it would place States that were parties to the treaties in question at a disadvantage and might therefore discourage other States from concluding such treaties or acceding to them—which was obviously undesirable. And States which had already concluded such treaties, finding themselves at a disadvantage, might not be inclined to become parties to the code—which was not desirable either.

115. There were also technical problems concerning the definition of breaches of a treaty which constituted crimes against peace. Even if one spoke of a "serious breach" the matter was still not sufficiently clear. In the case of some disarmament treaties in force, for example, the parties had accused each other of breaches, one party considering a particular breach to be of a technical character, the other seeing more in it. But as a result of renegotiation or interpretation by the parties, breaches of that kind had not threatened international peace and security.

[7] The text, as it emerged from the discussion in the Drafting Committee, read as follows:

"*Article 17. Breach of a treaty designed to ensure international peace and security*

"1. A serious breach of an obligation of a State under a treaty designed to ensure international peace and security, in particular a treaty relating to:

"(*a*) disarmament, or the prohibition, restriction or limitation of armaments;

"(*b*) restrictions on military training or installations or any other restrictions of the same character;

"(*c*) the prohibition of emplacements or tests of weapons;

"(*d*) the military denuclearization of certain territories.

"2. For the purposes of paragraph 1, a breach shall be considered serious where it is of such a nature as to endanger international peace and security, in particular by giving a military advantage to the violator.

"3. A measure taken by a State to ensure its right of self-defence shall not be considered a serious breach of an obligation under a treaty for the purposes of paragraph 1.

"4. A breach of an obligation under a treaty referred to in paragraph 1 cannot be invoked under this Code by a State not bound by the treaty or to the advantage of a State not bound by it."

[8] For the texts (art. 11, paras. 4 and 5) submitted by the Special Rapporteur and a summary of the Commission's discussion on them at its fortieth session, see *Yearbook ... 1988*, vol. II (Part Two), pp. 62-63, footnote 289 and paras. 256-261.

116. Such were, basically, the reservations which many members had expressed concerning article 17.

117. For those members who, on the contrary, were in favour of the article and wished to retain it, the fact that it applied only to the signatories of the treaties in question raised no problem. In their view, the criterion for determining whether or not an act was a crime under the code was its consequences for international peace and security; and any breach of a treaty, even a bilateral treaty, which was liable to threaten international peace had to be regarded as a crime, since all other States and the world in general would suffer from its consequences. Those members, while not ignoring the consequences which the inclusion of article 17 in the code would have for the conclusion of the treaties it referred to, or the danger of discouraging States from acceding to the code, thought that the problem should not be exaggerated either. In their opinion, safeguard clauses would make it possible to correct any disadvantage for the States parties to those treaties as compared with third-party States.

118. Following the long discussion in the Drafting Committee, it had been decided to place the whole article between square brackets and to inform the Commission of the difficulties encountered.

119. Mr. NJENGA said that there appeared to be no agreed text for article 17. Hence it would serve no useful purpose to forward to the General Assembly the text set out in document A/CN.4/L.455. The Commission should explain in its report to the General Assembly that no decision had been reached on the article, and the matter could then be decided later.

120. Mr. BENNOUNA said he agreed entirely that article 17 should not be forwarded to the General Assembly. He was very surprised to find that a document entitled "Titles and texts of articles adopted by the Drafting Committee" (A/CN.4/L.455) contained an article which had not in fact been adopted.

121. Mr. McCAFFREY said he, too, agreed that article 17 should not be referred to the General Assembly, since that would only cause more confusion as to the purpose of an article that had been the subject of considerable discord in the Drafting Committee and even, in his view, of general rejection. In any event, since the article had not been adopted by the Drafting Committee and recommended to the plenary Commission, he was not sure what the purpose of discussing it was.

122. The CHAIRMAN explained that, in view of its difficulties in completing work on article 17, the Drafting Committee had decided to refer the matter to the plenary Commission. It was for the Commission to decide whether or not to retain the article.

123. Mr. BEESLEY, associating himself with previous speakers, said that, in his view, article 17 should not be referred to the General Assembly. The Commission had had the benefit of a very objective account by the Chairman of the Drafting Committee of what had taken place in the Committee, which he would like to see in writing. The text of document A/CN.4/L.455 gave him less cause for satisfaction, particularly the reference in the footnote to article 17 to "The text, as it emerged from the discussion". He trusted that the Commission would reach a quick decision on whether or not to omit the article from its report to the General Assembly.

124. Mr. THIAM (Special Rapporteur) said that, contrary to what had been suggested, there had not been general rejection of article 17 in the Drafting Committee, although there had been disagreement on it. It was therefore for the plenary Commission to decide whether it wished the Drafting Committee to continue its work on the article or whether it wished to withdraw it. He favoured the latter course, since the Commission had discussed the text for two years without reaching agreement even on the principle, and the positions of members were still irreconcilable. The difficulties to which the Chairman of the Drafting Committee had referred were all points of substance, which that Committee could not decide. His personal view was that it would be wiser not to discuss the article any longer and to withdraw it from the Drafting Committee.

125. Mr. AL-QAYSI said that, in the light of the Special Rapporteur's remarks, the only solution would be to delete article 17 altogether.

126. Mr. KOROMA said that article 17 was admittedly a difficult provision, but it contained important elements. If the Commission rejected the article, it would not be doing itself justice. He therefore suggested that consideration of the matter be deferred, possibly for a further year, to see if a formulation could be found that would achieve the object of the article. In order not to waste any more time, however, he could agree to the postponement of further consideration of the matter.

127. Mr. Sreenivasa RAO agreed that the Commission should waste no more time on an article which was clearly not going to satisfy the majority of members. He therefore urged the Commission to adopt the Special Rapporteur's suggestion and delete article 17 entirely. The Drafting Committee could then move on to consider other articles of the draft code.

128. Mr. BARSEGOV said that any suggestion that article 17 as a whole had been rejected, either by the Drafting Committee or by the Commission itself, should be avoided, since it was not true. In fact there had been a time when the provisions in question had had the full support of the Commission, which was precisely why they had been referred to the Drafting Committee. What was more, the Drafting Committee's difficulties did not relate to the substance of the article, but were the normal kind that arose in such cases. Just when it had seemed that a possible solution was emerging, however, the climate of opinion had changed and many members now opposed the article.

129. He therefore wished it to be clearly reflected in the summary record of the meeting that, in his view, article 17 was an extremely important provision which concerned the fate of the world at a time when international relations were being restructured with a view to founding them not on force, but on the process of disarmament. Those who observed the work of the Com-

mission would no doubt find it difficult to understand why there had at first been virtually unanimous approval of the provisions in question, whereas there was now virtually unanimous rejection of article 17.

130. It had been said that, while the text of the article had not been adopted, the title had; in fact, however, the title still appeared in square brackets, which was the correct treatment as it would enable the Sixth Committee of the General Assembly to consider what issues were involved. If the article were deleted, it would not be known what had happened to such an important provision.

131. The issue was a political, not a legal, one. He would have no objection to ending the discussion on article 17, but would very much regret it if the Commission was unable to reach a decision on such an important provision.

132. Mr. PELLET said that the Special Rapporteur had made a reasonable and practical suggestion.

133. In response to Mr. Barsegov's remarks, he added that, of course, the violation of a treaty was always politically regrettable and legally blameworthy. Not every breach of an international obligation was a crime, however, still less a crime against peace. Hence he did not understand Mr. Barsegov's reasoning: he agreed with all his remarks but not the consequences that he inferred from them.

134. If the Commission maintained article 17 in the articles referred to the General Assembly—which he hoped it would not—he would suggest that the first sentence of the footnote to the article be reworded to read: "The Drafting Committee intends to revert to this article at a later stage if need be. It was unable to reach agreement on the content of the article or even on its principle at the present session."

135. Mr. ROUCOUNAS said that, from the very beginning of the consideration of article 17, he had been opposed to it. There had always been objections to the article because of problems of substance relating to the discrimination between parties and non-parties to disarmament treaties. He therefore agreed entirely with the proposal to delete the article, a solution which would better serve the cause of disarmament than seeking to criminalize a particular act and creating doubts about the universality of a crime covered by the code.

136. Mr. BARBOZA noted that the content of the footnote to article 17 differed entirely from what the Chairman of the Drafting Committee had said. According to him, the intention of the Drafting Committee had been to submit the text of article 17 for discussion with a view to bringing consideration of the article to an end. The gist of the footnote, however, was that the Drafting Committee intended to revert to the matter later. It was impossible to take a decision on such an important issue while that difference remained, and he was therefore not prepared to take part in a discussion on whether the article should be adopted. If the Drafting Committee had been unable to reach agreement it must say so, and refer the matter to the plenary Commission for a decision.

137. Mr. SOLARI TUDELA said that he had expressed certain doubts in the Drafting Committee concerning article 17, one of his difficulties being the universality of the crime contemplated. He had none the less supported the article and continued to do so, as he believed that a provision which condemned as a crime against peace breaches of treaties that were of great importance for the maintenance of peace could not be omitted from the code. That did not mean that the question of universality was not an important criterion: indeed, it was vital. A major effort to solve the problem had been made in the Drafting Committee but it had not been sufficient, and the Commission would now have to face up to that challenge.

138. Mr. GRAEFRATH said that he regretted the course the discussion had taken. There had been general agreement in the Drafting Committee on paragraphs 1 and 2 of article 17, but a problem had arisen with respect to paragraphs 3 and 4. There had been an impression that, under the terms of those paragraphs, States in breach of an obligation under one of the treaties in question would be punishable. He did not think that was so.

139. What was involved was a breach of a treaty of such a nature that it endangered international peace and security, and that was far too serious a matter to be dismissed lightly. If the Commission decided to take the major step of deleting article 17, it should be made clear in the commentary that a breach of the treaties in question would amount to "preparation of aggression" and perhaps also to "threat of aggression".

140. The text of article 17 set out in document A/CN.4/L.455 could not, of course, be submitted to the General Assembly together with articles that had been adopted. It could, however, be submitted together with the comments made by the Chairman of the Drafting Committee. The text on which the Drafting Committee could not agree should be reproduced in a footnote. There should also be an indication that consideration of the article had not been completed because of fundamental disagreement in the Commission, and the General Assembly should be informed of the problems involved with a view to obtaining its advice on how to proceed. He could not agree to the article simply being deleted on the ground that there were differing opinions as to whether it involved treaty law and whether there was reciprocity; that, to his mind, was not a convincing reason for deletion.

141. Mr. McCAFFREY said he agreed that the Commission should cease work on article 17, since it was clear, after two years' effort, that there was no change in members' conflicting positions. Contrary to what had been said, he did not believe that there had been agreement in the Drafting Committee on even one paragraph of the article. Indeed, some members, including himself, disagreed with the whole idea of having such an article. In his own case, it was because of the problems of reciprocity and universality: a crime under the code was universal by definition, yet a breach of a treaty of the type contemplated could not be universal, inasmuch as it would occur as between the parties to the treaty. Furthermore, the Commission would not, in fact, be deleting an article: it would be

deciding not to include an article on that particular subject and, in his view, should so report to the General Assembly. The text of article 17 set out in document A/CN.4/L.455 should not be included in the Commission's report to the General Assembly, since a number of members denied its very existence in the draft code.

142. Mr. JACOVIDES said that from the outset he had expressed reservations as to whether the Commission should deal with the idea embodied in article 17. His view was that, to be effective, the code must be as lean and defensible as possible and should not extend to the more controversial areas. Accordingly, he subscribed to the majority opinion in the Commission and did not favour referral of the matter to the General Assembly. Possibly, however, when the time came for the Commission to deal with aggression and the threat of aggression, an appropriate way could be found to accommodate the concerns expressed by certain members, including Mr. Graefrath.

143. Mr. PAWLAK said that he was in favour of article 17, though he was not very happy about its wording. If the crimes referred to in the article were not crimes against peace, then what were? It was not a question of punishing breaches of disarmament treaties, but serious breaches of treaties designed to ensure international peace and security. One only had to look back into history to see that the two world wars had started as a result of such breaches.

144. He therefore proposed, first, that the Commission's discussion should be fully reflected in the summary records and, secondly, that the Commission should seek the General Assembly's advice on how to proceed, explaining that difficulties had arisen because positions in the Commission differed. After all, there was no need to reject an important subject just because there was disagreement. There were many other subjects on which the Commission did not agree, but which it was still pursuing.

145. Mr. AL-QAYSI said it was abundantly clear from the discussion that a fundamental political issue was involved. It was therefore for the General Assembly to decide, on the basis of the summary records, whether it wished the Commission to revert to the matter. The Commission's prestige would only suffer if, notwithstanding the fundamental disagreement that would be apparent from the summary records, it told the General Assembly that it had decided to continue consideration of the matter. The only sensible decision would be to delete article 17 and set out the views of members in the summary records and in the report of the Commission. Then the General Assembly could, if it so wished, direct the Commission to reconsider the underlying principle of the article at its next session.

146. The CHAIRMAN asked whether members could agree not to refer draft article 17 to the General Assembly and to cease consideration of it.

147. Mr. KOROMA suggested that a decision on the article should be postponed. Otherwise, he would have to object to its deletion in the strongest terms.

148. Mr. BARSEGOV said that, if the decision suggested by the Chairman were adopted, he would like it to be recorded as having been taken by a majority.

149. The CHAIRMAN suggested that a meeting of the Bureau should be held forthwith to prepare a draft decision for consideration by the Commission at its next meeting.

It was so agreed.

The meeting rose at 6.20 p.m.

2197th MEETING

Tuesday, 17 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: 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. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/430 and Add.1,[2] A/CN.4/L.455)

[Agenda item 5]

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

1. The CHAIRMAN announced that the Enlarged Bureau had held consultations on the way in which draft article 17 (Breach of a treaty designed to ensure international peace and security) should be dealt with in the Commission's report to the General Assembly, and the Rapporteur would announce the result of the consultations later (see para. 53 below).

ARTICLE 18 (Recruitment, use, financing and training of mercenaries)

2. Mr. MAHIOU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 18, which read:

Article 18. Recruitment, use, financing and training of mercenaries

1. The recruitment, use, financing or training of mercenaries by agents or representatives of a State for activities directed against another State or for the purpose of opposing the legitimate exercise of

[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 ... 1990*, vol. II (Part One).

the inalienable right of peoples to self-determination as recognized under international law.

2. A mercenary is any person who:

(*a*) is specially recruited locally or abroad in order to fight in an armed conflict;

(*b*) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(*c*) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(*d*) is not a member of the armed forces of a party to the conflict; and

(*e*) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any person who, in any other situation:

(*a*) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) undermining the territorial integrity of a State;

(*b*) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(*c*) is neither a national nor a resident of the State against which such an act is directed;

(*d*) has not been sent by a State on official duty; and

(*e*) is not a member of the armed forces of the State on whose territory the act is undertaken.

3. In his sixth report, submitted in 1988, the Special Rapporteur had proposed a text containing a definition of the term "mercenary" based, in part, on article 47 of Additional Protocol I[3] to the 1949 Geneva Conventions.[4] Since then, the General Assembly had adopted and opened for signature the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries[5] and, on the basis of that new instrument, the Special Rapporteur had submitted a revised provision to the Drafting Committee. Unlike article 47 of Additional Protocol I, which applied only to mercenaries acting in the context of armed conflict, draft article 18 dealt, as did the 1989 Convention, with the recruitment, use, financing and training of mercenaries both in the case of armed conflict and for the purpose of destabilization operations carried out in the absence of armed conflict. From that standpoint, article 18 had the same scope of application as the 1989 Convention. On other matters, its scope was more restricted. It applied exclusively to acts in which agents or representatives of a State were involved and, contrary to the 1989 Convention, did not cover the recruitment, use, financing and training of mercenaries by private groups or individuals, or the activities of mercenaries themselves.

4. Paragraph 1 of article 18 defined the crime by using the terms of the 1989 Convention. The Drafting Committee, which had at first considered supplementing the list of crimes covered by that Convention by including the act of giving refuge to mercenaries, had decided that acts of that kind could come under the heading of complicity.

5. Article 18 dealt with the question of attribution in the same terms as did article 16 (International terrorism). The words "for activities directed against another State" should be read in the light of paragraphs 2 (*a*) and 3 (*a*), which defined the type of activities involved. The activities in question were of a degree of gravity which, in the opinion of the Drafting Committee, justified treating the acts covered by the first part of paragraph 1 as crimes.

6. The last part of paragraph 1 ("or for the purpose of opposing . . .") was based on paragraph 2 of article 5 of the 1989 Convention, whereby States parties undertook not to recruit, use, finance or train mercenaries "for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law". The Drafting Committee was mindful of the fact that articles 12, 14, 15 and 18 of the draft code referred to the right to self-determination in varying terms, and it planned to revert to the matter at a later stage with a view to giving the various provisions of the code the required consistency.

7. Paragraph 2 of article 18 defined a mercenary who acted in the context of an armed conflict, and paragraph 3 a mercenary who acted outside the context of such a conflict. The two definitions reproduced word for word the definitions laid down in article 1 of the 1989 Convention.

8. Mr. McCAFFREY said that he reserved his position on article 18 as proposed by the Drafting Committee. In his view, the article went too far, and some of its elements had no place in the draft code. Furthermore, the double negative in paragraph 2 (*e*) made the text virtually incomprehensible, at any rate in English.

9. Mr. BENNOUNA said it was unfortunate that the Drafting Committee had decided to follow the 1989 Convention, since that caused problems in article 18 as it did in other articles. Also, he understood that the various elements of the definition of the term "mercenary", as set out in paragraphs 2 and 3, had to be read cumulatively. If that was indeed so, it would be preferable to make it clear, perhaps by adding the word "and" at the end of each subparagraph. Lastly, it should be explained in the article why the definition of the term "mercenary" was divided into two parts.

10. Mr. KOROMA said that the word "locally", in paragraphs 2 (*a*) and 3 (*a*), created some ambiguity. Did it refer to the country in which the activities took place or to the country in which the person had been recruited?

11. Mr. NJENGA said that, like Mr. Bennouna, he considered that it should be made clear that the various elements of the definition of the term "mercenary" were cumulative. He also agreed that the double

[3] Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 3).

[4] For the text (art. 11, para. 7) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 64-65, footnote 297 and paras. 268-274.

[5] General Assembly resolution 44/34 of 4 December 1989, annex.

negative in paragraph 2 (*e*) made the text incomprehensible.

12. Mr. MAHIOU (Chairman of the Drafting Committee) explained that the Drafting Committee had merely repeated word for word the text of the 1989 Convention, which it had not felt it could modify. That was true, for instance, of the word "locally", which Mr. Koroma found ambiguous. The word "and", at the end of paragraphs 2 (*d*) and 3 (*d*), would, in his view, suffice to indicate that the elements listed in those paragraphs were cumulative.

13. Mr. PELLET said that he reserved his position on the principle of treating outright an activity such as mercenarism as a crime against the peace and security of mankind.

14. Mr. NJENGA said the fact that the definition of a mercenary had been taken from the 1989 Convention did not shield it from criticism. If that definition were retained, an explanation should at least be given in the commentary on the points that were not clear.

15. Mr. BENNOUNA said that the method whereby a provision was lifted from an existing convention and repeated, out of context, in another instrument was questionable from the standpoint of legal drafting. The Drafting Committee could certainly modify the provisions found in the 1989 Convention, since the object of the two instruments was not the same. Also, the Committee which had drawn up the 1989 Convention had consisted not of jurists, but of government representatives—in other words, politicians—whose concerns probably differed from those of the members of the Commission. For all those reasons, he would have preferred the Commission itself to examine the crime of mercenarism, so that a more coherent result from the legal standpoint could be achieved, and to display a little originality by not submitting to the Sixth Committee of the General Assembly a text which that Committee had already examined the previous year.

16. Mr. KOROMA said that, in drafting a new international instrument, it was quite common for existing texts to be adopted in their entirety. Like Mr. Njenga, however, he considered that, in such a case, the commentary should explain the various matters raised during the discussion. He was none the less prepared to accept article 18 as drafted.

17. Mr. JACOVIDES said he had always maintained that, if the code was to be widely accepted, it should not be too voluminous. Instead of repeating the provisions of the 1989 Convention, it should have been possible—and it was perhaps not too late to do so—simply to refer to the Convention. In reproducing the text of the relevant provision verbatim, the code seemed to be according a disproportionate place to the question of mercenarism.

18. Mr. THIAM (Special Rapporteur), in response to Mr. Bennouna and Mr. Jacovides, said that the Commission should decide once and for all whether provisions taken from other instruments should be reproduced word for word, or whether to be content with a mere reference. Moreover, where a text was repeated, any change, even the slightest, required an explanation. For that reason, it was often preferable to reproduce the texts and to include an explanation in the commentary.

19. Mr. ARANGIO-RUIZ said that he shared the doubts expressed by Mr. McCaffrey, Mr. Pellet and Mr. Bennouna.

20. Mr. BEESLEY said that he endorsed the reservations expressed by Mr. Bennouna, Mr. McCaffrey and Mr. Njenga.

21. Mr. MAHIOU (Chairman of the Drafting Committee), referring to Mr. Bennouna's remarks, said that, in his view, it seemed impossible that the same term—in the present case, the term "mercenary"—should be defined differently in two international legal instruments. Moreover, what mattered in article 18 was not so much the definition of the term "mercenary" as the activities that were characterized as crimes in paragraph 1. He agreed, however, that the commentary should reflect the remarks made about the article and give the necessary explanations.

22. Mr. CALERO RODRIGUES said that, under the 1989 Convention, two different acts were treated as crimes: first, the recruitment, use, financing and training of mercenaries; and, secondly, the activities of mercenaries. The draft code, which dealt with the first of those crimes, should therefore also include a definition of the term "mercenary", and the definition could not differ from the one in the 1989 Convention. If the proposed definition was a little long, it was precisely because several possibilities were contemplated: first, the use of mercenaries to fight in an armed conflict; and, secondly, the use of mercenaries to participate in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State, or at undermining the territorial integrity of a State. Those elements were necessary for the interpretation of the term "mercenary". For instance, the provision to the effect that a mercenary was any person who was specially recruited "locally or abroad" had been included to leave no room for doubt: the recruitment of mercenaries would come within the terms of the code whether it occurred in the country concerned or abroad.

23. Also, as Mr. McCaffrey had pointed out, the Commission might have to decide whether to treat mercenarism as a crime: that was another matter, although the Commission had apparently taken a majority decision to that effect when it had referred the provisions in question to the Drafting Committee.

24. Mr. TOMUSCHAT said he agreed that it would be unfortunate if two different definitions of mercenarism were laid down in two international instruments. In his opinion, however, the activities to be treated as crimes could have been characterized differently, on the basis of the method adopted for draft article 17 (Breach of a treaty designed to ensure international peace and security), paragraph 2 of which specified that, to be treated as a crime, the activity in question must be of such a nature as to endanger international peace and security. It was perhaps too late to amend article 18 along those lines, but the Commission could introduce a similar qualification in paragraph 1

on second reading. That would perhaps prove necessary, since the recruitment of mercenaries was only the first step in a long process and, in itself, did not necessarily endanger international peace and security, whereas the code was intended to cover cases in which international peace and security were endangered.

25. Mr. BENNOUNA said that he was not persuaded by the explanations given by the Chairman of the Drafting Committee.

26. As Mr. Tomuschat had suggested, the recruitment of mercenaries could be taken as the starting-point, if certain conditions were met, for a crime against the peace and security of mankind. The code was intended to deal only with the most serious crimes and it would be rendered meaningless if it were made to cover ordinary crimes. A petty mercenary or a petty drug trafficker had nothing in common with a person who committed a crime against the peace and security of mankind.

27. Mr. KOROMA said that, as he saw it, the essence of the definition of a mercenary was to be found in paragraph 3 (*a*) (i) and (ii) of article 18. Mercenaries usually chose only weak States as their targets: the developed countries were spared. If, therefore, the acts in question were to come under the code only if they endangered international peace and security, it was to be feared that no mercenary would ever be brought to justice. On the other hand, if the acts in question were included in the code, they would perhaps be subject to an international criminal jurisdiction, thereby resolving the difficulties involved in trying mercenaries in the countries where they were captured.

28. For all those reasons, it would not seem desirable to treat such acts as crimes only if they endangered international peace and security.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 18 as proposed by the Drafting Committee.

Article 18 was adopted.

ARTICLE X (Illicit traffic in narcotic drugs)

30. Mr. MAHIOU (chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article X, which read:

Article X. Illicit traffic in narcotic drugs

1. The undertaking, organizing, facilitating, financing or encouraging, by the agents or representatives of a State, or by other individuals, of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context.

2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs shall include the acquisition, holding, conversion or transfer of property by a person who knows that such property is derived from the crime described in the present article in order to conceal or disguise the illicit origin of the property.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

31. He recalled that the Special Rapporteur, following the Commission's discussion of his eighth report (A/CN.4/430 and Add. 1) at the present session, had submitted revised texts of draft articles X and Y characterizing illicit traffic in narcotic drugs as a crime against peace, and as a crime against humanity, respectively (see 2159th meeting, para. 1). The Drafting Committee had examined at length the question whether illicit traffic in narcotic drugs could be characterized as a crime against peace. Some members had taken the view that it could; others, while recognizing that drug connections and proceeds from the drug traffic could be used in one State to destabilize another, felt that the crime of drug trafficking, properly speaking, could only have a very indirect effect on international peace. The latter seemed also to be the position of the Member States of the United Nations, as was apparent from the preamble to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, as well as from General Assembly resolution 44/39 of 4 December 1989. The Drafting Committee had not wished at the present stage to take a final decision on whether illicit traffic in narcotic drugs could, or could not, be characterized as a crime against peace. On the other hand, it had unanimously recognized that such traffic, which impaired the health and well-being of mankind and threatened human beings with degradation, should be treated as a crime under the code. It was from that standpoint that the Committee had elaborated article X, to which it had not given a final number, since the question of the general plan of the code was still pending.

32. The enumeration at the beginning of paragraph 1 of article X was taken from article 16 (International terrorism), except that the word "assisting" had been replaced by "facilitating". It was not so much by active, as by passive, behaviour—for example, by not applying the regulations—that the agents or representatives of a State, or of banking or other institutions, became involved in the drug traffic, and the verb "facilitate" conveyed much better the idea of connivance. Paragraph 2 explained the meaning of the terms "facilitating" and "encouraging".

33. The expression "illicit traffic in narcotic drugs" had to be read in the light of the definition appearing in paragraph 3, which indicated that "narcotic drugs" included psychotropic substances.

34. In addition to the agents or representatives of a State, paragraph 1 mentioned "other individuals" as possible perpetrators of the crime under consideration. It would be explained in the commentary that the term "individuals" covered not only cartels, gangs and other private groups engaging in the drug traffic, but also banks and other financial institutions which handled the proceeds from such traffic. The expression "on a large scale" was intended to make it clear that the article covered operations of great magnitude and not isolated acts on the part of small traffickers. The words "within the confines of a State or in a transboundary context" were taken from the text proposed by the Special Rapporteur.

35. Paragraph 2, which explained the meaning of the terms "facilitating" and "encouraging", drew on paragraph 1 (*b*) (i) of article 3 of the 1988 Convention.

The notions of conversion and transfer mentioned in paragraph 1 (*b*) (i) of that article had been combined with the notions of acquisition and holding mentioned in paragraph 1 (*c*) (i). The word "property" had to be interpreted in its widest sense as covering movables, immovables and other types of assets.

36. The Drafting Committee had not wanted persons who acted in good faith to fall within the provisions of article X if they unwittingly acquired, held, converted or transferred property derived from illicit traffic in narcotic drugs. For that reason, paragraph 2 contained two safeguard clauses: first, the person concerned had to be aware of the origin of the property in question; and, secondly, his actions had to have the effect of concealing or disguising the illicit origin of the property.

37. The Drafting Committee had observed that paragraph 1 (*b*) (i) of article 3 of the 1988 Convention covered the act of assisting any person who was involved in the conversion or transfer of property to evade the legal consequences of his actions, but had not deemed it advisable to mention such acts in paragraph 2 of article X, considering that they were more in the nature of complicity. The Committee had noted also that, in the 1988 Convention, the French term *détention* was rendered in English as "possession" but had preferred to replace it with the term "holding", which better expressed the idea of provisional custody of another person's property.

38. Paragraph 3, which defined the expression "illicit traffic in narcotic drugs", was largely taken from article 3, paragraph 1 (*a*) (i), of the 1988 Convention. With regard to the phrase "contrary to internal or international law", the Drafting Committee had not wished to mention the various existing conventions because the code was intended to apply to all States that became parties to it, regardless of whether or not they were parties to those conventions. It had therefore preferred to make a general reference to international law. The reference to internal law was intended to avoid treating as crimes acts that were lawful under national legislations, such as the production, sale, importation or exportation of narcotic drugs for medical or pharmaceutical purposes. The words "contrary to internal... law" were in fact intended to clarify the meaning of the word "illicit" in the expression "illicit traffic in narcotic drugs".

39. Mr. McCAFFREY asked whether, as appeared to be the case, article X would apply to entirely domestic traffic in narcotic drugs, i.e. that which did not affect any other State—although destabilization of a State from within risked endangering international peace and security.

40. He suggested that, in paragraph 2, the word "described" should be replaced by "defined".

41. Mr. FRANCIS expressed doubts as to whether the expression "on a large scale", in paragraph 1, was really appropriate in the case of illicit traffic in narcotic drugs. What was the difference between a drug trafficker who ran, within the territory of a State or abroad, 100 tons of cocaine and a trafficker who ran one ton? In all cases, the victims were the whole of humanity and not one or two persons alone. As he saw it, illicit traffic in narcotic drugs should be characterized also as a crime against peace.

42. Mr. MAHIOU (Chairman of the Drafting Committee) pointed out that the Special Rapporteur had initially proposed two articles, one characterizing international traffic in narcotic drugs as a crime against peace and the other characterizing it as a crime against humanity, but that the views within the Drafting Committee had been divided. Some members had felt that it was possible to characterize such traffic as being also a crime against peace; others had considered that there were not enough elements for that purpose, and chiefly that there existed perhaps a connection between illicit traffic in narcotic drugs and other acts defined as crimes elsewhere in the code, such as aggression, intervention, etc. In the end, the Drafting Committee had chosen to characterize drug trafficking as a crime against humanity, on the understanding that the transboundary element was not indispensable. If, within a given country, drug trafficking was carried out on a large scale and affected many categories of the population, it could indeed be treated on a par with a form of genocide, coercion or grave violations of human rights, to such an extent as to be characterized as a crime against humanity.

43. Mr. FRANCIS said he was still convinced that there existed sufficient evidence to assert that international drug trafficking, in its present dimensions, was a grave obstacle to relations between States. It was a well-established fact and called for no further comment. It was in that context that drug trafficking had to be viewed. The Commission would inevitably have to revert to the matter.

44. Mr. McCAFFREY thanked the Chairman of the Drafting Committee for clarifying that article X also applied to illicit traffic in narcotic drugs entirely within the territory of a State, without participation from abroad, and that the characterization of illicit traffic in narcotic drugs as a crime against humanity did not necessarily require a transboundary element—even though that element obviously existed in most cases. It was a courageous approach and one of considerable importance, but the commentary would need to specify, for the purposes of interpretation, that such was the Commission's intention. As Mr. Francis had just pointed out, the problem was very serious: the whole future of human society was at stake. He would not in any way oppose adoption of the article.

45. Mr. BENNOUNA said he hoped that the commentary would underline the possible connections between the 1988 Convention and article X, since the article was simply an adaptation of the Convention.

46. As to the wording of the article, the commentary should also explain what was meant by the expression "within the confines of a State", in paragraph 1: did it refer simply to the territory of a State or did it include areas under a State's national jurisdiction or under its control? Did the expression also include ships and aircraft, as was the case with the 1988 Convention?

47. Lastly, he wished to know whether the opening words of paragraph 2, "For the purposes of para-

graph 1", had been deliberately omitted in the case of paragraph 3.

48. Mr. MAHIOU (Chairman of the Drafting Committee) pointed out, in reply to an earlier remark by Mr. McCaffrey (para. 40 above), that, in the French text of paragraph 2, the word used was *défini*. The English text should thus be brought into line with the French.

49. In response to Mr. Bennouna's comment, he explained that in paragraph 2 the Commission gave its own definition of the act of facilitating or encouraging illicit traffic in narcotic drugs, whereas paragraph 3 did no more than reproduce the definition contained in other relevant instruments.

50. Mr. BENNOUNA replied that that was precisely the problem, for the definition contained in paragraph 1 (*a*) (i) of article 3 of the 1988 Convention had been reproduced only in part. Paragraph 3 of article X should therefore have begun with the words "For the purposes of paragraph 1".

51. Mr. THIAM (Special Rapporteur), in reply to a request for clarification by Mr. FRANCIS, explained that illicit traffic in narcotic drugs, as mentioned in article X, was not confined to traffic within national boundaries: it was clearly indicated in paragraph 1 that the undertaking, organizing, facilitating, financing or encouraging of illicit traffic in narcotic drugs on a large scale, "whether within the confines of a State or in a transboundary context", constituted a crime against humanity.

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article X as proposed by the Drafting Committee, with the word "described", in paragraph 2, being replaced by "defined".

It was so agreed.

Article X was adopted.

ARTICLE 17 (Breach of a treaty designed to ensure international peace and security)[6] (*continued*)

53. Mr. EIRIKSSON (Rapporteur) recalled that the Enlarged Bureau had been assigned the task of drafting the part of section B of chapter II of the Commission's report to the General Assembly dealing with draft article 17, mentioning the absence of agreement on the subject in the Drafting Committee, the debate at the Commission's 2196th meeting (paras. 108 *et seq.*) and the possibility of continuing consideration of the question at the next session if matters evolved. The text proposed by the Enlarged Bureau read:

"*Breach of a treaty designed to ensure international peace and security*

"1. When introducing the report of the Drafting Committee concerning its work on the draft articles of the code, the Chairman of the Drafting Committee informed the Commission that the Committee had held a long discussion on draft article 17, concerning the breach of a treaty designed to ensure international peace and security, but had been unable to reach agreement.[1] The Committee had encountered once again the seemingly irreconcilable views which had prevented it from reaching agreement after long discussion at the Commission's forty-first session.[2]

"2. The Drafting Committee had concluded that it would be inappropriate to take up the question again in the absence of clear guidelines on the direction it should take.[3]

"3. The discussion in the Commission revealed a continuing difference of views on the advisability of including an article on the subject in the draft code. On the one hand, it was felt by some members that the importance of treaties dealing with such important contributions to international peace and security as disarmament could not be ignored in the code, particularly in the light of the inclusion of relatively less important questions.

"4. On the other hand, a number of views were expressed against dealing with the subject in the code. Some members believed that such an article would violate the principle of universality which must form part of provisions on criminal law. Others believed that such an article would discriminate against States which had entered into such treaties as compared to States which had not done so. The effect might be to discourage the conclusion of such agreements. Some members were concerned that such an article would raise fundamental questions of treaty law. A general point was made that an article of such a controversial nature would have an adverse impact on the acceptability of the code.

"5. The Commission was therefore not able to agree on guidelines for any future work of the Drafting Committee on this question. It furthermore noted that if, at its next session, it was able to give such advice, for example on the basis of the debate in the Sixth Committee of the General Assembly, the Drafting Committee should revert to the article after the completion of its consideration of the other draft articles on the topic.

[6] For the text discussed by the Drafting Committee, see 2196th meeting, footnote 7.

"[1] A text for this particular question was submitted by the Special Rapporteur in his sixth report at the Commission's fortieth session as paragraphs 4 and 5 of the revised draft article 11 (Acts constituting crimes against peace) (see *Yearbook ... 1988*, vol. II (Part Two), p. 62, footnote 289). Those paragraphs read:

'4. 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.

'5. A breach of the obligations of a State under a treaty prohibiting the emplacement or testing of weapons in certain territories or in outer space.' "

"[2] See the statement by the Chairman of the Drafting Committee at that session (*Yearbook ... 1989*, vol. I, p. 304, 2136th meeting, paras. 43-50)."

"[3] In the Drafting Committee, proposals centred on defining the crime as a serious breach of an obligation of a State under a treaty designed to ensure international peace and security, in particular a treaty relating to:

(*Continued on next page.*)

(*Footnote 3 continued.*)

"(*a*) disarmament, or the prohibition, restriction or limitation of armaments;

"(*b*) restrictions on military training or installations or any other restrictions of the same character;

"(*c*) the prohibition of emplacements or tests of weapons;

"(*d*) the military denuclearization of certain territories.

"For the purposes of this definition, some members would qualify a breach as serious where it was of such a nature as to endanger international peace and security, in particular by giving a military advantage to the violator. A further qualification was suggested to the effect that a measure taken by a State to ensure its right of self-defence should not be considered a serious breach of an obligation under a treaty for the purposes of the definition. Finally, it was the view of some members that a breach of an obligation under a treaty referred to in the definition could not be invoked under the code by a State not bound by the treaty or to the advantage of a State not bound by it."

54. Mr. AL-QAYSI said that the text proposed by the Enlarged Bureau could form the basis of a compromise solution, but would require some changes. First, there was no need for footnote 1 to include the texts of paragraphs 4 and 5 of draft article 11, which had already appeared in the Commission's report on its previous session. The footnote should read: "A text for . . . (Acts constituting crimes against peace). See *Yearbook . . . 1989*, vol. II (Part Two), p. 68, footnote 149." Secondly, footnote 3 should be deleted, for it seemed odd, to say the least, to report in detail to the General Assembly on the trends of opinion in the Drafting Committee. Thirdly, to reflect the variety of views on article 17 expressed at the previous meeting, the phrase "a number of views were expressed against", in paragraph 4 of the proposed text, should be replaced by "many members said that they were against".

55. Mr. Sreenivasa RAO said that he could accept Mr. Al-Qaysi's amendments to the text proposed by the Enlarged Bureau, as long as they did not become the subject of a protracted debate. Otherwise, he would prefer the text as it stood.

56. Mr. GRAEFRATH said that the proposed text should be improved in order to bring out more clearly the arguments advanced in favour of article 17. For that purpose, a sentence should be added at the end of paragraph 3, reading: "A serious breach of a treaty specially designed to ensure peace would necessarily be of universal concern and not simply a question of treaty law because, by definition, it would endanger peace." He supported the amendment to paragraph 4 suggested by Mr. Al-Qaysi, but would prefer to retain the footnotes as they stood, since they were intended to make the text easier for the reader to understand.

57. Mr. KOROMA said that footnote 1 would be an aid to discussion in the Sixth Committee of the General Assembly. Since article 17 dealt not with disarmament as such—an area in which the Commission had no competence—but with international peace and security, he proposed that the words "as disarmament" and "particularly in the light of the inclusion of relatively less important questions", in the second sentence of paragraph 3, should be deleted. He supported the idea of deleting footnote 3, which was controversial. Lastly, the penultimate sentence of paragraph 4 could be fleshed out to give an idea of the kind of questions the Commission was thinking of; otherwise, it could be deleted.

58. Mr. McCAFFREY said that it would be better, at the present stage in its work, for the Commission not to mention in its report the debate sparked off by article 17. It had not actually reached any conclusion yet, nor had it made a decision either way, and the text proposed for inclusion in the report would prompt the reader to ask why not. Paragraph 5 of that text was, in fact, a timid invitation to the Sixth Committee to advise the Commission. If the Commission was unable to agree on whether to include article 17 in the draft code, it should refrain from asking the advice of the Sixth Committee, because the Committee could only give a political answer. The Commission was in a blind alley, caused by purely legal problems. If it was none the less anxious to retain paragraph 5, it should not beat about the bush and should ask the Sixth Committee outright for instructions.

59. If the Commission did decide to include in its report a record of its debate on the matter, he thought that most of the amendments proposed by Mr. Al-Qaysi would be acceptable. In footnote 1, it would be sufficient to refer to the Commission's 1989 report. Footnote 3 should be deleted, for it would be misleading not to mention the majority view in the Drafting Committee, namely that article 17 had no part to play in the code. As to paragraph 2, he would suggest adding, after the words "the question again", the words "at future sessions of the Commission". He would have no objection to the sentence proposed by Mr. Graefrath if it was prefaced by the words "In the view of one member of the Commission". Paragraph 4 should begin: "Many members, on the other hand, were opposed to dealing . . .". The second sentence of the paragraph should begin with the words "These members believed", and the third with the words "They also believed". The second sentence of paragraph 5 might cause confusion and should be reworded as follows: "If, at its next session, it is able to agree on such guidelines, the Drafting Committee will revert to the article."

60. Furthermore, if the Drafting Committee completed its consideration of the other draft articles on the topic at the beginning of the next session, was it expected to drop everything else in order to return to article 17? What would happen to the other items on the agenda? In his opinion, at the next session the Drafting Committee should revert to article 17 only when it had finished its work, if sufficient time remained. The Commission should not be reporting to the Sixth Committee on its methods of work: the Committee was not interested in them, and the Commission should not encourage it to comment on the matter. Lastly, he deplored the many hours the Drafting Committee had spent on the question, to the detriment of other topics.

61. Mr. EIRIKSSON (Rapporteur) said the fact that the subject was a difficult one and that members of the Drafting Committee had been unable to agree was the very reason why the General Assembly should be told about it. Nevertheless, the Commission had not lost hope of coming to some agreement on article 17 and was not leaving the outcome entirely to the General Assembly.

62. Mr. BEESLEY said that, by and large, he was in favour of the amendments proposed so far. As to the footnotes, the first could be considerably shortened: after the reference to paragraphs 4 and 5 of draft article 11, one could simply add "which have since been withdrawn because of the difficulties involved". Footnote 3 should be eliminated altogether, because it merely reported the discussions in the Drafting Committee.

63. Mr. Graefrath's proposal was acceptable in the sense that it drew attention to the complex relationship between the future article 17 and treaty law. Mr. Graefrath had spoken of "universal concern", but he could equally have pointed to the connection with *jus cogens*; there were several ways of illustrating the complexity of the relationship. The real reason why the Commission could not come to a conclusion was that the actual content of article 17 would be discriminatory: some States would be in a treaty régime, something which would hold them to certain obligations and to a measure of reciprocity, whereas other States would remain free to act as they saw fit. As a result, the article would discourage States from signing disarmament treaties or acceding to existing ones, or even from accepting the code.

64. Lastly, he would like clarification of paragraph 5 of the proposed text, since it was not clear what the Commission wanted from the General Assembly.

65. Mr. PELLET said that he, too, thought that a report should be made to the General Assembly on the Drafting Committee's quest for a compromise solution. In that regard, he considered the text proposed by the Enlarged Bureau well-balanced and quite acceptable. The wording of the last sentence, despite Mr. McCaffrey's criticism, was especially shrewd. As to Mr. Graefrath's amendment, minority opinions should certainly be included in the Commission's report, as long as it was made quite clear that they were not shared by all members.

66. It had been proposed that the penultimate sentence of paragraph 4 should be amended, because it was self-evident that article 17 would raise "fundamental questions of treaty law". That was correct. However, not all those questions were evident, and they might be very different in nature: problems of interpretation would arise, but also, for instance, the problem of defining a "serious breach". But the most deep-seated problem was the one mentioned by Mr. Beesley, which had nothing to do with legal technique. The point was that the article viewed a breach from a formal standpoint—the treaty aspect—and not from a substantive standpoint. He therefore proposed that, at an appropriate place in paragraph 4, the following sentence should be added: "Moreover, some members of the Commission objected to the special emphasis which would thus be placed on treaty obligations."

67. In conclusion, paragraph 2 added nothing and should be omitted.

68. Mr. AL-QAYSI said that paragraph 2 summed up the conclusion the Commission had reached at the present session. In his view, it should be included in the report.

69. Mr. BARSEGOV, reiterating that, in his view, article 17 was an essential part of the draft code, said that the text proposed by the Enlarged Bureau for inclusion in the Commission's report was quite acceptable. It was a fact that the Commission had run into difficulty with article 17, and it would be wise to let the General Assembly know, especially when the subject-matter concerned was of such importance in view of the recent developments in Europe and the disarmament initiatives under way. The Commission must not allow itself to be overtaken by events.

70. Mr. MAHIOU (Chairman of the Drafting Committee), speaking as a member of the Commission, pointed out that he had never been in favour of draft article 17. However, he would prefer the General Assembly to be told of the difficulties encountered by the Commission, not only because it must be given a report of the work done, but also because the article in question was proving controversial and the resulting disagreement could hardly be concealed from the Sixth Committee.

71. The text proposed by the Enlarged Bureau was a compromise text which would be quite acceptable with a few minor changes. Paragraph 5 in particular, which stated the conclusion in a very subtle manner, ought to be retained. Admittedly the wording of paragraph 2 was not very clear, but it would be wise to point out that the difficulties encountered during the session now coming to an end would inevitably recur at the next session unless the Sixth Committee had some new ideas to put forward.

72. Mr. BARBOZA said that he did not find it unusual for the Commission to show the General Assembly that it was hesitant; some indecision was perhaps a virtue in a body of lawyers. Given the nature of the problem concerned, political positions were bound to cast their shadow on legal theory. That was one more reason why the Sixth Committee should be told of the situation.

73. From the point of view of the organization of work, the Drafting Committee should perhaps have informed the Commission that it was not making progress on draft article 17. The Commission should have done sooner what it was now about to do, and should do more often: state in plain terms that there was no agreement, polish the wording, and refer the matter to the General Assembly.

74. Mr. PAWLAK said that most of the proposed amendments would disturb the balance of a text which had already been much thought out. In his view, the proposed text should be kept as it was—including paragraph 5—with some minor changes: for instance, footnote 1 should be simplified, but not footnote 3, which was a faithful account of what had taken place in the Drafting Committee.

75. Mr. ARANGIO-RUIZ said that the questions raised by the relationship between article 17 and treaty law in general were at present insoluble. It was sufficient, in his view, to say so. Strictly speaking, that part of the Commission's report should be confined to the first sentence of paragraph 1 of the proposed text.

76. The CHAIRMAN suggested that the Rapporteur should, in the light of the opinions expressed and the various amendments proposed, prepare a new text for consideration at a later meeting.

The meeting rose at 1.10 p.m.

2198th MEETING

Tuesday, 17 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/430 and Add.1,[2] A/CN.4/L.455)

[Agenda item 5]

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

ARTICLE 17 (Breach of a treaty designed to ensure international peace and security)[3] (*continued*)

1. The CHAIRMAN invited further comments on the text proposed by the Enlarged Bureau for inclusion in the Commission's report to the General Assembly, concerning draft article 17 (see 2197th meeting, para. 53).

2. Mr. ROUCOUNAS said that he was prepared to agree to a text along the lines suggested by Mr. Al-Qaysi at the previous meeting (para. 54), but wished to clarify his position. The problem the Commission had faced for two years involved a matter that was basically one of discrimination and, in historical terms, had in fact been superseded. The Commission had not considered the fact that the primary rule went beyond treaty law. There were, of course, a number of things, such as genocide, racial discrimination, aggression and war crimes, which the international community had agreed to treat as crimes. The Commission, however, instead of also seeking to discern a rule of general international law in the field of disarmament, had fallen back on the notion of the relativity of treaties. That was why he had opposed the whole exercise from the outset. Furthermore, there were a host of problems involving treaty law, such as the validity of a treaty in time, the interpretation of treaties, the effects of treaties with regard to third parties, and the legal relations between the parties to treaties, all of which fell within the framework not of international criminal law, but of the law of treaties.

3. Mr. TOMUSCHAT said that, so far as substance was concerned, he did not favour adoption of article 17. He did consider, however, that the two trends of opinion which had emerged in the debate should be reflected in a balanced way in the Commission's report: the differences within the Commission could not be concealed from the General Assembly, which must be informed of them.

4. The CHAIRMAN drew attention to a revised version of the text proposed by the Enlarged Bureau, prepared by the Rapporteur, which read:

"*Breach of a treaty designed to ensure international peace and security*

"1. When introducing the report of the Drafting Committee concerning its work on the draft articles of the code, the Chairman of the Drafting Committee informed the Commission that the Committee had held a long discussion on draft article 17, concerning the breach of a treaty designed to ensure international peace and security, but had been unable to reach agreement. The Committee had encountered once again the seemingly irreconcilable views which had prevented it from reaching agreement after long discussion at the Commission's forty-first session.[1]

"2. The Drafting Committee pointed out the difficulties it would have in taking up the question again at future sessions of the Commission in the absence of clear guidelines on the direction it should take.[2]

"3. The discussion in the Commission revealed a continuing difference of views on the advisability of including an article on the subject in the draft code. On the one hand, it was felt by some members that the importance of treaties designed to ensure international peace and security could not be ignored in the code, particularly—in the view of one member—in the light of the inclusion of relatively less important questions. The example of disarmament treaties was cited. In the view of those members, the breach of such a treaty, because by definition it endangered peace, would be of universal concern, not merely a matter for the parties to the treaty.

"4. Many members, on the other hand, were opposed to dealing with the subject in the code. The reasons adduced in that respect included concern that such an article would violate the principle of universality which must underlie criminal-law provisions. The view was furthermore expressed that such an article would discriminate against States which had entered into the treaties concerned as compared to States which had not done so. The effect might be to discourage the conclusion of such treaties. The article was also criticized on the ground that it

[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 ... 1990*, vol. II (Part One).

[3] For the text discussed by the Drafting Committee, see 2196th meeting, footnote 7.

unjustifiably focused on treaty obligations and concern was expressed that such an article would raise fundamental questions of treaty law. Finally, the general point was made that an article of such a controversial nature would have an adverse impact on the acceptability of the code.

"5. The Commission was therefore not able to agree on guidelines for any future work of the Drafting Committee on this question. It furthermore noted that if, at its next session, it was able to agree on such guidelines, for example on the basis of the debate in the Sixth Committee of the General Assembly, the Drafting Committee should revert to the article after the completion of its consideration of the other draft articles on the topic.

"[1] See the statement by the Chairman of the Drafting Committee at that session (*Yearbook ... 1989*, vol. I, p. 304, 2136th meeting, paras. 43-50)."

"[2] For the statement by the Chairman of the Drafting Committee at the present session on draft article 17, see the summary record of the 2196th meeting (see *Yearbook ... 1990*, vol. I), paras. 108 *et seq.*"

5. Mr. EIRIKSSON (Rapporteur) said that the revised text would constitute subsection 3 of section B (Consideration of the topic at the present session) of chapter II of the Commission's report. No substantive changes had been made in paragraph 1, but footnote 1 in the earlier text, which had contained the provisions proposed by the Special Rapporteur, had been deleted. The reference in paragraph 2 to the Drafting Committee's view had been modified to reflect the Committee's position as reported by the Chairman of the Drafting Committee. The content of footnote 3 in the earlier text had been deleted. Instead, there was now a reference in footnote 2 to the statement made by the Chairman of the Drafting Committee. Paragraph 3 reflected the views of those members who favoured the inclusion in the draft code of an article on the subject, while paragraph 4 set forth the views of those who opposed the inclusion of such an article. Paragraph 4 also incorporated certain changes proposed by Mr. McCaffrey as well as a combined proposal by Mr. Pellet and Mr. Roucounas with regard to treaty law. Paragraph 5 was basically unchanged.

6. The CHAIRMAN suggested that, to save time, consideration of the matter should be suspended until the Rapporteur had had an opportunity to consult members.

It was so agreed.[4]

7. Mr. GRAEFRATH said that he wished to make a general remark concerning the Commission's report. An important question raised several times in the Drafting Committee had not been reflected in the articles adopted, nor had it been adequately explained in the report by the Chairman of the Drafting Committee. That question was the attribution of crimes to individuals. In its report to the General Assembly on its forty-first session, the Commission had stated: "... The question of the attribution of ... crimes to individuals will be dealt with later in the framework of a general provision."[5] No such provision had been formulated by the Drafting Committee at the present session. Articles 16, 18 and X did contain certain elements relating to the individuals who might commit the crimes in question, but that did not solve the general problem of determining who could commit a crime against peace, nor did it suffice to determine the subjective element which must involve a wilful act and exclude negligence.

8. He therefore suggested that a footnote should be included in the Commission's report on its present session explaining that the Commission would revert to the matter at a later session.

Draft report of the Commission on the work of its forty-second session (*continued*)*

CHAPTER IV. ***The law of the non-navigational uses of international watercourses*** (continued) (A/CN.4/L.449 and Add.1 and 2)

B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.449)

Paragraph 18 (*concluded*)

9. Mr. EIRIKSSON (Rapporteur) read out the following revised text of paragraph 18, which he had prepared together with the Special Rapporteur:

"There was general support for article 24, which reflected in a well-balanced way the view that there was no universal standard giving priority to any particular use of an international watercourse, including navigation, in the light of the many different uses of watercourses in the modern world and, in particular, the scarcity of unpolluted fresh water resources."

10. Mr. KOROMA proposed that the words "which reflected" in that text should be replaced by "which was considered to reflect".

11. Mr. SOLARI TUDELA said that he would like to place on record that, in addition to the considerations set out in paragraph 18, there was also the fact that river navigation was now of lesser importance.

12. Mr. CALERO RODRIGUES said that, while he had no objection in principle to the new paragraph 18, it disturbed the balance of paragraphs 19 and 20. Also, the new paragraph 18, like paragraph 20, spoke of "general support", so there seemed to be some duplication.

13. Mr. AL-QAYSI said that he appreciated the reasons for formulating the new paragraph 18 but found the previous text easier to understand, since it sought to establish a contradistinction between navigation and other uses of international watercourses, such as uses for domestic purposes. The new text made no such contradistinction and was therefore a little ambiguous. It was particularly important to bring out the relationship between the scarcity of fresh water resources and the idea that priority must not be given to any particular use. That was not clear from the new text.

14. Mr. BARSEGOV, agreeing in general with Mr. Calero Rodrigues, said that, in his view, paragraph 19 was unnecessary and could be deleted. He also considered that paragraph 20 should simply underline that

[4] See paras. 52 *et seq.* below.

* Resumed from the 2195th meeting.

[5] *Yearbook ... 1989*, vol. II (Part Two), p. 68, footnote 150.

States must have respect for the various uses of watercourses, whether for navigation, drinking-water, irrigation or other uses. There was no need to add anything, more particularly since the new paragraph 18 stated that there was "no universal standard giving priority". With that in mind, therefore, it might be possible to align the two paragraphs.

15. Mr. NJENGA said that there was a logical continuity in paragraphs 18, 19 and 20 which he, too, thought would be affected by the new text of paragraph 18. Instead, he would propose that the words "in a well-balanced way", in the previous text of paragraph 18, be replaced by "was well balanced and", and that the word "fresh" be inserted before the words "water resources".

16. Mr. PAWLAK said that he tended to prefer the previous text of paragraph 18 to the new text. He could accept Mr. Njenga's proposals, but would further propose that the word "any", before the word "priority", be omitted and that the words "no longer" be replaced by "not always". Again, the word "different" should be replaced by "other".

17. Mr. BEESLEY said that he would like the word "unpolluted", introduced in the new text of paragraph 18, to be retained.

18. The CHAIRMAN said that the original text of paragraph 18, as amended by Mr. Njenga and Mr. Pawlak and with the word "unpolluted" incorporated, would then read:

> "There was general agreement that article 24 was well balanced and reflected the fact that the priority once assigned to navigation was not always justified in view of the many other uses of international watercourses in the modern world and, in particular, the scarcity of unpolluted fresh water resources."

19. Mr. KOROMA said that the phrase "was not always justified" did not seem appropriate.

20. Mr. McCAFFREY (Special Rapporteur) said that the text read out by the Chairman did not adequately reflect the discussion that had taken place. The word "any" had originally been included before the word "priority" to express the idea that priority might once have been assigned to navigation, as some authorities believed, but that such a rule was no longer warranted.

21. Mr. NJENGA said he thought that the Special Rapporteur was drawing a sharp distinction between the past and the present. Undeniably, until the early years of the twentieth century most countries had given priority to navigation, but that had been at a time when water had not been scarce.

22. Mr. AL-QAYSI said that priority might always have been assigned to navigation, but that position was indefensible now. The proper meaning could only be conveyed by using the words "any", "once" and "no longer".

23. Mr. GRAEFRATH said that there was no uniformity of views about the situation in the past, but that did not influence the present. The important point was that there was general support for the principle implicit in article 24.

24. Mr. BEESLEY said that the Commission's views on present and future priorities must be made clear. The agreed meaning was that such priority as might once have been assigned to navigation was no longer justified, in view of the many uses of watercourses in the modern world.

25. Mr. McCAFFREY (Special Rapporteur) proposed that, in order to reflect the comments of Mr. Al-Qaysi and Mr. Beesley, paragraph 18 should be amended to read:

> "There was general agreement that article 24 was well balanced and reflected the fact that any priority that was once assigned to navigation was no longer justified in view of the many other uses of international watercourses in the modern world and, in particular, the scarcity of unpolluted fresh water resources."

26. Mr. BARSEGOV said that he could accept that text, on the understanding that there was no rule of general international law which established priority for any particular use.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the text proposed by the Special Rapporteur for paragraph 18 (para. 25 above).

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

28. Mr. BARSEGOV said that the word "universal" should be added before the words "preferential régime", so as to distinguish between a general régime and possible regional arrangements.

29. Mr. NJENGA supported that proposal and added that there was no need to include the words "in fact".

30. Mr. KOROMA said that paragraph 19 implied that a preferential régime would be confined to the treaties cited in the Special Rapporteur's fifth report. He would prefer the sentence to read simply: "Some members doubted whether there had ever existed a universal preferential régime."

31. Mr. CALERO RODRIGUES asked what view had actually been expressed by the members referred to in paragraph 19. If they had spoken of a preferential régime deriving from treaties, the report should say so.

32. Mr. BARSEGOV said that the view expressed had been that there was no rule of general international law concerning such a preferential régime.

33. Mr. KOROMA proposed rewording the paragraph to read: "Some members doubted whether a universal rule of international law existed establishing such a preferential régime."

34. Mr. McCAFFREY (Special Rapporteur) said that paragraph 19 as worded did reflect the debate in the Commission, which had not dealt in the abstract with the question of a possible preferential régime, but rather with the treaties, especially the 1921 Barcelona Convention and Statute, cited in his fifth report.

35. Mr. TOMUSCHAT suggested that, to take account of the changes proposed by Mr. Barsegov and

Mr. Koroma, the paragraph should read: "Some members doubted whether, deriving from treaties cited in the Special Rapporteur's fifth report, there had ever existed a rule of universal international law establishing such a preferential régime."

36. Mr. EIRIKSSON (Rapporteur) said that the changes being proposed for paragraph 19 would also affect paragraph 18. The words "in fact" were linked to the word "any" in paragraph 18, reflecting the view that there had never been such a priority.

37. Mr. NJENGA said that the problem was simply one of drafting. The words "in fact" added nothing, and could logically be deleted if the word "any" were deleted in paragraph 18.

38. The CHAIRMAN suggested that paragraph 19 should be amended to read: "Some members doubted whether there had ever existed a universal preferential régime deriving from the treaties cited in the Special Rapporteur's fifth report."

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

39. Mr. KOROMA suggested adding the word "one" before "use" in the first sentence, which would then read: "General support was expressed for the underlying principle of article 24 that no one use should have priority over other uses."

It was so agreed.

40. Mr. BARSEGOV said that the text was unclear. There was no such principle; decisions on the use of watercourses were made by States.

41. Mr. CALERO RODRIGUES proposed that, to take account of Mr. Barsegov's objection, the phrase "in the absence of agreement to the contrary" should be inserted after the words "the underlying principle of article 24 that".

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraph 21

42. Mr. BARSEGOV suggested that the first sentence, if retained, should be amended to read: "Commenting specifically on *paragraph 1*, one member observed that, in his view, it would be inappropriate to lay down a rule establishing any priority, since it was for States to resolve those questions."

43. Mr. EIRIKSSON (Rapporteur) said that he preferred, for the sake of brevity, to delete the first sentence altogether.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 25

Paragraphs 22 to 25 were adopted.

Paragraph 26

44. Mr. NJENGA suggested amending the second sentence to read: "A question was raised concerning the application of the concept of equitable cost-sharing, and whether it should be limited to the field of regulation."

45. Mr. CALERO RODRIGUES pointed out that the principle of cost-sharing itself had not been questioned—merely whether it applied only to regulation.

46. Mr. NJENGA withdrew his suggestion.

Paragraph 26 was adopted.

Paragraph 27

47. Mr. KOROMA suggested that the reference to "riparian States", in the first sentence, should be replaced by "watercourse States".

48. Mr. McCAFFREY (Special Rapporteur) said that both expressions were in common use; however, he preferred the expression "watercourse States", which would obviate difficulty in the Sixth Committee of the General Assembly.

Mr. Koroma's amendment was adopted.

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted with minor drafting changes.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

49. Mr. NJENGA, noting that paragraph 31 consisted of one particularly long sentence, suggested that it be broken up into three sentences.

50. Mr. EIRIKSSON (Rapporteur) said that the paragraph would then read awkwardly.

51. Mr. McCAFFREY (Special Rapporteur), noting that there was no substantive disagreement on paragraph 31, suggested that he collaborate with Mr. Njenga and the Rapporteur in seeking an appropriate formulation.

Paragraph 31 was adopted on that understanding.

Paragraph 32

Paragraph 32 was adopted.

Draft Code of Crimes against the Peace and Security of Mankind[6] (*concluded*)* (A/CN.4/430 and Add.1,[7] A/CN.4/L.455)

[Agenda item 5]

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

Article 17 (Breach of a treaty designed to ensure international peace and security)[8] (*concluded*)

* Resumed from para. 8 above.

[6] 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.

[7] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[8] For the text discussed by the Drafting Committee, see 2196th meeting, footnote 7.

52. Mr. EIRIKSSON (Rapporteur) said that, following consultations, a number of changes were suggested in paragraph 3 of the revised text proposed for inclusion in the Commission's report, concerning draft article 17 (see para. 4 above). A footnote was required in connection with the words "The discussion in the Commission", to indicate the meetings at which the discussion had taken place; the sentence "The example of disarmament treaties was cited" should be deleted; the words "such as arms-control and disarmament treaties" should be inserted after the words "to ensure international peace and security", in the second sentence; the words "in the view of one member", in the same sentence, should be deleted; the word "serious" should be inserted before "breach", in the last sentence; and, as suggested by Mr. McCaffrey, the last sentence should be amended to read: ". . . breach of such a treaty would, by definition, endanger peace and would be of universal concern . . .".

Paragraphs 1 and 2

53. Mr. AL-QAYSI, supported by Mr. MAHIOU (Chairman of the Drafting Committee), suggested combining paragraphs 1 and 2 of the revised text. The beginning of the second sentence of paragraph 1 should be amended to read: "He indicated that the Committee had once again encountered . . .", and the beginning of paragraph 2, which would become the last sentence of paragraph 1, should be amended to read: "He further pointed out the difficulties the Drafting Committee would have . . .".

It was so agreed.

Paragraphs 1 and 2, as amended, were adopted.

Paragraph 3

54. Mr. BEESLEY said that the text of paragraph 3, which would now become paragraph 2, was acceptable, but it overstated the situation somewhat. Even a serious breach of such a treaty would not necessarily be of universal concern, and he therefore suggested amending the last sentence to read: ". . . a serious breach of such a treaty could be of universal concern . . .". He would not, however, object to the text as it stood.

55. Mr. GRAEFRATH said that he could not accept Mr. Beesley's suggestion; the only breaches concerned were those that fell under the definition set out in paragraph 2 of draft article 17, which read: "For the purposes of paragraph 1, a breach shall be considered serious where it is of such a nature as to endanger international peace and security . . ."

56. Mr. KOROMA suggested replacing the word "difference", in the first sentence, by "divergence".

57. Mr. BEESLEY, replying to Mr. Graefrath, said that there were a number of arms-control treaties, all of them important, but even a serious breach of one of them might not necessarily be a threat to peace. There was a difference between seminal treaties and secondary treaties. However, he would not insist on his suggestion.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 3 with the amendments proposed by the Rapporteur (para. 52 above) and Mr. Koroma.

It was so agreed.

Paragraph 3, as amended, was adopted.

Paragraph 4

59. Mr. BENNOUNA proposed replacing the words "criminal-law provisions", in the second sentence, by "the concept of crimes against the peace and security of mankind". The reference to "The article" in the penultimate sentence should be amended to read: "The draft article".

60. Mr. TOMUSCHAT said that the phrase "The view was furthermore expressed", at the beginning of the third sentence, implied that it was the opinion of only one member, and should therefore be amended to read: "They furthermore expressed the view".

61. Mr. KOROMA suggested replacing the words "criminal-law provisions", in the second sentence, by "provisions under the code". Amending the beginning of the third sentence to read: "Furthermore, the view was expressed . . ." would respond to the remark made by Mr. Tomuschat. Lastly, the Commission should give some indication of what it meant by the expression "fundamental questions of treaty law", in the penultimate sentence, so as to help the General Assembly to reply.

62. Mr. AL-QAYSI said that he did not support Mr. Tomuschat's suggestion for rewording the beginning of the third sentence, because it was clear from the first sentence that the view of more than one member was involved. As to the proposal to replace the words "criminal-law provisions", he preferred Mr. Bennouna's proposal to Mr. Koroma's. Lastly, Mr. Koroma's remark concerning the expression "fundamental questions of treaty law" was well taken, and perhaps some examples could be given to show what was meant.

63. Mr. EIRIKSSON (Rapporteur) said that he supported the suggestion to replace the words "criminal-law provisions" by "the concept of crimes against the peace and security of mankind" and to amend the beginning of the third sentence to read: "Furthermore, the view was expressed . . .". Agreement would still have to be reached on examples of fundamental questions of treaty law.

64. Mr. ROUCOUNAS suggested adding the following phrase after the expression "fundamental questions of treaty law" in the penultimate sentence: "for example, in the fields of validity, interpretation or effects in respect of parties or third parties".

65. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 4 with the amendments proposed by Mr. Bennouna, with the beginning of the third sentence amended to read: "Furthermore, the view was expressed . . .", as proposed by Mr. Koroma, and with the addition of a phrase along the lines suggested by Mr. Roucounas.

It was so agreed.

Paragraph 4, as amended, was adopted.

Paragraph 5

66. Mr. KOROMA suggested replacing the word "any", in the first sentence, by "the".

It was so agreed.

Paragraph 5, as amended, was adopted.

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the revised text proposed (para. 4 above) for subsection 3 of section B of chapter II of its report, as amended.

It was so agreed.

68. Mr. BENNOUNA asked whether, in document A/CN.4/L.455 containing the draft articles adopted by the Drafting Committee, all reference to draft article 17 would be deleted.

69. Mr. GRAEFRATH said that he was against changing document A/CN.4/L.455, because otherwise it would not be clear what the whole discussion had been about. The document in question had been presented to the Commission and had formed the basis for discussion. The reference to draft article 17 therein should therefore be retained.

70. Mr. EIRIKSSON (Rapporteur) said that the next step would be a new document containing draft section D of chapter II of the Commission's report, setting out the articles adopted by the Drafting Committee, and subsequently adopted by the Commission, at the present session, together with draft commentaries thereto. Since draft article 17 had not been adopted, it would not appear in that document.

71. Mr. CALERO RODRIGUES agreed with the Rapporteur that there was no reason to include in the report a text that had not been adopted. But if no mention were made of draft article 17, should the other articles not be renumbered or an explanation be provided as to why an article was missing?

72. Mr. MAHIOU (Chairman of the Drafting Committee) said that Mr. Bennouna might be confusing the document containing the draft report of the Commission and document A/CN.4/L.455. Perhaps article 18 should have no number for the time being. The Secretariat could propose later how to resolve what was basically a technical problem.

73. Mr. BENNOUNA said that a mistake had been made in presenting an article that had not been adopted by the Drafting Committee. It would be confusing for the reader to find references to draft article 17 in the summary records, but none in the Commission's report. He would have preferred to call article 17 article "[X]" and to renumber article 18 as article 17. A revised version of document A/CN.4/L.455, with article 17 deleted because it had not been adopted by the Drafting Committee, should be issued.

74. Mr. THIAM (Special Rapporteur) said that such matters could be left to the Secretariat, which was best qualified to deal with them.

75. Mr. BEESLEY said that Mr. Bennouna's point was perfectly correct both legally and procedurally. There was a missing link in the chain of causation: the Commission would be giving the impression that the Special Rapporteur's withdrawal of his proposal for article 17 was unimportant.

76. Mr. BARSEGOV appealed to members not to prolong the discussion and complicate matters by debating procedural and editing questions. Such matters as the numbering and placing of articles could well be left to the Special Rapporteur and the Secretariat.

77. He wished to stress that everything in the statements made by the Chairman of the Drafting Committee accurately reflected the agreed views in that Committee, as indeed all members of the Drafting Committee could confirm.

78. Mr. KOROMA said that time was not on the Commission's side. He proposed that the Chairman should declare the discussion closed, on the understanding that the problems raised would be dealt with by the Secretariat and the Special Rapporteur.

79. Mr. MAHIOU (Chairman of the Drafting Committee) explained that the text of draft article 17 appearing in document A/CN.4/L.455 had not been adopted by the Drafting Committee, but the same was not true of the title. It was perfectly appropriate to retain that title, placed as it was between square brackets, without the actual content of the article. Opinions could, of course, differ about the advisability of the procedure adopted by the Drafting Committee, yet the Committee had agreed on it in the present instance.

80. The CHAIRMAN declared the discussion closed, on the understanding that the points which had been raised would be settled by the Special Rapporteur and the Rapporteur, with the help of the Secretariat.

It was so agreed.

81. Mr. BENNOUNA said that the procedure adopted was most unusual: there was no precedent for a whole article being placed between square brackets. He trusted that the Rapporteur would find some solution for the presentation of the matter that would serve to explain to readers of the Commission's report, among other things, the gap between article 16 and article 18.

Draft report of the Commission on the work of its forty-second session (*continued*)*

CHAPTER IV. ***The law of the non-navigational uses of international watercourses*** (continued) (A/CN.4/L.449 and Add.1 and 2)

B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.449)

Paragraph 33

82. Mr. SOLARI TUDELA said that all the Spanish-speaking members of the Commission were agreed on the need to correct the term *ordenación* in the Spanish text of the draft report. The proper expression was *gestión administrativa*.

83. The CHAIRMAN said that the Secretariat would arrange for the correction to be made throughout the report.

84. Mr. KOROMA asked for clarification from the Special Rapporteur on the expression "system of waters", used in the last sentence of paragraph 33.

* Resumed from para. 51 above.

85. Mr. McCAFFREY (Special Rapporteur) said that the expression had been used in connection with State practice and not with respect to the Commission's draft articles. Nevertheless, he could agree to the words "protection of the system of waters" being amended to read: "protection of international watercourse systems".

It was so agreed.

Paragraph 33, as amended, was adopted.

Paragraph 34

86. Mr. EIRIKSSON (Rapporteur) said that the word "exchanges", in the third sentence, should be placed in the singular and suggested that the end of the fourth sentence be amended to read: ". . . whether the article was absolutely necessary".

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted with a minor drafting change.

Paragraphs 36 to 61

Paragraphs 36 to 61 were adopted.

Paragraph 62

87. Mr. KOROMA suggested that the words "resolved on the private level", in the second sentence, should be amended to read: "resolved on the domestic level".

88. Mr. McCAFFREY (Special Rapporteur) proposed that the phrase in question be amended to read: "resolved through civil-law procedures".

It was so agreed.

89. Mr. Sreenivasa RAO drew attention to the statement in the last sentence that "the principles covered by the first six articles were summarized in paragraph 38 of the report". Since the report in question, i.e. the Special Rapporteur's sixth report, would not be before the Sixth Committee of the General Assembly, some elaboration was required.

90. Mr. TOMUSCHAT said that, if paragraph 38 of the sixth report was not unduly long, it could perhaps be reproduced in a footnote.

91. Mr. McCAFFREY (Special Rapporteur) proposed, as the simplest solution, that the last sentence of paragraph 62 be deleted.

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 69

Paragraphs 63 to 69 were adopted.

Paragraph 16 (*concluded*)*

92. Mr. EIRIKSSON (Rapporteur) submitted the following rewording for paragraph 16, which had been left in abeyance: "In his summing-up, the Special Rapporteur assured the Commission that, in submitting draft articles, it had always been his intention to remain within the framework-agreement approach."

93. Mr. PAWLAK said that he agreed to that reformulation.

The Rapporteur's amendment was adopted.

Paragraph 16, as amended, was adopted.

Section B, as amended, was adopted.

D. Points on which comments are invited (A/CN.4/L.449)

Paragraph 70

Paragraph 70 was adopted.

Section D was adopted.

94. Mr. EIRIKSSON (Rapporteur), further to a comment by Mr. RAZAFINDRALAMBO, said that in the final text of the report the footnotes would be in their proper places in all the language versions.

95. Mr. NJENGA, supported by Mr. KOROMA and Mr. Sreenivasa RAO, said that paragraph 70, just adopted, drew special attention to the draft articles contained in annex I, on implementation, submitted in the Special Rapporteur's sixth report. Actually, only some of those provisions had been referred to the Drafting Committee. Others had been withdrawn by the Special Rapporteur. It would be most unfortunate if the Sixth Committee were to be invited to discuss articles which had not been approved by the Commission.

96. Mr. McCAFFREY (Special Rapporteur) said that the text of paragraph 70 had been drafted in consultation with the Rapporteur. It was quite appropriate to ask the Sixth Committee for its comments on the draft articles in annex I, on implementation, because those articles would be considered by the Commission at its next session. As to the articles which the Commission had already adopted, comments by the Sixth Committee would not be useful at the current stage. Of course, when the first reading of the draft articles as a whole was completed, they would be referred to Governments for their comments and observations.

97. Mr. PAWLAK said that it was very appropriate to request the views of the Sixth Committee on the draft articles in question. After all, the General Assembly had repeatedly urged the Commission to request comments on specific points rather than general issues. What the Special Rapporteur had done was precisely to request comments on specific questions. He urged support for the Special Rapporteur and stressed that paragraph 70 should be retained as it stood.

98. Mr. CALERO RODRIGUES said that the General Assembly expected precisely requests for comments on specific issues. He could not understand the reluctance of some members of the Commission to act in accordance with the General Assembly's instructions. To the best of his knowledge, none of the draft articles in annex I had been withdrawn.

99. The CHAIRMAN pointed out that paragraph 70 had already been adopted without change. The views expressed by some members on its content would, of course, appear in the summary record of the meeting.

The meeting rose at 6.20 p.m.

* Resumed from the 2195th meeting, para. 52.