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Summary record of the 2134th meeting

Topic:
<multiple topics>

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

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

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

PARTS VII AND VIII OF THE DRAFT ARTICLES:

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

ARTICLE 25 (Regulation of international watercourses)¹⁰
(concluded)

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

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

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

26. Accordingly, article 24, paragraph 1, provided that neither navigation nor any other use enjoyed an inherent

priority over other uses. The Commission could, of course, consider indicating, if not priorities, an order of preference in that paragraph. There was general recognition that protection of the environment and of the quality of water was assuming a particular urgency and the Commission might wish, for example, to provide some indication in the article that domestic and agricultural uses should not be foreclosed by other uses.

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

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

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

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

The meeting rose at 11 a.m.

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

2134th MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

* Resumed from the 2126th meeting.

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

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

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

Co-operation with other bodies (concluded)*

[Agenda item 10]

STATEMENT BY THE OBSERVER
FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Leoro Franco, Observer for the Inter-American Juridical Committee, to address the Commission.
2. Mr. LEORO FRANCO (Observer for the Inter-American Juridical Committee) said that it was once again a privilege for him to address the Commission on behalf of the Inter-American Juridical Committee: the Commission's outstanding work in the progressive development and codification of international law had gained world-wide recognition and would help to place international relations on a firm foundation of fairness and justice.
3. The Committee placed great value on the regular exchange of observers with the Commission and it was to be hoped that that exchange would be maintained, enabling the two bodies to keep abreast of each other's activities. Owing to the financial difficulties of its parent body, the Organization of American States, the Committee's activities had been curtailed by a half. It had had to give up one of its two annual sessions and hold only one session in August. As a result of those circumstances beyond its control, the Committee's work had experienced some inevitable delays.
4. In addition to the close ties of co-operation between the two bodies, valuable personal relations had been established between the members of the Commission and the Committee. Thus, like other past chairmen of the Commission, Mr. Díaz González had been invited to lecture in the course on international law which the Committee held annually for young professors of international law, judges and foreign-service officials from various American countries. He expressed the hope that the present Chairman of the Commission, whose writings he had had occasion to read and admire, would agree to give a lecture during the course to be held in August 1989.
5. In 1988, the Committee had dealt with 7 of the 12 items on its agenda. The first was that of guidelines relating to extradition in cases of drug trafficking. In April 1986, an Inter-American Conference had been held at Rio de Janeiro to consider the alarming problem of the production and consumption of, and illicit traffic in, narcotic drugs and psychotropic substances. The programme of action adopted by the conference contained numerous suggestions and recommendations to the various OAS organs, including the Inter-American Juridical Committee. In turn, the OAS General Assembly had on 15 November 1986 adopted a declaration condemning drug trafficking as an international crime.
6. The Committee and its Rapporteur, Mr. Manuel Vieira, had prepared a draft resolution for submission to the OAS

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

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

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

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

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

* Resumed from the 2128th meeting.

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

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

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

13. The fourth item examined by the Committee was that of the draft additional protocol to the 1969 American Convention on Human Rights (Pact of San José). The purpose of the protocol was to deal with the protection of economic, social and cultural rights, to which the Pact of San José devoted only one article: article 26. The Rapporteur for the topic, Mr. Emilio Rabasa, had submitted a valuable study on economic, social and cultural rights, as well as on the rights of peoples, such as the right to solidarity. In his report, Mr. Rabasa had proposed possible mechanisms for the promotion and protection of the rights in question. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, with

quasi-judicial and judicial functions respectively, already existed to defend civil and political rights. Moreover, mechanisms were available under the International Covenant on Economic, Social and Cultural Rights. Bearing those facts in mind, the Rapporteur had suggested that the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture should—through *ad hoc* commissions—receive reports from member States on the application and development of the rights in question. Further to the examination of those reports, recommendations could be made for more effective application of the human rights involved. The two bodies would in turn report to the OAS General Assembly, the Inter-American Commission on Human Rights and agencies interested in certain matters, such as the Pan American Health Organization. The Committee had requested the Rapporteur to continue his work on the topic.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT BY THE OBSERVER
FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

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

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

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

28. The European Ministers of Justice had met in formal conference at Lisbon in 1988 and at an informal meeting at The Hague in 1989. One of the topics discussed at the Conference had been that of penal and criminological issues arising from the propagation of contagious diseases, including AIDS. The Ministers of Justice had placed emphasis on preventive measures and research, taking the view that criminal law in that field should intervene only as a last resort. Principles for a common policy, relating particularly to measures to be taken in prisons, were to be elaborated by the European Committee on Crime Problems. Other topics considered had been that of sexual exploitation,

pornography, prostitution and traffic in children and young adults, and also that of the primacy of the interests of the child in the sphere of private law. The informal meeting, for its part, had considered the question of legal problems arising from the use of modern systems of payment, particularly that of liability and proof in cases of electronic transfers of funds, and the issue of co-operation between the public and private sectors in crime-control measures.

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

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

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

32. A draft agreement on responsibility for the consideration of applications for asylum had been submitted to the Committee of Ministers in 1988. However, important problems still had to be settled before that instrument could be opened for signature by member States.
33. Lastly, the committee of experts on medical research on humans had prepared a draft recommendation on the wholly new topic of bio-ethics, with the object of inviting member States to enact legislation or take other appropriate steps to give legal force to the principles annexed to the recommendation.
34. The pioneering activities of the Council of Europe in problems of criminal law had included the adoption of a recommendation concerning the liability of enterprises for offences committed in the exercise of their activities and the publication of a report on extraterritorial jurisdiction in penal matters, containing proposals designed to prevent conflicts of jurisdiction and to resolve allied difficulties.
35. The committee of experts on computer crime had continued its work, which involved analysis of the various types of computer crime (fraud, sabotage, hacking, etc.); drawing up an obligatory list and an optional list of computer-related offences which could or should be incorporated in national legislation in order to harmonize European law in that area; and examining the extent to which the European conventions on various aspects of criminal law made it possible to combat such new forms of crime in Europe and, if necessary, working out proposals to supplement those conventions. The committee had formulated principles for incorporation in the criminal legislation of member States, thereby filling a gap in existing laws and ensuring maximum concordance.
36. The select committee of experts on sexual exploitation, pornography, prostitution and the traffic in children and young adults had continued to collect data on those problems by using official statistics and research findings. It would elaborate a draft recommendation and consider the advisability of formulating a European convention on the prevention and punishment of those phenomena. The problems involved offered an opportunity for co-operation between the countries of Europe, and with other countries as well.
37. A select committee of experts on international co-operation in the detection, seizure and confiscation of criminal proceeds had begun its work in 1988. It was studying methods of depriving offenders of the proceeds of their crimes, particularly drug trafficking, and thereby making criminal activities unprofitable. A preliminary draft European convention on the subject was being elaborated, in close co-operation with the United Nations.
38. The Council of Europe, through its many activities in the legal field, was thus contributing to the evolution of law on an international scale. Although its work was done in the European context, nearly all of its achievements—its conventions, recommendations, publications and so on—were open and available to States, institutions and individuals outside the territories of its 23 member States. The Council hoped in that way to serve the entire world, so that it might become a safer, happier and more democratic place, a place more respectful of human rights and of the rule of law.
39. The CHAIRMAN said that the experience of the European Committee on Legal Co-operation in drafting legislation on liability was of direct relevance to the Commission's work. It was of particular interest that the Committee's approach emphasized aspects of liability relating to civil law, rather than State responsibility. The Commission had a long tradition of fruitful co-operation with the Committee and attached great importance to that co-operation.
40. Mr. REUTER, speaking on behalf of members of the Commission from the Western European and other States, said that the Commission had always been highly appreciative of the work of the European Committee on Legal Co-operation and was all the more so now, when the fact that Europe was destined to become a continent without borders had been thrown into relief by a number of recent events, including the profound changes and new spirit of openness in Eastern Europe. After all, what were large confederations like the United States of America and Argentina if not proof of how a European confederation might be made to work?
41. Europe was now an area of demographic depression: it operated only with the help of manpower from foreign countries, workers who initially wanted merely to make some money and return home but then grew accustomed to their host country and wished to remain. They were often prepared to take on the responsibility that went with residence in a country, yet were not always met with corresponding generosity from the country's citizens. The account just given of the European Committee's activities was highly relevant to those problems, and he thanked the Committee's Observer for it.
42. Mr. DÍAZ GONZÁLEZ, speaking also on behalf of members of the Commission from Latin-American countries, said that, as the Commission's designated participant for the current year in the work of the European Committee on Legal Co-operation, he had listened with special interest to the statement by the Committee's Observer. Many of the subjects mentioned were closely related to matters under study by the Commission. Another similarity between the two bodies was that they were both celebrating their fortieth anniversary in 1989. The Committee, like the Commission, had done highly commendable work, and it was to be hoped that it would continue in its endeavours.
43. Referring to the Committee's activities relating to refugees and émigrés, he said that the situation now was the opposite of what it had been in the past. Once it had been Latin-American States that had received numerous émigrés from Europe: Italian immigrants, for example, had helped Argentina and Venezuela prosper. Now the children of European refugees who had settled in Latin America were returning to their parents' native lands.
44. He thanked the Observer for the European Committee and expressed the hope that the co-ordination between the two bodies would continue as a means of promoting respect for the law and for democratic principles throughout the world. A Europe without borders might ultimately lead to the achievement of a world without borders.
45. Mr. BARSEGOV, speaking on behalf of members of the Commission from the Eastern European countries, thanked the Observer for the European Committee on Legal

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

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

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

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

Draft Code of Crimes against the Peace and Security of Mankind² (continued)* (A/CN.4/411,³ A/CN.4/419 and Add.1,⁴ A/CN.4/L.433)

[Agenda item 5]

DRAFT ARTICLES PROPOSED
BY THE DRAFTING COMMITTEE

ARTICLES 13, 14 AND 15

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

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

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

52. The Drafting Committee had intended to take up all those articles at the present session and thereby complete the part on crimes against peace. Yet despite its efforts, it had not attained that goal. It could propose only three articles: article 13 (Threat of aggression), article 14 (Intervention) and article 15 (Colonial domination and other forms of alien domination). The Drafting Committee had also considered incorporating an additional article dealing with the preparation of aggression, an issue that had been discussed by the Commission in 1988.⁶ Mr. Shi and Mr. Barsegov had presented a proposal suggesting the possible content of an article on the planning and preparation of aggression. After very preliminary consideration, the Drafting Committee had reached the conclusion that the matter would require more extensive examination, which would not be possible at the present session. It had therefore decided to take up that proposal at the forty-second session, in 1990. In a spirit of co-operation, the authors of the proposal had not objected to that decision.

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

* Resumed from the 2107th meeting.

² The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18.

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

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

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

⁶ *Ibid.*, pp. 58-59, paras. 224-228.

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

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

ARTICLE 13 (Threat of aggression)

55. The text proposed by the Drafting Committee for article 13⁹ read:

Article 13. Threat of aggression

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

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

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

58. With regard to the distinction between an actual threat of aggression and mere verbal excesses, the phrase "which would give good reason to the Government of a State to believe" had been included to provide an objective criterion, in so far as possible, in determining whether a particular course of conduct or expression of intention amounted to a

threat of aggression. Such a determination would naturally depend on the circumstances of each case and could only be made *post facto* by the judge in the light of those circumstances. The Drafting Committee none the less believed that the criterion of reasonableness served a useful purpose in that context.

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

60. While he agreed with the purpose of the article, which was to treat threat of aggression as a separate crime, he considered that the phrase "or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" was not satisfactory. It introduced a subjective element, so that, in the case of measures other than declarations, communications and demonstrations of force, a threat of aggression would apparently be a crime only if the State which was the object of such a threat believed that aggression against it was being prepared. The determination of the constituent elements of a crime, however, was a matter for the judge, subject to the principle *nullum crimen nulla poena sine lege*. Threat of aggression, as defined in article 13 was not to be confused with so-called indirect aggression and ideological aggression, involving hostile propaganda attacks of such magnitude as to endanger the security of the State concerned, nor with the concept of economic coercion as embodied in article 32 of the Charter of Economic Rights and Duties of States¹⁰ and reflected in article 19 of the Charter of OAS.¹¹

61. Furthermore, although the draft code was designed to apply to individuals, States should not escape responsibility for criminal acts committed by individuals acting on their behalf. It sufficed in that respect to recall article 5, paragraph 2, of the 1974 Definition of Aggression¹² and, more particularly, article 52 of the 1969 Vienna Convention on the Law of Treaties,¹³ whereby:

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

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

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

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

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

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

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

¹² See footnote 8 above.

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

¹⁴ See footnote 7 above.

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

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

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

66. Mr. FRANCIS, agreeing with Mr. McCaffrey that article 13 was vague, said that not only article 13 but also article 14 should be fleshed out somewhat to take account of the relevant elements of the 1974 Definition of Aggression¹⁵ and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁶ As had already been noted, one concept which was fundamental to both provisions was that of acts which constituted a threat to international peace and security. Since a threat of aggression was, from the very outset, directed against international peace and security, he would suggest that, to put teeth into article 13, the phrase “which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State” should be replaced by “which would constitute a threat to international peace and security”.

67. Mr. MAHIU said that, by comparison with article 2, paragraph (2), of the 1954 draft code, article 13 undeniably represented progress, for it was important to pin-point in precise terms those elements—declarations, communi-

cations and demonstrations of force—which would enable a threat of aggression to be identified. The words “or any other measures” had, of course, been included to avoid too narrow a definition, but were qualified by the requirement that there must be good reason to believe that aggression was being seriously contemplated. One point of concern, however, was that, under the terms of the article, it would be left to the Government of a State which believed that aggression was being contemplated against it to determine whether there was a threat of aggression. As Mr. McCaffrey had observed, it was the intent of the State that was the subject of such a threat, rather than that of the State that made the threat, which seemed to matter according to the present wording. That was a point the Chairman of the Drafting Committee might wish to clarify.

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

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

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

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

¹⁵ See footnote 8 above.

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

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

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

The meeting rose at 1 p.m.

2135th MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/411,² A/CN.4/419 and Add.1,³ A/CN.4/L.433)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 13 (Threat of aggression)⁴ (concluded)

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

2. Mr. AL-QAYSI said that article 13 was necessary, since it completed article 12, which the Commission had provisionally adopted at the previous session⁵ and which defined aggression as a crime against the peace and security of mankind. The proposed text was perhaps the best solution the Drafting Committee could produce. Admittedly, the concept of "threat" was not easy to define, but in the

present case it was a matter of defining "threat of aggression", a far more specific expression.

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

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

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

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

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

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

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

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

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

² Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

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

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