Document:-

A/CN.4/SR.2136

Summary record of the 2136th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1989, **vol. I**

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

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

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

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

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

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

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

Article 14 was adopted.[19]

The meeting rose at 1.05 p.m.

[17] See footnote 6 above.

[18] See footnote 7 above.

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

2136th MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

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

[Agenda item 5]

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

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

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

Article 15. Colonial domination and other forms of alien domination

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

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

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

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

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

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

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

[5] See 2096th meeting, footnote 19.

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

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

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

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

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

...

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] See 2096th meeting, footnote 19.

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

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

Article 15 was adopted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Draft article 16

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

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

The meeting rose at 11.30 a.m.

2137th MEETING

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

Chairman: Mr. Bernhard GRAEFRATH

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

Bicentenary of the French Revolution

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

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

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

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

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

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

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

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