Document:-

A/CN.4/SR.2197

Summary record of the 2197th 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:-

1990, vol. I

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

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

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

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

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

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

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

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

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

It was so agreed.

The meeting rose at 6.20 p.m.

2197th MEETING

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

Chairman: Mr. Jiuyong SHI

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

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

[Agenda item 5]

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

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

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

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

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

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

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

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

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

2. A mercenary is any person who:

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

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

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

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

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

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

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

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

(ii) undermining the territorial integrity of a State;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 18 was adopted.

ARTICLE X (Illicit traffic in narcotic drugs)

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

Article X. Illicit traffic in narcotic drugs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Article X was adopted.

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

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

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

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

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

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

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

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

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

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

'4. A breach of the obligations of a State under a treaty designed to ensure international peace and security, in particular by means of:

'(i) prohibition of armaments, disarmament, or restriction or limitation of armaments;

'(ii) restrictions on military training or on strategic structures or any other restrictions of the same character.

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

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

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

(*Continued on next page.*)

(*Footnote 3 continued.*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

2198th MEETING

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

Chairman: Mr. Jiuyong SHI

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

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

[Agenda item 5]

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

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

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

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

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

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

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

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

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

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

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

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

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

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