

Document:-
A/CN.4/SR.2198

Summary record of the 2198th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1990, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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 Mankind¹ (continued) (A/CN.4/430 and Add.1,² A/CN.4/L.455)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

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

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

2. Mr. ROUCOUNAS said that he was prepared to agree to a text along the lines suggested by Mr. Al-Qaysi at the previous meeting (para. 54), but wished to clarify his position. The problem the Commission had faced for two years involved a matter that was basically one of discrimination and, in historical terms, had in fact been superseded. The Commission had not considered the fact that the primary rule went beyond treaty law. There were, of course, a number of things, such as genocide, racial discrimination, aggression and war crimes, which the international community had agreed to treat as crimes. The Commission, however, instead of also seeking to discern a rule of general

international law in the field of disarmament, had fallen back on the notion of the relativity of treaties. That was why he had opposed the whole exercise from the outset. Furthermore, there were a host of problems involving treaty law, such as the validity of a treaty in time, the interpretation of treaties, the effects of treaties with regard to third parties, and the legal relations between the parties to treaties, all of which fell within the framework not of international criminal law, but of the law of treaties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*⁴

7. Mr. GRAEFRATH said that he wished to make a general remark concerning the Commission's report. An important question raised several times in the Drafting Committee had not been reflected in the articles adopted, nor had it been adequately explained in the report by the Chairman of the Drafting Committee. That question was the attribution of crimes to individuals. In its report to the General Assembly on its forty-first session, the Commission had stated: ". . . The question of the attribution of . . . crimes to individuals will be dealt with later in the framework of a general

provision."⁵ No such provision had been formulated by the Drafting Committee at the present session. Articles 16, 18 and X did contain certain elements relating to the individuals who might commit the crimes in question, but that did not solve the general problem of determining who could commit a crime against peace, nor did it suffice to determine the subjective element which must involve a wilful act and exclude negligence.

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

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

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

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

Paragraph 18 (*concluded*)

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

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

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

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

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

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

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

* Resumed from the 2195th meeting.

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

⁴ See paras. 52 *et seq.* below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

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

It was so agreed.

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

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

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraph 21

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

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

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 25

Paragraphs 22 to 25 were adopted.

Paragraph 26

44. Mr. NJENGA suggested amending the second sentence to read: "A question was raised concerning the application of the concept of equitable cost-sharing,

and whether it should be limited to the field of regulation."

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

46. Mr. NJENGA withdrew his suggestion.

Paragraph 26 was adopted.

Paragraph 27

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

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

Mr. Koroma's amendment was adopted.

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted with minor drafting changes.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

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

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

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

Paragraph 31 was adopted on that understanding.

Paragraph 32

Paragraph 32 was adopted.

Draft Code of Crimes against the Peace and Security of Mankind⁶ (concluded)* (A/CN.4/430 and Add.1,⁷ A/CN.4/L.455)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

ARTICLE 17 (Breach of a treaty designed to ensure international peace and security)⁸ (concluded)

* Resumed from para. 8 above.

⁶ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

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

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

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

Paragraphs 1 and 2

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

It was so agreed.

Paragraphs 1 and 2, as amended, were adopted.

Paragraph 3

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

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

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

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

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 3 with the amendments

proposed by the Rapporteur (para. 52 above) and Mr. Koroma.

It was so agreed.

Paragraph 3, as amended, was adopted.

Paragraph 4

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

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

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

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

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

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

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

It was so agreed.

Paragraph 4, as amended, was adopted.

Paragraph 5

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

It was so agreed.

Paragraph 5, as amended, was adopted.

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

It was so agreed.

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

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

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

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

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

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

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

75. Mr. BEESLEY said that Mr. Bennouna's point was perfectly correct both legally and procedurally. There was a missing link in the chain of causation: the

Commission would be giving the impression that the Special Rapporteur's withdrawal of his proposal for article 17 was unimportant.

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

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

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

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

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

It was so agreed.

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

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

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

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

Paragraph 33

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

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

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

* Resumed from para. 51 above.

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

It was so agreed.

Paragraph 33, as amended, was adopted.

Paragraph 34

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

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted with a minor drafting change.

Paragraphs 36 to 61

Paragraphs 36 to 61 were adopted.

Paragraph 62

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

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

It was so agreed.

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

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

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

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 69

Paragraphs 63 to 69 were adopted.

Paragraph 16 (concluded)*

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

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

The Rapporteur's amendment was adopted.

Paragraph 16, as amended, was adopted.

Section B, as amended, was adopted.

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

Paragraph 70

Paragraph 70 was adopted.

Section D was adopted.

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

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

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

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

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

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

The meeting rose at 6.20 p.m.

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