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Summary record of the 2061st meeting

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

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2061st MEETING

Tuesday, 14 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] *(continued)* (A/CN.4/404,[2] A/CN.4/411,[3] A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *(concluded)*

ARTICLE 11 (Acts constituting crimes against peace)[4] *(concluded)*

1. Mr. AL-KHASAWNEH, commending the Special Rapporteur for the elegance and compactness of his sixth report (A/CN.4/411) and the wealth of sources on which it drew, said that the approach the Special Rapporteur had adopted might be the only way to tackle a topic which touched everyone's deepest convictions and in which doctrinal certainty was not necessarily a virtue. The Commission thus had to face up to its responsibilities and give the Special Rapporteur clear-cut answers to the questions he had raised. It had to consider the topic in theoretical terms and in terms of the formulation of the draft articles.

2. In theoretical terms, the first problem was that of the purpose of the Commission's work. As Mr. Graefrath (2055th meeting) had rightly pointed out, the elaboration of the draft code served a high moral, legal and political purpose. It could not be claimed that the Commission's work served no purpose because States lacked the political will to implement the future code. It was true that no one, or practically no one, had been prosecuted for a crime against the peace and security of mankind since the Second World War. It was, however, precisely because crimes of that kind were being committed every day that a concerted legal response by the international community was required.

3. It was also true that there were few texts which could serve as a basis for the Commission's codification work, apart from the penal codes of members' countries, whose significance had been stressed by Mr. Tomuschat (2056th meeting) and Mr. Arangio-Ruiz (2060th meeting). The authors of the draft code did not, however, necessarily have to be criminal-law experts. The drafters of the 1954 code had not all been specialists in criminal law, and the Commission, in its present composition, would certainly be able to perform the task entrusted to it. The situation had been no different in the case of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft[5] or in that of the legal instruments relating to international terrorism and the taking of hostages. There was, moreover, little in national penal codes to define the latter crime and even less by way of precedents, even though the problem itself was not a new one. But that had not prevented the General Assembly from adopting the 1979 International Convention against the Taking of Hostages,[6] thus establishing a penal régime in that regard. Despite what Mr. Arangio-Ruiz thought, the problems arising from the relationship between international criminal law and internal criminal law were not insurmountable: with political will and some measure of boldness they could be overcome.

4. The question of the relationship between the draft code and internal law should not discourage the Commission, for, regardless of the legal régime or the internal law to which reference was being made, some criminal-law concepts were so widely accepted as to have become "settled law". That was the case of the individuality of punishment and the presumption of innocence. Those principles were now firmly established—in human rights matters, for example—in instruments that had been accepted by a very large number of States. To be sure, emphasis on those universally accepted criminal-law concepts varied from one legal system to another, but the problems created by such disparities were not insurmountable either.

5. The Commission's real problem lay in the opposition between the positivist and the natural schools of law. In other words, should the characterization of an act as a crime against the peace and security of mankind be based on the maxim *nullum crimen sine lege*—regardless of how the term *lex* was interpreted—or on the fact that the act in question was a *malum per se*? The answer to that question would have a direct bearing on the drafting of the code and on the approach to be adopted by the Commission. He would opt for the natural-law approach. That would, of course, give the Commission the formidable privilege of defining *malum per se*. It should, however, not be forgotten that the tragic events leading to the trial of the major criminals of the Second World War had taken place in a context of extreme legal positivism and that, when the international community had decided to punish those criminals, it had been guided more by considerations of justice than of law *stricto sensu*. The Commission would thus also have the advantage of being in a better position to appreciate the relevance of

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[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 . . . 1987*, vol. II (Part One).

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

[4] For the text, see 2053rd meeting, para. 1.

[5] United Nations, *Treaty Series*, vol. 704, p. 219.

[6] United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 124.

such crimes as *apartheid*, colonialism and mercenarism, which had not been included in the 1954 draft code but should be covered in the future instrument.

6. In addition to the relationship between law and justice, the second major theoretical problem raised by the drafting of the code was that of the relationship between peace and justice. Mr. Tomuschat had rightly pointed out that world problems could not be solved by judges and that the preponderant role of diplomacy had to be maintained. He had also cited the example of an aggressor who prolonged a war in order to delay the proceedings to which he might be liable at the end of the conflict. If the argument were taken to its logical conclusion, however, it might lead to absurd results, for would it be acceptable to allow a few criminals to go unpunished in order to put an end to the suffering of the many? That argument would not be very different from maintaining, as Leibniz had done, that evil was a necessary part of the general good. Mankind did not in fact live in the best of all possible worlds and judges should have an opportunity to correct it, if only because they, unlike diplomats, had rarely had such an opportunity. In any event, Mr. Tomuschat had put his finger on a problem that would trouble anyone interested in upholding justice and, at the same time, maintaining peace.

7. The problem was that peace and justice seemed to be irreconcilable. That irreconcilability, which was the result of differences in nature—since justice was a logical concept, while peace was a compromise required by human nature and by circumstances—could be expressed at many levels of abstraction and some would even go so far as to say that the two concepts were mutually exclusive. However, from the practical point of view, which was the Commission's main concern, the problem could be stated in the following terms: in which cases and to what extent should justice, as embodied in the draft code, give way to the pragmatic, but effective, solutions available to diplomacy? Should negotiations be held with terrorists who, under the draft code, would be perpetrators of crimes against peace? In the event of aggression, could justice be done only when there was a victor and a vanquished? Those questions were not easy ones and the only justification for asking them was to draw attention to the limits of human reason and moral law. The answer was not to provide in the code for flexibility to accommodate the realities of political life or, in other words, to set aside moral considerations: that would suppress the problem, but would not solve it. In that connection, he recalled that, in the early stages of Islamic law—and therefore well before Leibniz—jurists had adopted the principle *Dar'o al-shar al-a'dham bil al-shar al-asghar* (درء الشر الأعظم بالشر الأصغر), which referred to "the permissibility of averting a greater evil through a smaller one". The application of that principle was, however, very strictly regulated.

8. With regard to the relationship between peace and justice, it could therefore be concluded that the need to keep a role for diplomacy did not obviate the need to complete the draft code; that justice was the main reason for the Commission's present work; that it might be difficult for it to reconcile such different concepts as peace and justice; that the most difficult aspect of its work was that it was trying to draft an instrument of criminal law; and that, even though it might be theoretically possible to complete such an instrument, that would involve difficult moral choices.

9. That question of moral choices raised the general problem of subjectivity. The Special Rapporteur had already referred to that problem in his third report[7] and the reason for such subjectivity was obvious: the degree of reprobation elicited in the public conscience by a particular act could never be uniform. According to the Special Rapporteur, that problem could be solved by linking the seriousness of a crime to the interests and property protected by law. Such interests and property were, however, easier to identify in an internal-law setting than in an international one. International law was thoroughly steeped in subjectivity, as the discussion had shown. Mr. Reuter (2055th meeting), for example, had recalled that, during the discussion of the draft articles which had formed the basis for the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, some members of the Commission had been ready to understand, if not to condone, the motives of terrorists; Mr. Beesley (2059th meeting) had said that objectivity with regard to mercenarism was easier for those whose countries were not plagued by it; Mr. Sepúlveda Gutiérrez (*ibid.*) had pointed out that mercenarism was often glorified; and, as was well known, colonialism had in the past been regarded as a civilizing mission.

10. The last example provided a good illustration of the problem of subjectivity: should colonialism be included in the draft code because of its belated condemnation by the international community or because the Commission was convinced that it was the most brutal form of the denial of the right of peoples to self-determination and that it was a *malum per se*? In his own view, the second reason was the correct one. Any other approach would be tantamount to admitting that justice was possible only after a phenomenon had become part of history. Crimes such as colonialism, *apartheid* and mercenarism should, however, not be condemned *a posteriori*.

11. The drafting of the code also raised the more technical problem of definitions and classification. As was well known, when the drafters of a penal code made no attempt to define the crimes included in it and rated criminal offences by the severity of the punishment imposed or simply by providing a list, the same problems arose in connection with classification as with definition. Worse still, it was impossible to draw up an exhaustive list, for the simple reason that life rarely followed the same course as the law. The Special Rapporteur had used both methods—definition and enumeration—in so far as legal reasoning would allow. Mr. Graefrath had nevertheless pointed out that, in order to define a crime, all the forms it could take did not have to be described: it was enough to identify its chief elements according to a principle that Grotius had established on the basis of what Cicero had said in a passage which he himself read out.

[7] See *Yearbook . . . 1985*, vol. II (Part One), p. 69, document A/CN.4/387, para. 47.

12. He reminded the Commission that, in dealing with the theoretical problems raised by the draft code, it was not starting with a clean slate, since there were many instruments that had a bearing on the subject-matter under consideration. It could even be said that the Commission was engaged in a codification of codifications. The compendium of relevant international instruments prepared by the Secretariat[8] was, however, a disparate collection of texts that could hardly serve as a basis for codification. It included texts adopted by some regional conferences, a pre-war treaty that had never entered into force and a regional instrument that had become part of the United Nations system. Also available to the Commission were the 1954 draft code—now somewhat outdated—a few widely accepted treaties and the judgment of the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17). Those texts obviously did not all have the same weight. In any event, criminal responsibility was too important to be decided on the basis of obscure interpretations of political resolutions and instruments intended for other purposes.

13. With regard to draft article 11 as submitted by the Special Rapporteur, he said that more careful thought should be given to the classification of the acts under consideration as crimes against peace, war crimes or crimes against humanity. Many crimes belonged to two of those categories, if not all three. It was also becoming increasingly difficult to draw a distinction between a state of war and a state of peace. Perhaps the classification could be dispensed with, since the distinction for the purpose of criminal prosecution would ultimately depend on the consequences of each crime.

14. During the discussion, it had been suggested that each of the crimes listed in draft article 11 should form the subject of a separate article. That was a problem of form that could be left to the Drafting Committee. The explanatory note in paragraph 1 (*a*) (ii) could be transferred to the commentary without affecting the proposed definition. On a final point of drafting, there seemed to be some doubt about the terms "intervention" and "interference", but they were practically synonymous; in Arabic, at least, a single word was used for both.

15. For the reasons he has already given, he supported the idea of including preparation and planning of aggression as separate crimes against the peace and security of mankind. The difficulties to which the Special Rapporteur had referred in that connection could be obviated if the Commission's work led to the establishment of an international criminal court.

16. The crime of annexation was unfortunately not a historical phenomenon, as shown by the criminals who had recently reinstituted it and who had been referred to in Security Council and General Assembly resolutions. For that reason and also because annexation could be accomplished by threat, especially when a belligerent occupant was actually in possession of a territory, it had to be dealt with as a separate offence.

17. Intervention in the internal or external affairs of States created infinite problems, because States conducted their relations in an infinite number of ways. The passage from lawful and perhaps desirable intervention to wrongful intervention was often imperceptible. Fortunately, however, the element of coercion established a dividing line. In any event, the crime of intervention should be formulated in the strictest possible terms.

18. The crime of terrorism called for a number of comments. First, the list of terrorist acts contained in subparagraph (*b*) of the second alternative of paragraph 3 of article 11 should be updated by including acts against airports and maritime safety, so as to take account of the adoption in early 1988, at Montreal and at Rome, of international instruments on those questions.[9] Moreover, as Mr. Ogiso (2057th meeting) had pointed out, consideration also had to be given to the poisoning of drinking-water supplies and acts against nuclear installations. The words "any form of violence directed against persons who enjoy international protection or diplomatic immunity", in subparagraph (*b*) (iii), had to be given further consideration, for it was hard to see how a fight with a diplomat could constitute a crime against humanity.

19. Paragraph 4, relating to breaches of the obligations of a State under a treaty, would be more readily understandable in the context of a balance of power such as the one that had existed between the two world wars. In formulating a provision that would be composed of the two elements of such treaty obligations and the maintenance of international peace and security, however, it was important not to put States which were not parties to a treaty designed to ensure international peace and security in a more advantageous position than States which were.

20. The two alternatives of paragraph 6, on colonialism, could be combined by adding the words "including colonialism" at the end of the second alternative. Although most third-world jurists had reason to view the right to self-determination in terms of a metropolitan-colonial relationship, it should not be forgotten that it was a right to which all peoples were entitled. Although the exercise of that right often led to the establishment of States, that did not mean that the right would then be extinguished and that it could not be exercised again.

21. An *Ad Hoc* Committee of the General Assembly was working on a definition of mercenarism, but the Commission did not have to wait for its conclusions, just as it did not have to refrain from considering any subject relating to the collective security system simply because an *Ad Hoc* Committee had been set up to deal with the strengthening of the provisions of the Charter of the United Nations.

22. In conclusion, he said that the definitions and classifications the Commission was formulating were

[8] A/CN.4/368 and Add.1.

[9] Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, signed at Montreal on 24 February 1988 (*International Legal Materials* (Washington, D.C.), vol. XXVII, No. 3 (1988), p. 627); and Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, both signed at Rome on 10 March 1988 (*ibid.*, p. 668).

imperfect; its sources were disparate and often conflicting; the subjectivity of criminal law was acute; and considerations of justice left little room for flexibility. Those were real problems that could be discussed by jurists endlessly. They were, however, not insoluble problems and the search for justice was bound to succeed.

23. Mr. Sreenivasa RAO said that the Special Rapporteur's sixth report (A/CN.4/411) introduced several important ideas and elements that ought to enable the Commission to complete the drafting of the code without further delay. At present, he would refer only to a few of the many issues that had been raised and would consider them from his personal point of view.

24. It had been agreed that the draft code should cover only crimes that were serious enough to endanger international peace and security. In that context, crimes against the peace and security of mankind were not very different from the threats to international peace and security referred to in the Charter of the United Nations. Thus, as Mr. Beesley (2055th meeting) had noted, the code should make a constructive contribution to the system of collective security under the Charter.

25. In characterizing particular crimes, there was no need to draw fine distinctions between crimes against peace, crimes against humanity and war crimes, which were all interrelated in terms of effect and differed only in terms of content. While the Commission should draw upon the 1954 draft code and not overlook crimes such as aggression, intervention and colonial or alien domination, it should also include more recent crimes that were now quite common, such as the use or threat of use of nuclear weapons, terrorism and mercenarism. In dealing with the two latter crimes, the Commission, which had its own mandate, did not have to await the outcome of the work being done by other United Nations bodies, although it did, of course, have to keep up with such developments; indeed, the decisions it adopted on those questions might be helpful to those other bodies.

26. A crime eligible for prosecution under the code did not have to be attributable to a State, even though State involvement in the commission of the crime might be of concern for the purposes of the code. Of late, there had been an increase in crimes against the peace and security of States and their peoples and institutions committed by individuals and organizations that seemed to have their own identity and not to be associated with any State. Frequently, too, terrorists or mercenaries interfered in the internal affairs of a State while other States vociferously denied any direct or indirect involvement in such acts. For the sake of effectiveness, the Commission should therefore not exclude from the scope of the draft crimes against the peace and security of mankind committed or attempted by private individuals or organizations. The draft code should, of course, also focus on agents or authorities of a State who committed crimes, even though State responsibility —criminal or otherwise—was a separate matter not within its scope.

27. While it would be desirable to set up an international criminal court, the preparation of the draft code should not be hampered because that goal might not be achievable in the near future. There were other, more immediate forms of implementation, such as recognition of the principle of universal jurisdiction, with an obligation for every State to prosecute or extradite persons guilty of a crime under the code. A number of recently concluded treaties, such as the Extradition Treaty between Canada and India of 6 February 1987, the Regional Convention on Suppression of Terrorism signed by the member States of the South Asian Association for Regional Co-operation on 4 November 1987 and other similar instruments already mentioned by several members of the Commission, provided examples of decentralized systems of jurisdiction which relied on national tribunals to deal with offences relating to terrorism and mercenarism. As matters now stood, and in the absence of willingness on the part of States to accept the jurisdiction of the ICJ or of an international criminal court, the determination of crimes of aggression and intervention would continue to be the responsibility of the Security Council and, naturally, of the General Assembly. There was thus no need to make the completion of the Commission's mandate to draft the code conditional on the question of the establishment of an international criminal court. The Commission should, however, affirm the importance of such an institution in order to avoid the sort of valid criticism made against the Nürnberg and Tokyo Tribunals set up only to try the war crimes committed by the vanquished Powers.

28. Even in the absence of neutral, independent international machinery, the draft code would not lose any of its value. Like other instruments of international law, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,[10] the Manila Declaration on the Peaceful Settlement of International Disputes[11] and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,[12] the code would serve the cause of peace and security. The clarity with which it reflected the common values and interests of the international community and the precision with which it was drafted would help to enhance its usefulness to all decision makers, national and international alike.

29. Once the Commission had decided to include a crime such as terrorism or mercenarism in the code, it did not have to list too many examples by way of illustration or definition. Moreover, an example need not necessarily be chosen on the basis of the gravity of the act in question, although it was desirable that it should be. It had to be remembered that even a minor act constituting a crime against the peace and security of mankind could have far-reaching consequences. If the code was to have a truly deterrent effect, it must not overlook any conduct, however minor its consequences, that was recognized as constituting a crime against the peace and security of mankind.

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

[11] General Assembly resolution 37/10 of 15 November 1982, annex.

[12] General Assembly resolution 42/22 of 18 November 1987, annex.

30. Turning to draft article 11 and, first of all, to the question of aggression, he said that the 1974 Definition of Aggression[13] was politically the most acceptable one and should be adopted by the Commission for the purposes of the code. Paragraph 1 of article 11 should be drafted in such a way that responsibility for the act in question would not be attributable solely to a State. In other words, the paragraph should be drafted in neutral terms so that it would cover acts committed by States, but also those committed by other entities, the essential criterion being the use or threat of use of force or the existence of a threat to the peace and security of mankind. While it was true that acts of aggression of the type most relevant to the code would normally be committed by States or by State authorities, other crimes included in the code could be committed by private individuals and an introductory clause drafted in neutral terms would avoid the need to define the term "State" in the article itself. The explanatory note in paragraph 1 (*a*) (ii) might therefore be better placed in the commentary.

31. For the reasons already given by several members, the threat of aggression deserved to be included in the code. A threat could sometimes accomplish much the same purpose as an act of aggression itself. In his view, the concept of threat included the preparation and planning of aggression. He would, however, have no objection if the Commission investigated the matter further to see whether the preparation of aggression should be listed as a separate crime, even though he shared many of the doubts expressed by other members as to the complexities involved in a definitional exercise to differentiate between intention of aggression and defensive preparedness.

32. With regard to the question of interference in the affairs of another State, the Commission might use the same term—"intervention"—in English and in French. As the ICJ had indicated, interference could take many forms, some of which were perfectly in order. However, intervention which threatened the territorial integrity, independence or sovereignty of a State could also take several forms and did not always have to involve the direct use of armed force. In that connection, the Commission might refer to the Agreement on the Principles of Mutual Relations, in Particular of Non-Interference and Non-Intervention, signed by Afghanistan and Pakistan at Geneva on 14 April 1988,[14] which referred to several international instruments setting forth the principle of non-interference and non-intervention and listed 13 obligations that were to be complied with for the purpose of implementing that principle (art. II). He thus agreed that intervention should be included in the draft code, but considered that it should be defined in such a way as to cover various forms of interference which were prohibited under international law and constituted a threat to the peace and security of mankind. That task could be entrusted to the Drafting Committee.

33. The code should also deal separately with annexation, with the sending of armed bands into the territory of another State and with mercenarism. It was true that those acts were subsumed under the 1974 Definition of Aggression, but, even if their consequences were not the same as those of an act of aggression, they were sufficiently grave and deserved to be included in the code in their own right.

34. Terrorism was a characteristic feature of modern times and should be included in the code separately from intervention. There was a growing body of international instruments defining the most serious terrorist acts. Terrorism had many objectives, but the most important was to threaten the authority of the State through the systematic killing of innocent civilians, arson, destruction of public and private property and attempts on the lives of heads of State or Government and other agents of the State. Whether the objective was a ransom, the release of other terrorists or the recognition of a new State, acts of terrorism undermined the authority of the State and threatened its territorial integrity even when they were committed by private individuals or groups without the support of any other State.

35. Many international agreements provided for inter-State co-operation with regard to terrorism. For example, a provision of the 1987 Extradition Treaty between Canada and India had been reproduced in the Regional Convention on Suppression of Terrorism adopted by the South Asian Association for Regional Co-operation (see para. 27 above). The Treaty contained a very detailed list of terrorist acts which had been based on the list contained in the 1977 European Convention on the Suppression of Terrorism.[15] It covered crimes within the meaning of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, crimes within the meaning of any convention to which the two contracting States were parties and under which they were bound to prosecute or extradite persons responsible for terrorist acts and, lastly, crimes connected with terrorism. All those elements had been reproduced by the Special Rapporteur in the second alternative of paragraph 3 of draft article 11. However, the list in the Extradition Treaty also included acts that might usefully be mentioned in any list of terrorist acts, namely murder, grievous bodily harm, kidnapping, the taking of hostages, crimes causing serious damage to property or disruption of public services and crimes involving the use of weapons, explosives or dangerous substances. The list was so detailed that it could, for example, apply to the poisoning of watercourses. It also covered any attempt or conspiracy to commit one of the crimes mentioned, as well as the giving of advice to any person on how to commit those crimes. Together with a general definition of terrorism, the list would usefully supplement the draft code.

36. He agreed with the view that the draft code should not deal with all breaches—without distinction—of the obligations of a State under an arms-control or disarma-

[13] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[14] *Official Records of the Security Council, Forty-third Year, Supplement for April, May and June 1988*, document S/19835.

[15] See 2057th meeting, footnote 11.

ment treaty. Only the most serious breaches having major consequences for the peace and security of mankind should be covered; he had in mind, for example, the first use by a State of nuclear weapons.

37. As to colonial domination, he concurred with the views expressed by Mr. Francis (2054th and 2056th meetings), Mr. Koroma (2054th meeting) and Mr. Njenga (2057th meeting) and noted that a consensus appeared to be taking shape in favour of combining elements of the two alternatives of paragraph 6 of article 11, so that neither old nor new forms of colonialism would remain outside the scope of the code.

38. The principle of the right of peoples to self-determination formed the basis for many other rights and duties under international law. There was no need to discuss the principle at length in the context of the draft code. No reference to it could, however, ignore its distinct facets, namely, at the international level, the struggle of colonial peoples for freedom, sovereignty and national independence and, at the internal level, the achievement of freedom of expression, association and organization. The latter aspect of human rights was a legitimate part of the right to self-determination and, as the result of a voluntary and peaceful consensual process, it could, in some cases, find expression in the founding of a new State. On the other hand, to invoke the right to self-determination in order to threaten the territorial integrity and independence of a State and to seek to achieve that objective through outside interference, violence, terrorist acts or other acts prohibited under international law would constitute a serious crime against the peace and security of mankind. It would therefore be improper and even ironical to argue, as had been attempted, in favour of such a right in the name of promoting the objectives of the draft code, and he suggested that the Commission should refrain from dealing directly with the right to self-determination in the instrument it was drafting.

39. The question of mercenarism should be dealt with in the draft code and, in that connection, the Commission could draw on the work being done by other bodies. As already stated, however, it should proceed with its task without waiting for the *Ad Hoc* Committee of the General Assembly to complete its work, which was to draft a convention focusing on the prevention of mercenarism. The *Ad Hoc* Committee needed a definition of mercenarism that would take account of the recent developments in the phenomenon in situations other than international armed conflict. In that connection, it should be noted that some delegations in the *Ad Hoc* Committee had taken the view that article 47 of Additional Protocol I[16] to the 1949 Geneva Conventions was not relevant and did not meet the future convention's requirements. The definition of the criminal responsibility of States which had failed to take effective measures to combat mercenarism was another aspect of the problem with which the *Ad Hoc* Committee had to deal. There, the point at issue was the punishment not only of mercenaries themselves, but also of the organizations that recruited, financed and trained them. The questions of judicial guarantees, co-operation among States—whether in connection with the exchange of information, extradition, prosecution or the adoption of uniform legislative measures—and the drafting of appropriate international instruments were some of the ideas that should be considered in that regard. The Commission should take account of those trends and affirm that, when mercenarism constituted a threat or involved the use of violence, when, through the activities of organized armed bands, it interfered in the internal affairs of a State, or when its purpose was the suppression of national liberation movements recognized by the United Nations, it constituted a crime against the peace and security of mankind and was a violation of the fundamental rights and principles provided for in Articles 1 and 2 of the Charter of the United Nations. The most important point in a definition of mercenarism was to stress the element of private gain rather than the fact that a mercenary was or was not a national of a party to the conflict or that his salary was or was not comparable to that of combatants of equal rank in the regular armed forces. What mattered was to recognize that the mercenary sought to serve his personal ends, whoever employed him.

40. In conclusion, he said that, if the code were drafted along those lines, it would be of great value to all countries by reminding States, and especially the most powerful among them, that they must refrain from committing the acts in question and destabilizing other States. Only with the elimination of such crimes would the weak and developing countries be able to achieve freedom and organize themselves economically, politically, socially and culturally in the interests of the human dignity, peace and well-being of their peoples.

41. Mr. ROUCOUNAS, commenting first on intervention, noted that the term lacked precision, since it embraced direct and indirect, and lawful and unlawful, intervention, as well as interference. The main point, however, was that contemporary international law proscribed intervention in both the internal and the external affairs of States. Any interference of a significant kind by one State—usually the more powerful—in the decisions of another State—usually the weaker—amounted to an infringement of the latter's sovereignty. Furthermore, the legal threshold beyond which it was possible to speak of intervention had often led commentators to state the principle of non-intervention in relatively abstract terms, and then to rely on specific cases to determine whether it had occurred.

42. In 1965, the General Assembly, in response to an initiative by the Latin-American Group, had declared intervention to be inadmissible in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.[17] That principle had since been confirmed in other texts, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[18] and, more recently, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of

[16] See 2054th meeting, footnote 9.

[17] General Assembly resolution 2131 (XX) of 21 December 1965.

[18] See footnote 10 above.

Force in International Relations.[19] A virtually identical form of wording was used in the various texts: paragraph 7 of the latter Declaration, for example, read:

7. States have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.

That standard formula should be read together with paragraphs 5, 6 and 8 of the same Declaration.

43. In the final analysis, what was prohibited under contemporary international law was interference that prevented the free exercise of the sovereign rights of a State, namely of the rights recognized by international law as falling exclusively within national jurisdiction. That explained the need for a precise definition of intervention in the draft code. Account also had to be taken of the fact that the principle of non-intervention covered in part other principles, such as respect for territorial sovereignty and the prohibition of the use of force. He noted in that connection that, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17), the ICJ had held that certain activities could seem to constitute intervention without doing so. Accordingly, paragraph 3 of draft article 11 should be more narrowly worded.

44. The same remarks applied to paragraphs 4 and 5 of article 11. There, however, the matter was more complicated, for it fell, in some respects, within the 1974 Definition of Aggression[20] and also touched upon the law of treaties. The Commission should not forget that its contribution to the disarmament process would depend on the extent to which it encouraged States to seek general, lasting and comprehensive disarmament by way of treaty. He therefore agreed with Mr. Sreenivasa Rao that only the most serious violations of treaty obligations should come within the scope of the draft code. That part of the code should, moreover, be considered together with the provisions of the Charter of the United Nations concerning the natural right of self-defence and the prohibition of the use of force. He was pleased to note in that connection that many members shared his view that threat was a fundamental element to be taken into consideration in the code. If a State was faced with a potential aggressor which used threat, or armed force, against it, that State had the right of self-defence and it was the possibility that it might make use of that right to protect its sovereignty and territorial integrity that discouraged the potential aggressor. The Commission should therefore make it quite clear, in the course of its work, that it was taking account of self-defence.

45. Mr. BARSEGOV said that the particularly rich and dynamic discussion on the draft code which had taken place at the current session prompted questions that called for detailed consideration. For the past few days, the Commission had, for instance, been considerind whether violations of the principle of the self-determination of peoples and nations should be included in the list of crimes against peace. There was no need to recall the place of that fundamental principle in international life or its *jus cogens* character, both of which were confirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[21] and in a number of other international instruments, including the Helsinki Final Act.[22] It was now said that the right of peoples to self-determination was a right that belonged to the third generation of human rights, and its exercise was rightly regarded as a prerequisite for the realization of those rights. In any event, the emergence of that principle had been the result of the efforts of mankind as a whole and it was no exaggeration to say that all peoples had contributed to it.

46. As the representative of the Soviet socialist legal system, he took pride in the role the USSR had played in developing that democratic and humanist idea and affirming it in international relations. Even before the October Revolution, Lenin had elaborated the economic, political and legal aspects of the principle of self-determination. As stated in the theses of the Central Committee of the Communist Party, the Soviet State had performed outstanding work of historic significance in affirming that principle, both in relations between the peoples of which the USSR was composed and in relations between States at the international level. The principle had, moreover, provided the basis in international law for decolonization, and the countries which had become independent had in turn played a vital role in its further elaboration and consolidation as one of the fundamentals of contemporary international law and international relations. Since reality was infinitely complex, the best norms could obviously not prevent the occurrence of certain specific problems which had to be taken into account: in the Soviet Union, problems in relations between nationalities were a direct legacy of Stalinism. Those problems would be settled democratically as part of the process of *perestroika.*

47. As stated in the United Nations special study on the right to self-determination,[23] the principle of self-determination exercised an influence on all, or virtually all, areas of international law. The question as to the need to include violations of that principle in the list of crimes against peace had been raised in the Commission. The suggestion was obviously legitimate. In his view, in order to define the relationship between the principle of self-determination and the future code, it was necessary first to have a good understanding of what was covered by self-determination. Mr. Arangio-Ruiz, in his two detailed statements (2053rd and 2060th meetings), had developed the idea—which he himself could only endorse—that self-determination had two aspects. The first and, as it were, external aspect, which could be defined in Lenin's words, "With whom do we want to live?", concerned the determination of frontiers on the basis of the free expression of the will of a territory's population. The second, internal aspect con-

[19] See footnote 12 above.

[20] See footnote 13 above.

[21] See footnote 18 above.

[22] See 2053rd meeting, footnote 15.

[23] *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, study prepared by A. Cristescu (United Nations publication, Sales No. E.80.XIV.3).

cerned the free choice by the people of each country of their social, cultural, ideological and other institutions. That idea went back a long time: in his book entitled "Territory in international law", published in 1958, he had quoted a commentary on the Charter of the United Nations whose authors had first adopted and then, during the cold war, dropped that interpretation of the principle of self-determination. In Soviet doctrine of international law, that interpretation was axiomatic. The two aspects had to be borne in mind in deciding where, and in what form, violations of the principle of self-determination could be included in the draft code.

48. Violations of the principle of self-determination took different forms and were specific in nature. It was therefore necessary to determine which violations gave rise to criminal responsibility under the draft code as crimes against the peace and security of mankind. The list of crimes against peace in draft article 11 as submitted by the Special Rapporteur in his sixth report (A/CN.4/411) already included a number of extremely serious violations of the principle of self-determination, such as colonialism, foreign domination, annexation, intervention and the use or threat of force against independence, etc. In particular, there was an obvious link between the external aspect of the principle and annexation, which it was proposed to include in the draft code and which already appeared in the 1974 Definition of Aggression.[24] In Soviet doctrine, the key element in the definition of annexation formulated by Lenin was precisely the violation of the right of peoples freely to decide their own destiny. That idea was also to be found in various normative instruments, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and the Helsinki Final Act, as well as in the decisions of the ICJ.

49. Since the question of the relationship between self-determination and the principle of territorial integrity was already settled in international law, and in the texts he had cited in particular, he would merely point out that, although both principles had their own content, they none the less interacted with one another and were not mutually exclusive. For example, the principle of self-determination excluded neither the possibility of union within multinational States, nor the creation of two States out of a single nationality, nor the union of a people or part of a people with another people within a common State, nor, finally, secession. Indeed, the territorial integrity of the State should be founded on the self-determination of peoples. Similarly, the self-determination of peoples united within the framework of a national or multinational State was not possible if the principle of territorial integrity, which protected them against any external interference, was not observed. The Soviet Constitution was based on those principles and established no hierarchical order between them.

50. Intervention, too, was linked to violation of the principle of self-determination, but more to its internal aspect, since the purpose of intervention was to prevent a people from freely choosing its economic and cultural destiny and way of life.

[24] See footnote 13 above.

51. If the Commission adopted the viewpoint of those members who considered that violation of the principle of self-determination was not confined to the crimes listed in the draft code, it would have to proceed from definitions of acts constituting crimes that were not artificial and far-fetched but actually existed, being recognized in other instruments, and in particular in the decisions of the Nürnberg Tribunal. Failing that, it might enter into the realm of relations between peoples and Governments and come into direct conflict with the principle of non-intervention, which had a place in the draft code.

52. Lastly, he considered that, when defining the crimes to be included in the draft code, the Commission should spell out the link between certain crimes and the principle of self-determination. He therefore proposed that a kind of saving clause be added to draft article 11 to indicate that violations of the principle of self-determination were related to the various crimes covered by the code.

53. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

54. Mr. THIAM (Special Rapporteur) thanked all the members of the Commission for their comments, which he would take fully into account. The present topic was like a capricious and elusive animal and the Commission had to beware of all its traps and tricks, which included abstraction and generalities; vague and ambiguous concepts, such as self-determination, which were borrowed from political discourse and therefore defied analysis or codification; and the over-ambitiousness to which Utopian reverie could lead.

55. Those were the reasons why he had suggested at the very start that the Commission should concern itself with specific problems and delimit the scope of the topic *ratione materiae* by including only the most serious crimes—those so odious and barbarous that they affected the very foundations of human civilization—and *ratione personae* by taking account only of the criminal responsibility of the individual, the responsibility of the State remaining for the moment purely hypothetical. The distinction between private individuals and authorities of the State could be left aside, since the principle of the criminal responsibility of individuals covered all eventualities, whether the individual had acted as a private citizen or as an authority of the State. The text would only be needlessly overburdened if the words "An individual who . . ." were repeated in each article: once the principle—the fundamental principle, as Mr. Al-Khasawneh had pointed out—of the criminal responsibility of the individual had been laid down, nothing more needed to be added.

56. Some members of the Commission, for example Mr. Calero Rodrigues (2053rd meeting), had questioned whether the text of the 1974 Definition of Aggression had to be reproduced in the provision on aggression and had expressed a preference for dealing with each of the acts constituting aggression in separate articles. In his own view, such an approach would not be logical, since

the Commission had waited 30 years for a definition of aggression to be adopted before continuing its work on the draft code. The Definition now existed and it must be duly taken into account. Like many members of the Commission, moreover, he believed the combination of a general definition with a list of acts constituting aggression was entirely justified: since the topic was a relatively new one, it was appropriate to illustrate the definition by specific acts, in keeping with the practice in criminal law.

57. Mr. Reuter (2054th meeting) and Mr. Mahiou (2060th meeting) had raised another question: whether, for the purposes of the code, there had to be a finding by the Security Council that an act of aggression had been committed. Opinions differed on that point. Mr. Beesley (2055th meeting) took the view that the court which had jurisdiction should be left free to institute proceedings, even if there had been no finding of aggression by the Security Council, while Mr. Arangio-Ruiz (2060th meeting) held the opposite view. Stated in different terms, the problem was whether action by a court of law, which was—by definition—independent, should be subordinated to the decision of a political body. He believed that, if the question were answered in the affirmative, any attempt to characterize aggression as a crime under the draft code might just as well be abandoned. In most of the cases brought before it, the Security Council either was unable expressly to determine that an act of aggression had been committed because one of its permanent members exercised its right of veto, or it refrained from doing so for political reasons. As Mr. Al-Khasawneh had pointed out, the legal sphere must be separated from the political.

58. The question had also been raised as to whether national courts should have jurisdiction in cases involving acts of aggression. Clearly, if the court before which such a case was brought was in the State which had been the victim of the act of aggression, its ruling could hardly be impartial. In that light, Mr. Beesley's proposal (2059th meeting, para. 30) for the establishment of a mixed court, comprising judges from a number of States, should be given further consideration.

59. He was aware that all members of the Commission were in favour of the inclusion of preparation of aggression in the draft code, but he had raised the question because doctrine was not consistent on that point. At Nürnberg, the United States Judge Francis Biddle had taken the view that preparation of aggression should not be treated as a crime. The matter was a complex one indeed, as shown by the example given by Mr. Barboza (2056th meeting) of an act of aggression prepared and carried out by two different individuals or two different groups. Should preparation of aggression then be construed as a form of complicity? The problem then was that the concept of complicity did not have the same scope under all legal systems. If preparation of aggression was to be included in the draft code, it would be necessary, as Mr. Yankov (2058th meeting) had pointed out, to indicate which acts constituted aggression, if only to ensure that it could not serve as a pretext for counter-aggression. Similarly, should a State which, after having prepared to commit aggression, decided, for its own reasons, not to carry out the act be prosecuted? Those might well be questions of fact that would have to be left to the judge of the competent court to decide in each particular case.

60. He agreed that the term "threat" was used differently in paragraph 2 of draft article 11 than in Article 2, paragraph 4, of the Charter of the United Nations, but thought that the Charter nevertheless covered threat in the sense of a word or an act aimed at exercising coercion. The question as to where threat ended and preparation began, for the purposes of the draft code, was an extremely delicate one, even though it did appear that the threat of aggression, as a form of pressure, could be distinguished from preparation. That was, in any event, another question of specific fact that would have to be decided by the competent court in each particular case.

61. He agreed with Mr. Roucounas (2057th meeting) that, under the draft code, the commission of an act of annexation must not be made contingent upon the use of force: history showed that annexation could be achieved through threats, pressure and other means not requiring the use of force.

62. As to intervention in the affairs of another State, it had only been for the purposes of the discussion that he had drawn a distinction between lawful and unlawful intervention, as the ICJ had done in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17), and it would be noted that the distinction had not been drawn in draft article 11 itself. He agreed with Mr. Díaz González and Mr. Sepúlveda Gutiérrez (2059th meeting) that it would be difficult to restrict the content of the concept of intervention to armed intervention, as Mr. McCaffrey (2054th meeting) would like. The term "coercion" which he used in the first alternative of paragraph 3 of article 11 did, in fact, have some merit.

63. Although the members of the Commission all agreed that terrorism should be included among the crimes covered by the draft code, the text he had proposed had been criticized on two counts. The first criticism, which had been formulated by Mr. Mahiou, among others, was that the text reproduced the wording of an instrument adopted long ago, the 1937 Convention for the Prevention and Punishment of Terrorism. In his own view, that criticism was not justified, first because the 1937 Convention covered nearly all possible cases and even the means that might be used to commit terrorist acts, and secondly because he had taken care to supplement its provisions to take account of new forms of terrorism. The second criticism was that the text he had proposed applied to acts such as damage to public property that were not serious enough to constitute crimes under the draft code. In his view, it was not the magnitude of the harm, but the complicity, involvement or participation of a State which should determine that an act would be characterized as terroristic. As Mr. Bennouna (2057th meeting) had pointed out, the involvement of a State was the decisive criterion. In his third report on the present topic, he had made the following comment with regard to international terrorism:

. . . It is characterized and given an international dimension by State participation in its conception, inspiration or execution. . . .

. . .

For the purposes of the present draft, any definition of terrorism must highlight its international character, which is linked to the nature of the targets, in this case States. . . .[25]

Acts of terrorism committed by private individuals were covered by the draft code only if a State was implicated as an accessory, participant or accomplice; otherwise, they were covered by ordinary law.

64. A distinction could not be drawn between "good" and "bad" terrorism. Although there might be cases, such as national liberation struggles, in which terrorism was intended to achieve lawful ends, it was the lawfulness of the means used that counted for the purposes of the draft code. Terrorism *per se*, which usually struck innocent victims, could not be justified by any cause, however legitimate.

65. Replying to Mr. Reuter (2056th meeting) and Mr. Ogiso (2057th meeting), who had advocated applying the criterion of gravity to breaches of the obligations of States under treaties designed to ensure international peace and security, he said that the element of gravity was inherent in the very commission of such breaches. In such instances as well, however, questions of fact would have to be decided. As Mr. Tomuschat (2056th meeting) had pointed out, no one would reproach a State for reducing the size of its arsenal, even if, in so doing, it was going against the terms of a disarmament treaty. He would have no objection if paragraphs 4 and 5 of draft article 11 were combined: he had separated them because the first reproduced almost verbatim a provision contained in the 1954 draft code, while the second dealt with new situations.

66. Members of the Commission were divided into three camps in their views on colonial domination: Mr. Tomuschat, Mr. Sreenivasa Rao, Mr. Njenga and Mr. Razafindralambo preferred the first alternative of paragraph 6 of article 11; Mr. Ogiso, Mr. Shi, Mr. Sepúlveda Gutiérrez and Mr. Hayes preferred the second; and Mr. Reuter, Mr. Francis, Mr. Bennouna, Mr. Barsegov and Mr. Díaz González believed that the two alternatives should be combined. He would not have any objection to the latter approach so long as two separate paragraphs were retained: even if it was now part of history, colonial domination had affected a great many countries, and on those grounds it deserved to be covered in a separate paragraph.

67. The question of self-determination had been raised in connection with the provision on colonial domination. In his view, "self-determination" was a term that referred to a principle and, as such, it had no place in a criminal-law text providing for penalties. Because that term had so many connotations, it could only hamper progress on the drafting of the code, which dealt with self-determination in international relations—in other words, with non-intervention in the internal affairs of States—but not with the right to self-determination of peoples within States. As Mr. Francis (2054th meeting), Mr. Njenga (2057th meeting) and Mr. Koroma (2060th meeting) had pointed out, there would be enormous problems if internal situations were covered: the African countries, in particular, would be unable to accept such an approach, as they had established the principle of the unalterability of frontiers in order to combat centrifugal tendencies caused by the existence of so many different ethnic groups.

68. Turning to the concept of preparation of aggression, which Mr. Graefrath (2055th meeting) had asked to have included in the draft code, he said he believed that it was too early to take a decision on that point. He had dealt with the question in this third report,[26] in analysing the concept of conspiracy, which, he had noted, involved the idea of collective responsibility, which was far from being accepted by all legal systems. The Nürnberg Tribunal had applied the concept to crimes against peace, but had refused to apply it to crimes against humanity and war crimes. The Commission should wait until it had considered crimes against humanity before taking a stand on the matter.

69. Mr. Mahiou's proposal that the expulsion of populations from their territories should be treated as a crime was an interesting one, but he was not sure whether such expulsion was a crime against peace or a crime against humanity. The idea could certainly be taken up at the next session, during the consideration of crimes against humanity.

70. Lastly, the Drafting Committee should take account of all the drafting suggestions that had been made.

71. Mr. KOROMA said that, although it was unfortunate that he had been unable to speak before the Special Rapporteur had summed up the discussion, he had no fundamental disagreement with the Special Rapporteur, who had in fact referred to most of the points he himself had intended to raise. The discussion might have been more productive if each of the crimes had been considered separately, but members had still been able to make whatever comments they had deemed necessary. Like many others, he would have preferred, for historical and other reasons, that annexation be dealt with as a separate crime: the Special Rapporteur appeared to have forgotten to comment on that suggestion in the statement he had just made.

72. The productive debate, ranging over problems such as the use of force, aggression, massive violations of human rights and the denial of the right of peoples to self-determination, which characterized the current international situation, had shown how relevant the topic was and had made it clear that the Commission should continue its work on the draft code.

73. Mr. THIAM (Special Rapporteur) said he had indicated that annexation would be covered by a separate provision.

74. The CHAIRMAN said that differences of opinion on draft article 11 related exclusively to form and not to content and he therefore suggested that the text, together with the comments made by members of the Commission and by the Special Rapporteur in his

[25] *Yearbook . . . 1985*, vol. II (Part One), pp. 77-79, document A/CN.4/387, paras. 126 and 142.

[26] *Ibid.*, pp. 73-75, paras. 93-105.

summing-up of the discussion, be referred to the Drafting Committee. If there were no objections, he would take it that the Commission agreed to refer draft article 11 to the Drafting Committee.

It was so agreed.[27]

75. Mr. McCAFFREY, recalling that the Commission had decided in principle not to refer draft articles to the Drafting Committee prematurely, said that he had some reservations about the advisability of referring to the Committee the provisions of draft article 11 relating to mercenarism and terrorism, as well as paragraphs 4 and 5.

76. The CHAIRMAN said that the Drafting Committee would take Mr. McCaffrey's reservations into account.

The meeting rose at 1.05 p.m.

[27] See draft articles 11 and 12 as proposed by the Drafting Committee (2084th meeting, paras. 68 *et seq.*, and 2085th meeting, paras. 23 *et seq.*).

2062nd MEETING

Wednesday, 15 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

1. The CHAIRMAN announced that, in the week of 6 to 10 June 1988, the Commission had used 100 per cent of the conference servicing time allotted to it.

The law of the non-navigational uses of international watercourses (*continued*)* (A/CN.4/406 and Add.1 and 2,[1] A/CN.4/412 and Add.1 and 2,[2] A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLES 16 [17] TO 18 [19]

2. The CHAIRMAN invited the Special Rapporteur to introduce chapter III of his fourth report (A/CN.4/412 and Add.1 and 2), containing draft articles 16 [17], 17 [18] and 18 [19],[3] which read:

PART V. ENVIRONMENTAL PROTECTION, POLLUTION AND RELATED MATTERS

Article 16 [17]. Pollution of international watercourse[s] [systems]

1. As used in these articles, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct and which produces effects detrimental to human health or safety, to the use of the waters for any beneficial purpose or to the conservation or protection of the environment.

2. Watercourse States shall not cause or permit the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system].

3. At the request of any watercourse State, the watercourse States concerned shall consult with a view to preparing and approving lists of substances or species the introduction of which into the waters of the international watercourse [system] is to be prohibited, limited, investigated or monitored, as appropriate.

Article 17 [18]. Protection of the environment of international watercourse[s] [systems]

1. Watercourse States shall, individually and in co-operation, take all reasonable measures to protect the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas, from impairment, degradation or destruction, or serious danger thereof, due to activities within their territories.

2. Watercourse States shall, individually or jointly and on an equitable basis, take all measures necessary, including preventive, corrective and control measures, to protect the marine environment, including estuarine areas and marine life, from any impairment, degradation or destruction, or serious danger thereof, occasioned through an international watercourse [system].

Article 18 [19]. Pollution or environmental emergencies

1. As used in this article, "pollution or environmental emergency" means any situation affecting an international watercourse [system] which poses a serious and immediate threat to health, life, property or water resources.

2. If a condition or incident affecting an international watercourse [system] results in a pollution or environmental emergency, the watercourse State within whose territory the condition or incident has occurred shall forthwith notify all potentially affected watercourse States, as well as any competent international organization, of the emergency and provide them with all available data and information relevant to the emergency.

3. The watercourse State within whose territory the condition or incident has occurred shall take immediate action to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting therefrom.

3. Mr. McCAFFREY (Special Rapporteur) said that chapter III of his fourth report (A/CN.4/412 and Add.1 and 2) dealt with environmental protection, pollution and related matters.

* Resumed from the 2052nd meeting.

[1] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

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

[3] The numbers originally assigned to the articles appear in square brackets.