Document:-

A/CN.4/L.459 [and corr.1] and Add.1

Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Drafting Committee: Parts One and Two; articles 1-26 - reproduced in A/CN.4/SR.2236 to SR.2237 and SR.2239 to 2241

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1991, vol. I

the draft articles on jurisdictional immunities of States and their property and to draw up a convention on that topic. If he heard no objection, he would take it that the Commission wished to adopt a recommendation to that effect and to entrust the drafting of the recommendation to the secretariat, on the understanding that the Commission would take a decision on that text during its consideration of the chapter on that topic contained in its draft report to the General Assembly.

It was so agreed.

The meeting rose at 12.30 p.m.

2236th MEETING

Friday, 5 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

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

Relations between States and international organizations (second part of the topic) (*concluded*) (A/CN.4/438,[1] A/CN.4/439,[2] A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*concluded*)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 *and*

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22[3] (*concluded*)

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), summing up the discussion on his fifth and sixth reports (A/CN.4/438 and A/CN.4/439), thanked members who had participated in the debate for their objective and helpful comments. He said that all those who had spoken had, by and large, agreed, both with the contents of the reports and with the draft articles proposed. Practically all the changes suggested were drafting improvements and would be referred to the Drafting Committee for any necessary action.

2. The idea had been advanced that communications facilities should also cover computers and electronic equipment. As he saw it, the reference to "and other communications" in article 14 covered the matter. Possibly the point might be made clearer by using the formula "and other means of communication". One member had commented on the use of the terms "secret" and "secrecy" in the fifth report. There was of course no intention of introducing any idea of mystery. The purpose was simply to refer to confidential matters, knowledge of which was confined to a very restricted circle. For example, a State secret, sometimes described in English as "top secret", was not known to the public in general.

3. Mr. Roucounas (2234th meeting) had suggested that the draft articles should refer to the use of a flag or emblem by an organization. It was doubtful whether all intergovernmental organizations required a flag. As to the use of an emblem, the cases that had arisen had been solved, curiously enough, by applying the Paris Convention for the Protection of Industrial Property. His own intention had been to deal with the subject along with the right to issue laissez-passer, at the end of the whole draft.

4. Two members had spoken on the content of the topic and on the future work on it. In that connection, he drew attention to the outline adopted by the Commission in its report to the General Assembly at its forty-second session.[4] The outline established the content and thrust of the topic and was reproduced in a footnote to his sixth report.

5. One member had criticized the use of the words "in principle" in paragraph 1 of draft article 21. Actually, that restrictive wording ran counter to his own more liberal approach to the matter of the privileges and immunities of international organizations, but he had retained it because it was in conformity with State practice. A similar restriction was found, for example, in article II, section 8 of the Convention on the Privileges and Immunities of the United Nations and in article III, section 10, of the Convention on the Privileges and Immunities of the Specialized Agencies. The Drafting Committee could decide whether to retain the words "in principle".

6. Lastly, as all the other comments had concerned drafting points, he suggested that the best course would be to refer articles 12 to 22 to the Drafting Committee for consideration in the light of the discussion.

7. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 12 to 22 to the Drafting Committee.

It was so agreed.

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[1] This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[3] For texts, see 2232nd meeting, para. 2.

[4] *Yearbook ... 1987*, vol. II (Part Two), document A/42/10, p. 52, footnote 182.

Draft Code of Crimes against the Peace and Security of Mankind[5] (*continued*)* (A/CN.4/435 and Add.1,[6] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

8. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles in part one of the Draft Code of Crimes against the Peace and Security of Mankind as proposed by the Drafting Committee (A/CN.4/L.459 and Corr.1).

9. Mr. PAWLAK (Chairman of the Drafting Committee) expressed gratitude to all those who had contributed to the work of the Drafting Committee during the 22 meetings devoted to the topic, as well as to the Special Rapporteur, whose constructive spirit and flexibility had made it possible to arrive at another organized set of draft articles to be presented to the General Assembly at its forthcoming session. He also thanked the secretariat for its valuable cooperation.

10. The Drafting Committee's report consisted of two parts: the first (A/CN.4/L.459 and Corr.1) contained part one of the draft (articles 1 to 14); the second (A/CN.4/L.459/Add.1), devoted to part two of the draft (articles 15 to 26), would be distributed shortly.

11. Because a number of changes were being suggested for articles adopted at previous sessions, the Drafting Committee did not find it advisable to cover in separate documents the articles adopted at the present session and those adopted at previous sessions. It was, instead, presenting its work in the normal sequence of the articles and, in each case, he would indicate whether an article constituted a modified version of a previously adopted text or a new formulation worked out at the present session.

12. When the Committee had started its work on the topic at the present session, it had had before it various elements of the future Code, which had been painstakingly identified and agreed upon over the past four or five years. In that connection, he paid tribute to the valuable work of former Chairmen of the Drafting Committee. At the present session, the Committee, in addition to completing the catalogue of crimes to be covered, had organized the various existing elements into a coherent whole, and had worked out formulations concerning some questions relating to defences. It had tried to devise solutions for a number of basic outstanding issues which had hitherto made it difficult to visualize the final product. The draft now before the Commission still left a few questions unanswered, but it provided a complete picture on which all concerned would, it was to be hoped, find it easier to make useful comments.

13. The Committee considered that the Code should be divided into parts, rather than chapters, as had initially been envisaged. With regard to part one, it suggested that the title "Introduction" should be deleted and that the part should be subdivided into chapters. The headings "Definition and characterization" for chapter I and "General principles" for chapter II remained unchanged.

ARTICLE 1 (Definition)

ARTICLE 2 (Characterization)

14. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for the title of chapter I and for articles 1 and 2, which read:

PART ONE

CHAPTER I

DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2. Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

15. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee was not proposing any changes in those two articles.

16. The CHAIRMAN pointed out that no action was needed on articles 1 and 2 since the texts had been adopted previously in their present form.

ARTICLE 3 (Responsibility and punishment)

ARTICLE 4 (Motives)

ARTICLE 5 (Responsibility of States)

17. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for the title of chapter II and for articles 3, 4 and 5, which read:

CHAPTER II

GENERAL PRINCIPLES

Article 3. Responsibility and punishment

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in articles ...] is responsible therefor and is liable to punishment. "Attempt" means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

* Resumed from the 2214th meeting.

[5] 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.

[6] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

Article 4. Motives

Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime.

Article 5. Responsibility of States

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

18. Mr. PAWLAK (Chairman of the Drafting Committee) said that articles 3, 4 and 5 were being presented together in view of their interrelationship. At the previous session, the articles referred to the Drafting Committee had included three provisions, namely articles 15, 16 and 17, dealing respectively with complicity, conspiracy and attempt. The Committee, after a long discussion, had felt that those three articles should be examined in the context of article 3 previously adopted by the Commission. That article entitled "Responsibility and punishment" dealt in its two paragraphs with three issues: (*a*) an individual who committed a crime against the peace and security of mankind was responsible and should be punished; (*b*) responsibility for the crime was not affected by any motive invoked by the accused and not covered by the definition of the crime; and (*c*) prosecution of an individual for a crime did not relieve a State of any responsibility under international law for an act or omission attributable to it.

19. The second and third issues, in the Committee's view, also applied to complicity, conspiracy and attempt, and it had therefore decided to restructure article 3 so as to limit article 3 proper to the various forms of participation in a crime under the Code, then to have a separate article (article 4) dealing specifically with the irrelevance of any motives invoked by the accused to the determination of responsibility and punishment, and finally, an article 5, on the responsibility of a State independent of that of the individual whom it prosecuted for a crime.

20. Article 3 dealt with responsibility and punishment. Paragraph 1 was a simplified version of paragraph 1 of the original article 3[7] and provided for the responsibility and punishment of an individual who committed a crime against the peace and security of mankind. Paragraph 2 was new; it dealt with complicity, conspiracy and incitement, and it incorporated the idea and some of the wording used in original articles 15 and 16 as proposed by the Special Rapporteur. There had been some discussion in the Drafting Committee as to whether complicity was a concept broad enough to include conspiracy and incitement. The issue had been raised more particularly in view of the fact that there seemed to be no clear legal term in French, for example, for "conspiracy". Some English terms which had their legal roots in common law jurisprudence did not appear to have precise equivalents in other languages and systems. However, by the end of the discussion, the Committee had decided to mention other forms of participation since they had been considered in the Nürnberg Principles and in some conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide, as being independent of complicity. In doing so, the Committee had decided to define complicity, which was a legal term with equivalent meaning in most legal systems, but not to define conspiracy. It referred instead to conspiracy in the same way as it had been mentioned in article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide.

21. Paragraph 2 began by defining complicity as aiding, abetting or providing the means for the commission of the crime. There had been some discussion as to whether complicity *post facto* was also included in that definition. Although the definition of complicity was not entirely clear in that respect, most members of the Committee had felt that *post facto* complicity should not be included, for the article and the whole Code dealt with the commission of a crime and not with what happened afterwards.

22. For the reasons already explained, conspiracy was not defined and was simply mentioned. Similarly, paragraph 2 referred only to incitement, which was also mentioned in the Convention on the Prevention and Punishment of the Crime of Genocide but was qualified by the words "public and direct". In the opinion of the Drafting Committee, incitement to commit a crime against the peace and security of mankind did not need to be limited to public incitement, since that would be too restrictive for the purposes of the Code. Incitement none the less had to be direct.

23. Paragraph 3 dealt with attempt, a separate form of participation. The Committee took the view that even an attempt to commit a crime under the Code was of sufficient gravity to justify responsibility and punishment. Paragraph 3 provided for that responsibility and for punishment of an individual who attempted to commit a crime and it also defined the term "attempt", which was well known in criminal law in all legal systems.

24. Square brackets had been placed around the words "as set out in articles . . .", in the first sentence of paragraph 3, the purpose being to bring to the attention of Governments an issue on which the Committee had not reached agreement, namely, whether an attempt to commit any of the crimes under the Code should be punishable. In further explanation, he pointed out that, under paragraphs 1 and 2 the commission of any of the crimes in the Code, as well as acts of complicity, conspiracy or incitement, would entail liability and were punishable. There was a general consensus in the Committee on that point, but not with respect to an attempt to commit every single one of those crimes. For example, some members did not agree that an attempt to commit the crime of threat of aggression should be punishable.

25. The Committee had felt that it would be appropriate to elicit the views of Governments and the best way to do so was to use square brackets for the phrase in question. In addition, the commentary would explain the matter and would indicate that the question would be reconsidered on second reading, in the light of Government comments.

26. Article 4 was taken from paragraph 1 of the original version of article 3. As he had explained earlier, the article had been restructured. The irrelevance of any motives invoked by the accused, which in the original ver-

[7] For text, see *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

sion of article 3, paragraph 1, applied to an individual who had committed a crime, now applied also to any person who aided, abetted, provided the means for or conspired in or directly incited or attempted the commission of any of the crimes listed in the Code.

27. Article 5 was paragraph 2 of the former article 3. It indicated the responsibility of a State under international law, independently of the responsibility of the accused, even when the latter was prosecuted for the crime.

28. Mr. ROUCOUNAS noted that the word *Introduction* appeared before the title of chapter I, in the French version of document A/CN.4/L.459, but not in the English version. It should be deleted. He did not understand why, in the French version of article 3, paragraph 3, the word *tentative* appeared in quotation marks. The meaning of "attempt" was already clear from the preceding sentence.

29. Mr. RAZAFINDRALAMBO, commenting on the French version, said that article 5 used the words *un acte ou une omission* whereas the term employed in article 2 was *une action ou une omission*. For the sake of consistency the same wording should be used. Moreover, the term *acte* covered both acts and omissions, and the reference to omissions could therefore be deleted.

30. Mr. SOLARI TUDELA said that the Spanish version of article 3, paragraph 4 contained serious mistakes and he suggested that it should be redrafted by the Spanish-speaking members of the Commission, in conjunction with the secretariat.

31. Mr. PAWLAK (Chairman of the Drafting Committee) said he agreed to the deletion, in the French version, of the word *Introduction* and the quotation marks appearing round the word *tentative* in article 3. The Spanish version should be checked with the secretariat by the Spanish-speaking members.

Articles 3 and 4 were adopted, subject to any drafting changes required in the Spanish version.

32. Mr. GRAEFRATH, referring to Mr. Razafindralambo's suggestion to delete the words "or omission" from article 5, said that an act or omission as mentioned in that article related to the responsibility of States, not individuals. For the sake of clarity, the text of article 5 should be left unaltered.

33. Mr. BARSEGOV and Mr. JACOVIDES said that they agreed with Mr. Graefrath.

34. Mr. RAZAFINDRALAMBO said that, since the wording used in the English version of article 2 and article 5 was identical, the disparity in the wording of those two articles in the French version was inexplicable.

35. Mr. THIAM (Special Rapporteur) said that the reference to *une omission* in the French version of article 5 should not be deleted. Perhaps the French version should refer to *actions ou omissions*.

36. Mr. MAHIOU asked the Special Rapporteur why the term *action* had been used in the French version of article 2, although the term used later in the draft articles in connection with the list of crimes (articles 15 to 26) was *acte*.

37. Mr. THIAM (Special Rapporteur) said the Drafting Committee had already discussed at length whether the term *acte* should be used throughout the draft to designate both acts and omissions, but the view was taken that the word was not sufficient in itself to cover the characterization of crimes.

38. Mr. TOMUSCHAT said the wording of article 5 should correspond with article 3 of part 1 of the topic of State responsibility, which read:

> There is an internationally wrongful act of a State when:
>
> (*a*) conduct consisting of an action or omission is attributable to the State under international law; and
>
> (*b*) that conduct constitutes a breach of an international obligation of the State.

Accordingly, the term "action" should be used in article 5.

39. Mr. PAWLAK (Chairman of the Drafting Committee) commented that the draft articles on State responsibility had not yet been adopted on second reading. The term "act" should be retained in the English version of article 5 on first reading. It was the term employed elsewhere in the draft, including article 2, and its use in the English version did not affect the French version.

40. Mr. TOMUSCHAT said that, although the draft articles on State responsibility had not yet been adopted on second reading, they were a carefully devised system in which an "act" was an overall concept, encompassing both actions and omissions. In the draft Code, article 5 alone referred to the conduct of a State; hence, in that article alone, the term "act" should be replaced by "action", to reflect the specific situation of State conduct.

41. Mr. AL-BAHARNA said that article 5 should be left unchanged. The word "act" was the correct term to use in criminal law, in which the expression "actions or omissions" was unknown. The Commission was not concerned at present with the draft articles on State responsibility, and might in any case make changes to that draft.

42. Mr. CALERO RODRIGUES said that the term "act" could be used in both positive and negative contexts to refer to both actions and omissions, and it was therefore the correct term to use.

43. Mr. SEPÚLVEDA GUTIÉRREZ said that *un acto o una omisión* in the Spanish version, was correct from the viewpoint of Spanish terminology in criminal law. The term *acción* would have no meaning in that context.

44. Mr. BEESLEY said the question should be left to the Special Rapporteur and the Drafting Committee. He was inclined to agree with Mr. Al-Baharna that the wording of the draft should reflect customary legal usage as far as the English version was concerned.

45. Mr. EIRIKSSON said he did not accept the use of the term "action" in the draft articles on State responsibility. He preferred to leave the text of article 5 unaltered; it could usefully be accompanied by a commentary.

46. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that article 5 should be left unchanged.

Article 5 was adopted.

ARTICLE 6 (Obligation to try or extradite)

ARTICLE 7 (Non-applicability of statutory limitations)

ARTICLE 8 (Judicial guarantees)

47. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 6, 7 and 8, which read:

Article 6. Obligation to try or extradite*

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court.

*** This article will be reviewed if an international criminal court is established.**

Article 7. Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

Article 8. Judicial guarantees

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular, he shall have the right to be presumed innocent until proved guilty and have the rights:

(*a*) in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

(*b*) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*c*) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*d*) to be tried without undue delay;

(*e*) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(*f*) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(*g*) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*h*) not to be compelled to testify against himself or to confess guilt.

48. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Committee was not suggesting any changes for articles 6 and 7, which had initially been adopted as articles 4 and 5. As to article 8, previously numbered 6, the Committee suggested incorporating in the opening paragraph a reference to the right to be presumed innocent, as well as the phrase introducing the enumeration of the rights of the accused. The resulting presentation of the article would be closer to usual practice.

49. The CHAIRMAN said that no action was required on articles 6 and 7, the texts of which had been adopted previously in their present form; only the numbering had been changed.

Article 8 was adopted.

ARTICLE 9 (*Non bis in idem*)

ARTICLE 10 (Non-retroactivity)

50. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 9 and 10, which read:

Article 9. **Non bis in idem**

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court. *

2. Subject to paragraphs 3, 4 and 5, no one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by an international criminal court* or by a national court for a crime under this Code if the act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

(*a*) if the act which was the subject of the previous judgement took place in the territory of that State; or

(*b*) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

*** The reference to an international criminal court does not prejudge the question of the establishment of such a court.**

Article 10. Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act, which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

51. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Committee was suggesting two minor changes in article 9: the inclusion of the word "or" at the end of paragraph 4 (*a*), and the substitution of the phrase "no one shall be tried or punished" for the phrase "no one shall be liable to be tried or punished". The latter change had inadvertently been omitted from document A/CN.4/L.459. More important, the Committee was suggesting the elimination of the square brackets which had initially been placed around paragraph 1 as well as around the phrase "by an international criminal court or" in paragraph 3. In its view, retaining the brackets would give the impression that the fundamental principle enunciated in paragraph 1 was being called in question. Although it was aware that the final wording of the article depended on the future decision on the establishment

of an international criminal court, the Committee preferred to append a footnote to that effect to article 9, rather than to give the impression that the *non bis in idem* principle was not generally acceptable. The Drafting Committee was not suggesting any change for article 10.

52. Mr. EIRIKSSON said that the comma after the word "act", in paragraph 2 of article 10, should be deleted.

53. Mr. HAYES, supported by Mr. AL-KHASAWNEH and Mr. BEESLEY, expressed a reservation regarding article 9. Regrettably, the draft articles did not contain an adequate reflection of the *non bis in idem* principle; indeed, it had been said that there was no such principle in international law. The principle must, however, be adequately reflected in the draft, since the Commission was in the process of creating an international code of criminal law.

54. Mr. MAHIOU pointed out a discrepancy in the French version of article 9, which referred to the international criminal court as a *tribunal*, although the term *juridiction* was used elsewhere.

55. The CHAIRMAN invited the Commission to adopt article 9 and said that no action was required on article 10, the text of which had been adopted previously in its present form; only the numbering had been changed.

Article 9 was adopted.

ARTICLE 11 (Order of a Government or a superior)

ARTICLE 12 (Responsibility of the superior)

ARTICLE 13 (Official position and responsibility)

56. The CHAIRMAN invited the Chairman of the Drafting Committee to introduced the text proposed by the Drafting Committee for articles 11, 12 and 13, which read:

Article 11. Order of a Government or superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.

Article 12. Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

Article 13. Official position and responsibility

The official position of the individual who commits a crime against the peace and security of mankind and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

57. Mr. PAWLAK (Chairman of the Drafting Committee) commenting on article 11, said that, in his fifth report,[8] the Special Rapporteur had presented an article dealing with exceptions to the principle of responsibility (article 9), establishing, *inter alia*, that the order of a Government or of a superior created an exception to criminal responsibility, provided a moral choice was in fact not possible for the perpetrator. The Drafting Committee had deferred action on that article until the present session and its discussion had revealed many divergent views, as he would explain when the Commission came to consider article 14. However, there was general agreement on the principle, upheld both in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal,[9] and in the 1954 draft Code, that the perpetrator of a crime against the peace and security of mankind was not, as a rule, relieved of criminal responsibility on the ground that he had acted on the order of a Government or of a superior. The Committee considered that that principle was of such importance in the context of the Code that it should be enunciated in the draft even at the present stage, although the question of defences had yet to be fully resolved. The text of article 11 closely followed article 4 of the 1954 draft Code, except for a few editorial changes. As for its place in the draft, it was thought that the articles dealing with the implications, in terms of criminal responsibility, of the hierarchical position of the perpetrator should be regrouped to form a sequence of articles 11, 12 and 13. Articles 12 and 13, formerly 10 and 11, had been left unchanged, except that the word "criminal", before "responsibility", in the title of article 13, had been deleted for consistency with the title of article 12.

58. Mr. AL-BAHARNA said that the indefinite article should be inserted before "superior", in the title of article 11.

59. Mr. EIRIKSSON said that there was some linkage between articles 11 and 14, as the Chairman of the Drafting Committee had indicated. Neither article could be completed without the other, because together they formed a subgroup dealing with the defence of coercion, which had not yet been fully developed in article 14. Hence there might be a need to return to article 11. As to article 13, he thought it had been agreed that the text would refer to "an individual", not "the individual". Moreover, there should be a comma after "the peace and security of mankind".

60. Mr. ROUCOUNAS said that, in view of the particularly important and complex nature of articles 9 and 11, he would like to receive the commentary to those articles as quickly as possible.

61. The CHAIRMAN said that due note had been taken of that request.

62. Mr. BEESLEY said that he attached such importance to article 11 and to the principle it enunciated that he was prepared to accept the article there and then, even if it was to be amplified later. In his view, the defence in question was so unacceptable that it was essential to limit it.

Article 11, as amended, was adopted.

[8] *Yearbook... 1987*, vol. II (Part One), pp. 1-10, document A/CN.4/404.

[9] See 2207th meeting, footnote 5.

63. The CHAIRMAN said that no action was required on article 12, the text of which had been adopted previously in its present form; only the numbering had been changed.

Article 13 was adopted.

64. Mr. BEESLEY said that he found it somewhat curious to speak of an individual who committed a crime and then to discuss possible defences. That issue could, however, be discussed on second reading.

ARTICLE 14 (Defences and extenuating circumstances)

65. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 14, which read:

Article 14. Defences and extenuating circumstances

1. The competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime.

2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.

66. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as already indicated, the Drafting Committee's point of departure in working out article 14 had been article 9 as proposed by the Special Rapporteur in his fifth report.[10]

67. The Committee had discussed at some length a revised version of article 9 proposed by the Special Rapporteur. On most aspects of the text, however, opinions were divided. Self-defence, for example, was viewed by some members as having a place in the draft and by others as irrelevant. Of those who supported its inclusion, some wanted to confine it to the case of aggression, while others considered that it should apply to all crimes. Of those who viewed self-defence as irrelevant in that context, some had observed that use of force committed in accordance with the Charter of the United Nations did not qualify as aggression, whereas others maintained that the acts covered by the Code were of such a nature that they could not conceivably be committed in self-defence. A second aspect of the question of defences which had been discussed on the basis of the Special Rapporteur's revised text was whether coercion, state of necessity, *force majeure* and error should be available as defences to the perpetrators of war crimes provided specific conditions were met. In the Committee's opinion, state of necessity, *force majeure* and error were highly complex concepts that should be analysed in depth before any conclusion could be drawn as to their applicability in relation to crimes against the peace and security of mankind in general and to war crimes in particular. A third element of the Special Rapporteur's text related to the unavailability of defences to the perpetrators of specific crimes. As to the fourth element, the order of a superior, as he had already indicated, the Committee had dealt with it under a separate article, namely article 11, which the Commission had just adopted.

68. On all other aspects of the question of defences, however, the divergence of views could not be reconciled in the Drafting Committee. It had therefore felt that, because of the complexity of the issues involved, it should at that stage work out a general clause that would leave it to the court to determine the admissibility of defences under the general principles of law on defences, in the light of the character of each crime. Similarly, paragraph 2 of article 14 left it to the court to take account of extenuating circumstances, where appropriate, in passing sentence. That article was not intended to be exhaustive where the question of defences and extenuating circumstances were concerned, but rather to serve as a reminder that the question should be addressed again on second reading, when more specific rules could be formulated.

69. The Drafting Committee was aware that, although defences and extenuating circumstances both had implications regarding the extent of the criminal responsibility of the perpetrator, they were very different concepts. It had dealt with them tentatively in two separate paragraphs of the same article, which was itself provisional in nature.

70. Some members of the Committee had expressed reservations about paragraph 2 because they had considered that the question of extenuating circumstances should be dealt with later, rather than in the context of defences.

71. Mr. TOMUSCHAT said that it was essential to be clear about what was meant by the expression "general principles of law", in paragraph 1. Did it refer to the principles mentioned in Article 38 of the Statute of ICJ or to the general principles of law derived from a comparison of all criminal codes throughout the world?

72. Mr. SEPÚLVEDA GUTIÉRREZ said that he agreed with the content and scope of the article, but wished to enter a reservation regarding the expression *causas de justificación*, in the Spanish version. The expression was not appropriate, for a crime could never be justified. It would be preferable to use the technical term *excluyentes* or *eximentes de responsabilidad*.

73. Mr. EIRIKSSON said that, while he had agreed to the Drafting Committee's decisions, he had been opposed to the inclusion of paragraph 2 because it would be inadvisable to refer to the sentencing stage in an article initially designed to cover defences. Moreover, the question of defences had been dealt with in paragraph 1 on the understanding that it would have to be discussed in more detail later. Consequently, there was no need to refer at that stage to extenuating circumstances, which would be considered later within the whole context of sentencing.

74. Mr. MAHIOU said that, rather than have two separate paragraphs in the same article, he would prefer to have two separate articles, because defences and extenuating circumstances were two entirely different things: the effect of a defence was to eliminate the offence, whereas extenuating circumstances intervened to mitigate the penalty only after it was found that there had been an offence. Also, there was some ambiguity about the wording of the article, for the words "In passing sentence", in paragraph 2, seemed to refer back to paragraph 1.

[10] See footnote 8 above.

75. Mr. ROUCOUNAS said that he agreed entirely with Mr. Mahiou. Two groups of rules dealing with different aspects of criminal procedure were, of course, covered in the same article. He had, however, taken note in that connection of the explanation by the Chairman of the Drafting Committee to the effect that the article was meant to serve as a reminder and was of a preliminary nature.

76. When the two issues covered by article 14 were reconsidered, it would be necessary to understand what was meant by the words "general principles of law". They might, of course, be taken to refer to Article 38 of the Statute of ICJ, which did not exclude international criminal law or indeed any other law. A generous interpretation was therefore required not only because it was a matter of criminal law and of protecting the accused but also because the question of general principles of law had been the subject of considerable effort by legal writers and the courts. For some, those principles represented a cross-section of legal systems throughout the world which could be applied in a given case, whereas for others they already formed part of the international order.

77. Mr. BEESLEY said that he shared the position taken by Mr. Eiriksson and Mr. Mahiou. The distinction between defences, which were pleaded before conviction, and extenuating circumstances, which were taken into account in sentencing, was clear-cut in most systems of law. Though he had reservations about the article, therefore, he did not object to it.

78. Mr. HAYES said that he, too, did not object to adoption of the article as drafted. He had, however, reserved his position on paragraph 2 in the Drafting Committee because he considered that the paragraph related to penalties rather than to the conviction stage. Moreover, the Special Rapporteur, in his ninth report, had dealt with the question of extenuating circumstances in the draft article on sentencing; and that, in his own view, was the right place to do so.

79. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as he had explained in his introduction, the article was of a tentative nature and, on that understanding, he would suggest that it should be adopted. The separation of the article into two paragraphs, or articles, was of secondary importance; what mattered was to draw the attention of Governments and the Sixth Committee to the matter and thus prompt their comments. He would have no objection to two separate articles, however, if that would help to overcome the objections.

80. Mr. CALERO RODRIGUES, noting that the difference of views persisted despite the preliminary nature of the article, observed that one easy solution—which would also forestall any reference by Governments to that particular point—would be to have two separate articles.

81. Mr. RAZAFINDRALAMBO said he had always been of the view that the two concepts of defences and extenuating circumstances, which were quite distinct, should be dealt with in two separate articles. In a spirit of compromise, he had none the less agreed that they should be covered by two paragraphs in the same article. Should the Commission now favour the adoption of two separate articles, such a course would be perfectly acceptable.

82. Mr. DÍAZ GONZÁLEZ expressed a reservation with regard to the Spanish version of the article. In the first place, the wording of paragraph 1 was very strange, for it was difficult to see what principles of law could justify a crime. How, for instance, was it possible to justify the crime of genocide—or indeed, any other crime against the peace and security of mankind?

83. So far as paragraph 2 was concerned, he agreed entirely with Mr. Sepúlveda Gutiérrez that it would be preferable to use the word *eximentes*.

84. Mr. AL-BAHARNA said that defences and extenuating circumstances were interrelated inasmuch as counsel for the defence, when submitting his case for the accused, would in any event plead extenuating circumstances. For that reason he was opposed to two separate articles. The position would be just the same—counsel for the defence would still plead extenuating circumstances—even if the whole article was deleted from the Code.

85. Mr. BARSEGOV said that he was prepared to accept the draft article either as it stood or in the form of two separate articles. Some members of the Commission had argued that, because their own legal systems did not link them, the questions of responsibility and extenuating circumstances should be treated separately in the draft. It was clear that every legal system drew a distinction between responsibility for an act and extenuating circumstances. That did not mean, however, that there was no connection between the two concepts.

86. Mr. EIRIKSSON said that he had not meant to imply that the entire article lacked substance. In fact, paragraph 1 could stand on its own. His earlier comment on lack of substance had been directed at paragraph 2. He would have strong reservations if it were to become a separate article, particularly since the matter it dealt with did not belong in that section of the draft Code.

87. Mr. Sreenivasa RAO said he shared Mr. Al-Baharna's view that there was an interrelationship between defence and extenuating circumstances. Article 14 was an accurate reflection of the sequence of events before a court of law. In his initial submissions, the counsel for the accused customarily presented the defence *per se*; he might, in addition, make reference to extenuating circumstances, which would then be taken into consideration at the time of sentencing. The article was therefore acceptable as it stood. In his view, what mattered was the manner in which the Commission presented the issues to the General Assembly. Rather than choosing a solution about which many members had strong reservations, it would be better to adopt the article as it was, on the understanding that it might eventually take a different form; mention of that reasoning could then be made in the Commission's report.

88. Mr. MAHIOU said that, in commenting earlier on the possibility of turning the two paragraphs into separate articles, he had stressed that the matter should be considered on second reading. He was not, therefore, ob-

jecting in any way to provisional adoption of article 14. The reservations members had expressed so far would be reflected in the commentary and would be taken into consideration on second reading.

89. The CHAIRMAN, speaking as a member of the Commission, said he had earlier held the view that extenuating circumstances belonged exclusively in the domain of penalties. However, as Mr. Al-Baharna and Mr. Sreenivasa Rao had observed, stressing the interrelationship between the defence and the extenuating circumstances did not diminish the force of article 14. He recalled that in the *Corfu Channel* case,[11] ICJ had used the justification of extenuating circumstances as a defence. As international jurists, the members of the Commission were under an obligation to respect the jurisprudence of ICJ. The Commission should therefore adopt the article in its present form.

90. Mr. THIAM (Special Rapporteur) said that he shared the view of the Chairman. In treating the paragraphs separately, the Commission might well end up with two articles of very little substance. If the Commission took that course of action, the two articles would certainly have to be elaborated further. Any changes of that nature would have to be considered on second reading. In his opinion, article 14 should be adopted as it stood. The fact that the article contained two paragraphs would demonstrate that the Commission was fully aware of the distinction between responsibility and extenuating circumstances.

91. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in view of the debate so far, he would appeal to members to withdraw or limit their reservations to article 14. Attaching a large number of reservations to an article of such importance could convey a misleading impression and give rise to doubts about the collective wisdom of the Commission. The article was being considered on first reading and was simply a "hook" on to which States could hang their views. Further elaboration was always possible on second reading.

92. With respect to the question raised by Mr. Tomuschat (para. 70 above), article 14 had been drafted on the understanding that the term "general principles of law" referred to the general principles of penal law rather than to the general principles under Article 38 of the Statute of ICJ. If appropriate, that clarification might be reflected in the commentary.

93. Mr. BEESLEY said that, as others had pointed out earlier, the reservations being expressed with respect to article 14 should be given due consideration at a later stage. In that connection, it was gratifying that the Chairman had mentioned the *Corfu Channel* case, the relevance of which could be considered on second reading of article 14. In his view, the Commission should move ahead and adopt the article.

94. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 14 as it stood.

Article 14 was adopted.

[11] *I.C.J. Reports 1949*, p. 4.

95. Mr. PELLET said that he had participated actively in the work of the Drafting Committee and had not opposed the necessary compromise solutions. At the same time, his enthusiasm for the draft as a whole was limited. In that connection, he wished to point out two major shortcomings with respect to chapter II, on General principles. The first and most serious concerned the problem of the responsibility of groups. Although frequently raised in the Commission's debates, the issue had not been taken up by the Drafting Committee and there was no mention of it in the draft Code. While it was true that article 3, paragraph 2, spoke about conspiracy, the article concerned only the individual conspirator, not the group as a whole. The issue was to determine whether legal persons could be held responsible for participating in or committing crimes. As long as the Commission refused to take a position on that complex issue, the draft Code would remain incomplete. The second shortcoming lay in the absence in the Code of any reference to the question of advocating crimes against the peace and security of mankind. Did the fact of advocating a crime constitute a crime in itself? If not, the Commission should have said as much in the Code and suggested that such advocacy should be considered as an offence. The Code also failed to address the related issue of the denial that certain crimes against the peace and security of mankind had even been committed, which was currently a very painful issue in his own country, France. For all those reasons, he wished to express a general reservation with regard to part one of the draft.

96. Mr. THIAM (Special Rapporteur) said that he had deliberately chosen not to introduce into the Code the question of assigning responsibility to groups. It was a difficult matter on which viewpoints differed widely. At the present stage, such a provision did not belong in the Code, which dealt exclusively with responsibility of the individual. Even in the case of domestic law, the concept of the responsibility of groups continued to be a matter of debate.

97. In his opinion, addressing the issue of advocating crimes would only be a further unnecessary complication to the already difficult task of arriving at precise definitions of the crimes under the draft Code.

98. Lastly, he did not think that the absence of references to the responsibility of groups and to the advocacy of crimes weakened the Code in any fundamental way.

99. Mr. MAHIOU said the Commission had discussed the issue of the criminal responsibility of legal persons at great length. The debate had given rise to serious divisions of opinion and the decision had thus been made to confine the Code to individuals. It was not appropriate to include advocacy of crimes. To his knowledge, even under domestic law, it was considered as an offence and not as a crime. Therefore, it would be difficult to include it in a code which related to crimes of the most serious nature.

100. Mr. PELLET said it should have been stated explicitly in part one that the provisions of the Code were entirely without prejudice to the attribution of responsibility to groups. Furthermore, the fact that an issue was difficult did not mean that it should not be addressed; for

that reason, he was not convinced by the Special Rapporteur's explanation.

101. The CHAIRMAN said that Mr. Pellet's concerns were shared by other members of the Commission. Perhaps the Commission should include in its final report a statement to the effect that a decision had been taken to limit the Code to the responsibility of the individual.

The meeting rose at 12.40 p.m.

2237th MEETING

Tuesday, 9 July 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Cooperation with other bodies (*concluded*)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN welcomed Mrs. Killerby, Observer for the European Committee on Legal Cooperation, and invited her to address the Commission.

2. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) said that the European Committee on Legal Cooperation (CDCJ) had been kept regularly informed of the activities of the Commission and had had the privilege of hearing a statement in that regard by Mr. Pellet at its 54th meeting, in December 1990.

3. Since she had addressed the Commission at its previous session, two more States had become members of the Council of Europe—Hungary and Czechoslovakia—and other Central and Eastern European countries, with which the Council now had an extensive programme of cooperation in the legal field, were expected to become member States in the near future.

4. CDCJ had in particular the task of developing European cooperation between member States of the Council of Europe with a view to harmonizing and modernizing private and public law, examining the functioning and implementation of Council of Europe conventions and agreements in the legal field (except in the penal sector) with a view to adapting them and improving their practical application where necessary, and preparing, jointly with the European Committee on Crime Problems, the Conferences of European Ministers of Justice and ensuring the follow-up, having regard to the relevant decisions of the Committee of Ministers. An informal meeting of European Ministers of Justice had taken place in Ottawa in June 1991 to consider questions relating to sentencing and the rule of law and the citizen. The eighteenth Conference of European Ministers would take place in Nicosia (Cyprus) in June 1992.

5. The Committee of Experts on Public International Law, which followed the Commission's work very closely, and of which Mr. Eiriksson was a member, had referred in particular, at its meeting in September 1990, to the importance of the Valletta meeting on the peaceful settlement of disputes, organized by the Conference on Security and Cooperation in Europe, the desirability of contributing to the United Nations Decade of International Law and the need to enhance the role of the Sixth Committee of the General Assembly of the United Nations. The Committee of Experts had also made certain proposals concerning its own future role and had suggested in particular that it should meet at the level of chief legal advisers to Ministers of Foreign Affairs and report directly to the Committee of Ministers of the Council of Europe. The Committee of Ministers had accepted those proposals and the Committee of Experts, which was now an ad hoc committee—the Committee of Legal Advisers on Public International Law—was directly answerable to the Committee of Ministers. Its terms of reference were, in particular, to exchange views on and to examine questions of public international law at the request of the Committee of Ministers, the European Committee on Legal Cooperation and at its own initiative. At its first meeting, in Strasbourg in April 1991, the Committee had welcomed the positive results of the Valletta meeting and had held a preliminary exchange of views concerning the privileges and immunities of certain "experts on missions" for the United Nations. It had also stressed the value of the United Nations Decade of International Law as a means of strengthening international law and had expressed the hope that States and organizations, and in particular the Council of Europe, would contribute to the Decade. The Council of Europe had replied to the request for information made by the General Assembly in resolution 45/40 on the United Nations Decade of International Law. At its meeting in September 1991, the Committee would consider, for example, the work of the General Assembly and the International Law Commission, the United Nations Decade of International Law, and current problems of international law, including matters concerning the Conference on Security and Cooperation in Europe.

* Resumed from the 2233rd meeting.

6. Commenting on some of the international instruments prepared by CDCJ, she said that the European Convention on certain international aspects of bankruptcy had been opened for signature in 1990. The Convention provided for legal cooperation with respect to certain international aspects of bankruptcy such as the power of administrators and liquidators in bankruptcy to act outside national territory, the possibility of resorting to the opening of secondary bankruptcies in the territory of other Parties and the possibility for creditors to lodge their claims in the bankruptcies opened abroad.

7. A committee of experts of CDCJ was continuing its work on a draft convention on civil liability for damage resulting from activities dangerous to the environment, the object of which was to provide for means of prevention and reinstatement and to ensure adequate compensation. It was expected to complete its work in 1992 and, subject to the approval of the Committee of Ministers, would then begin to examine the question of compensation funds.

8. Another committee of experts had been instructed to prepare a draft European convention on the exercise of rights by a child, the aim being to ensure that children were given assistance and certain procedural rights in order to implement their rights, in keeping with article 4 of the United Nations Convention on the Rights of the Child, whereby States undertook to take all the legislative, administrative and other measures necessary to implement the rights recognized under the Convention. CDCJ had proposed that, when the committee of experts had completed that work, it should examine questions relating to transsexuals and, subsequently, to adults subject to a disability. A second European Conference on Family Law would be held in Budapest in 1992.

9. Another CDCJ committee of experts was preparing a second protocol to amend the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality in order to permit dual nationality. The draft protocol would in particular enable contracting States to allow persons to retain their nationality of origin in certain cases, namely, persons resident in the host country from an early age (second-generation migrants) who acquired the nationality of the host country; a spouse who acquired the nationality of the other spouse; and children who acquired the nationality of a parent. CDCJ had proposed that, when that work had been completed, the committee of experts should examine new problems connected with nationality.

10. CDCJ had also adopted a number of draft recommendations prepared by its subordinate committees, for instance, a draft recommendation on administrative sanctions, which had been adopted by the Committee of Ministers of the Council of Europe as Recommendation No. R (91) 1 and which set forth the principles concerning administrative acts that imposed a penalty on persons on account of conduct contrary to the applicable rules; a draft recommendation on family matters, which provided for emergency measures to be taken when the interests of children and other persons in need of special assistance and protection were in serious danger; a draft recommendation stipulating that communication to third parties, in particular by electronic means, of personal data held by public bodies should have its basis in law and be accompanied by safeguards for those concerned; and, lastly, a draft recommendation, adopted by the Committee of Ministers of the Council of Europe as Recommendation No. R (90) 19, which related to the protection of personal data used for payment or other related operations and which set forth principles to ensure respect for privacy in the collection, storage, use, communication and conservation of personal data.

11. As to its future work, in 1992 in particular, CDCJ had made proposals concerning: administrative law (privatization of public services and enterprises, and rules for an administrative and court system to guarantee legal security for citizens); data protection (examination of current data protection problems and preparation of appropriate legal instruments); civil justice (proposal to include in the existing work on criminal justice an aspect of civil justice entitled: "Efficiency and fairness of civil justice"); and legal data processing.

12. In addition to the European Convention on certain international aspects of bankruptcy, already mentioned, a number of instruments prepared by CDCJ had been opened for signature in 1990, namely, Protocol No. 9[1] to the Convention for the Protection of Human Rights and Fundamental Freedoms, which introduced further improvements to the procedure provided for under the Convention; the Fifth Protocol[2] to the General Agreement on Privileges and Immunities of the Council of Europe, which provided that the salaries, emoluments and allowances of members of the European Commission of Human Rights and the European Court of Human Rights should be exempt from taxation; the European Convention on the General Equivalence of Periods of University Study;[3] the European Social Security Code (revised);[4] and, lastly, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,[5] which sought to deprive criminals of the proceeds from crime and property used to commit a criminal offence and provided for measures to be taken at the national and international level in that connection.

13. In addition to the treaties being prepared by CDCJ, to which she had already referred, the Council of Europe had prepared certain international instruments: a draft European charter requiring States to comply with provisions concerning regional or minority languages spoken within their territories; a draft European convention on the protection of the rights of ethnic, linguistic and religious minorities; a draft framework convention setting forth general common rules for the protection of the human person in the context of biomedical sciences; a draft instrument on the mobility of young persons; a draft convention to improve participation by foreigners in public life at the local level, especially by enhancing the possibilities for them to participate in local public af-

[1] Council of Europe, *European Treaty Series*, No. 140 (Strasbourg), 1991.

[2] Ibid., No. 137 (Strasbourg), 1990.

[3] Ibid., No. 138 (Strasbourg), 1991.

[4] Ibid., No. 139 (Strasbourg), 1991.

[5] Ibid., No. 141 (Strasbourg), 1990.

fairs; a draft convention on copyright law and neighbouring rights in the framework of television by satellite; a revised draft European convention on the archaeological heritage, incorporating concepts and ideas that had become accepted practice.

14. In her statement she had summarized some of the work being carried out in the legal field by the Council of Europe, on which she would be happy to answer any questions members might wish to raise.

15. The CHAIRMAN thanked Mrs. Killerby for her very clear account of the impressive work of CDCJ, and wished the Committee every success. He expressed the hope, on behalf of the Commission, that the mutually beneficial cooperation between CDCJ and the International Law Commission would continue.

16. Mr. PELLET, speaking on behalf of members from the Group of Western European and other States, thanked Mrs. Killerby for an extremely comprehensive, meticulous and concise account of the work of CDCJ.

17. At the request of the Chairman at the forty-second session, he had represented the Commission at the 54th meeting of CDCJ and had given a brief account of the work of the Commission at that session. In the exchange of views that had followed, the participants had stressed the importance of the Commission's work and the special interest for CDCJ of the draft articles on jurisdictional immunities of States and their property, the law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law, and the draft Code of Crimes against the Peace and Security of Mankind. They had also welcomed the effective cooperation between the United Nations and the Council of Europe within the framework of the United Nations Decade of International Law, although some had expressed the hope that the two organizations would go further than mere coordination. The Chairman of CDCJ had suggested that the question should be included on the agenda for its future work.

18. He shared in the hope voiced by most members of CDCJ who trusted that the cooperation between that Committee and the Commission—and the United Nations in general—would be intensified. Personally, he did not altogether see what forms such strengthened cooperation could take but he considered that it was a useful subject for the Commission to consider in the context of consideration of its working methods. At all events, he was convinced that the two organizations would probably have much to gain by strengthening their cooperation, and the Commission might perhaps wish to establish direct links with the ad hoc Committee of Legal Advisers on Public International Law, in view of its new status.

19. Lastly, he asked Mrs. Killerby to convey his sincere thanks to the members of CDCJ and the members of the secretariat of the Council of Europe for the welcome they had given him.

20. Mr. JACOVIDES, speaking on behalf of the members from the Asian Group, thanked Mrs. Killerby for her comprehensive statement, which was particularly useful since the Commission could derive nothing but benefit from legal work carried out at the regional level.

21. He had noted the emphasis placed by CDCJ on the Valletta meeting on the peaceful settlement of disputes and its participation in the United Nations Decade of International Law. He would like to know whether CDCJ had taken up the question of the draft Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal court.

22. At the General Assembly's latest session, he had had an opportunity to participate in a meeting organized in New York, on the sidelines of the Sixth Committee, by Mr. Correl, Vice-Chairman of the ad hoc Committee of Legal Advisers on Public International Law. He urged all members of the Commission able to do so to attend a similar meeting which was planned for 28 October 1991, again in New York.

23. Mr. BARSEGOV, speaking also on behalf of Mr. Pawlak, thanked Mrs. Killerby for her extremely interesting statement on the legislative activities of CDCJ. Those activities opened up new perspectives, made possible by the far-reaching changes in the eastern European countries which had led to the removal of the political, legal and economic obstacles that had until then hampered relations between all European countries. Much remained to be done, of course, if the common European home was to be constructed and the foundation laid for effective cooperation and genuine economic integration. A European legal area would also have to be created—though, clearly, that was no easy matter in view of the gap that had opened up between European legal institutions—and against that background information with respect to the legal norms drawn up within the European framework would have to be mutually exchanged.

24. Mr. THIAM, speaking on behalf of members from the African Group, thanked Mrs. Killerby for her very informative statement which attested to the fruitful activities of CDCJ. Since the questions with which CDCJ was dealing were very similar to those on the Commission's agenda, it would be entirely fitting for the two organizations to develop and strengthen their cooperation.

25. Mrs. Killerby's statement offered Africa much food for thought in its quest for economic, social and legal integration, which was why it paid close attention to European experiences.

26. Mr. SEPÚLVEDA GUTIÉRREZ, speaking on behalf of members from the Latin American Group, expressed his sincere thanks to Mrs. Killerby for her erudite and eloquent statement. The work of CDCJ served as an example for the Organization of American States in that it attested to the part played by meaningful cooperation in strengthening the rule of, and respect for, international law.

27. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) thanked members for their kind words. She welcomed the proposal that the Commission should enter into direct cooperation with the ad hoc Committee of Legal Advisers on Public Inter-

national Law and would for her part suggest that the two organizations should explore ways of arranging such cooperation. The former Committee of Experts on Public International Law had been kept informed, both by Mr. Eiriksson and by Mr. Pellet, of the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind and, in particular, on the possible creation of an international criminal court. The Committee of Experts had held a brief exchange of views on the matter which made it quite clear that the idea of creating an international criminal court—which would of course have to be considered in depth—was extremely attractive.

28. She trusted that the cooperation between the Committee and the Commission would continue and prosper.

The law of the non-navigational uses of international watercourses (*concluded*)* A/CN.4/436,[6] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

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

29. The CHAIRMAN reminded members that the Commission still had to decide, pursuant to articles 16 and 21 of its Statute, to transmit to Governments, through the Secretary-General, the draft articles it had adopted on first reading, inviting them to submit their comments and observations to him by 1 January 1993.

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind[7] (*continued*) (A/CN.4/435 and Add.1,[8] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

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

30. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the second part of the Committee's report, which contained the titles and texts of the articles in part two of the draft Code as adopted by the Drafting Committee (A/CN.4/L.459/Add.1).

31. Mr. PAWLAK (Chairman of the Drafting Committee), introducing part two of the draft Code, said the Committee had been of the view that the title already adopted by the Commission (''Crimes against the peace and security of mankind'') should be retained. The purpose of part two was to define the scope *ratione materiae* and *ratione personae* of the draft Code. In that connection, the Drafting Committee had had a twofold task, first, to complete the list of crimes by providing definitions of war crimes and a series of other crimes, such as genocide and apartheid, and, secondly, to provide answers to basic questions of general import, the consideration of which it had deferred until a clearer idea had emerged of the scope of the draft *ratione materiae*. The first of those questions was whether the distinction between crimes against peace, war crimes and crimes against humanity should be retained. On that point the Drafting Committee took the view that, although the distinction had proved useful in determining the approach to be adopted in relation to each crime, it had become unnecessary now that solutions had emerged with respect both to the constituent elements and to the attribution of each crime. Accordingly, Part Two was not subdivided into chapters but into twelve articles, with a preliminary clause which appeared, *mutatis mutandis*, in each article.

32. The second basic issue which had arisen concerned attribution, namely, the identification of the persons to whom responsibility for each of the crimes listed in the Code should be ascribed. The Commission had found a tentative solution to that issue in the case of aggression, by using the wording ''any individual to whom responsibility for acts constituting aggression is attributed under this Code''. That wording did not, however, have any substantive content and merely served as a reminder that, sooner or later, the question of attribution would have to be addressed. At the present session, the Committee had worked out three types of solution to the problem, depending on the nature of the crimes concerned. Some of the crimes defined in the Code, such as aggression, threat of aggression, intervention, colonial domination and apartheid, were always committed by, or at the order of, individuals occupying the highest decision-making positions in the political or military apparatus of the State; a second group of crimes—international terrorism and mercenarism—would come under the Code, in accordance with decisions already taken by the Commission, whenever agents or representatives of a State were involved. A third group of crimes—illicit traffic in narcotic drugs, war crimes, genocide, systematic or mass violations of human rights and wilful and severe damage to the environment—would be punishable under the Code by whomsoever they were committed, in other words, even in the absence of State involvement.

33. The last issue of general import considered by the Drafting Committee concerned penalties. Different trends had emerged in that connection during the Commission's debate. Some members had taken the view that the matter should be left to domestic law. Others had recalled that the absence of any provision in that respect in the 1954 draft Code had been regarded by many as one of the draft's major flaws, and hence their insistence that the question should be dealt with. Some had advocated the inclusion of a scale of penalties that would be applicable to all crimes, while others had been in favour of accompanying the definition of each crime by the corresponding penalty. The Committee had not attempted to

* Resumed from the 2231st meeting.

[6] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[7] 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.

[8] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

reconcile those divergent views. It had merely signalled the problem by including between square brackets, at the end of the introductory paragraph of each article, the word "to" followed by a blank space. In that way, all positions were safeguarded and on second reading the Commission would be able to revert to the issue, including the question of the penalties to be applied for complicity, conspiracy and attempt, in full knowledge of the various approaches identified thus far. The Committee might wish to indicate in its report to the General Assembly that the matter was one on which the views of Governments would be of particular interest.

PART TWO (Crimes against the peace and security of mankind)

ARTICLE 15 (Aggression)

34. Mr. PAWLAK (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for the title of part two and for article 15, which read:

PART TWO

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 15. Aggression

1. An individual who as leader or organizer plans, commits or orders the commission by another individual of an act of aggression shall, on conviction thereof, be sentenced [to ...].

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

(*a*) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(*b*) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(*c*) the blockade of the ports or coasts of a State by the armed forces of another State;

(*d*) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(*e*) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(*f*) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(*g*) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(*h*) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

35. The order in which the crimes were listed did not imply any value judgement as to the degree of seriousness of those crimes. Article 15, like the next three articles, defined a crime which presupposed decisions taken at the policy-making level and in which large segments of the population of a State might be regarded as being directly or indirectly involved. In order to keep the scope *ratione personae* of the provisions concerned within reasonable limits, the Drafting Committee had restricted the circle of potential perpetrators to leaders and organizers, a phrase borrowed from the Charters of the Tokyo[9] and Nürnberg[10] Tribunals and which should be read in conjunction with the provisions on complicity and conspiracy. Article 15 did not require that leaders or organizers should themselves have perpetrated the act of aggression: it made them liable for the mere ordering of such an act. The same remark applied to all subsequent articles in part two.

36. The Drafting Committee proposed that paragraph 1 as initially adopted should be replaced by the new text now before the Commission. The new provision made it a crime not only to commit but also to plan an act of aggression, having regard to the definition of a crime of aggression as laid down in the Charters of the Tokyo and Nürnberg Tribunals and Allied Control Council Law No. 10.[11] Paragraphs 2 to 7 remained unchanged. The bracketed portions signalled divergences of opinion which the debate in the Sixth Committee should help to reconcile.

37. Mr. PELLET said that, before dealing with the questions raised by article 15, he wished to make two comments of a general nature. The first, which was of lesser importance, concerned the structure of the draft. He noted, with respect to the French version, that a *première partie* of the draft had first been referred to the Commission but that it now had before it a *Titre II*. As the words *partie* and *titre* were not interchangeable, that, albeit minor, drafting problem had to be resolved. His second remark concerned the unduly summary introduc-

[9] See 2210th meeting, footnote 7.

[10] See 2207th meeting, footnote 5.

[11] Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

tory phrase in each article, which the Drafting Committee had adopted in his absence. The crime of aggression, for instance, would as a general rule consist of orders given by an individual probably to groups of individuals or to institutions but not to individuals; that was why he had reservations about the words "the commission by another individual" which appeared in the articles in part two.

38. As for article 15 itself, he not only had reservations about it but was absolutely opposed to it, even though his views would have no effect since the Commission had already adopted the article in substance. The reason for his opposition was not that aggression did not amount to a crime against the peace and security of mankind—indeed, it was the very epitome of such a crime—but because he was against a procedure which consisted of simply lifting the Definition of Aggression from the annex to General Assembly resolution 3314 (XXIX), and for three reasons. First, the general view was that the Definition was poorly drafted and did not really show what was meant by "aggression"; proof of that could be seen in the use of the words "In particular" in paragraph 4 of article 15, which the Drafting Committee had rightly placed between square brackets. An illustrative list was never acceptable in a criminal law instrument and, generally speaking, the Definition had never been regarded as properly defining anything. When it had adopted the Definition, the General Assembly had known full well that the Security Council would remain free to characterize an act as aggression as it saw fit, and according to its own criteria. Accordingly, it was highly questionable to reproduce in a criminal code a text with no specific scope.

39. Secondly, the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) was not in any event meant to provide the basis for characterizing an act as a crime under criminal law. It was designed to enable the Security Council to decide, in a given situation, whether or not there had been aggression. In the case of the Gulf, the Security Council had not concerned itself with the Definition at all.

40. Thirdly, as a matter of principle, it was not a good idea to include in the Code excerpts from other texts. A definition of aggression would probably prove to be an insurmountable task for the Commission, should it decide to tackle the matter again. The only possible course, therefore, was to indicate that aggression constituted in itself a crime against the peace and security of mankind, with the consequences defined under the Code, and to leave it to the courts which had jurisdiction, in other words, to domestic courts or to a future international criminal court, to decide, in the light of the facts of the case and in accordance with general principles of international law, whether aggression had occurred and to draw the appropriate conclusions. That had not been the approach adopted by the Drafting Committee and the Commission, which had preferred to reproduce a General Assembly recommendation in a text destined to become a treaty that would be binding on States. That was asking a lot of the States which had voted for a recommendation in the knowledge that it did not, as such, have binding force.

41. Mr. BARSEGOV said that he shared some of Mr. Pellet's concerns. He therefore suggested that the words "by another individual of an act of aggression", in paragraph 1 of article 15, should be replaced by "an act constituting an aggression".

42. Prince AJIBOLA said that it was difficult to reconcile the use of the word "individual" in paragraph 1 with the references in the subsequent paragraphs to the use of armed force and to the armed forces of a State. In a State, could the same individual be vested with the power to order and to direct an act of aggression? In many States, decisions were taken in a wholly democratic way, which was why it was difficult to know whether an order to commit aggression should be attributed to the same individual. At present, the Code contained no provision to cover such a case, but it should be catered for, in one way or another. Either the Commission should define the word "individual" as including a "group of individuals" or it should add the words "or group of individuals" after "individual". The same applied to the words "another individual" although it was quite conceivable that those words, when used in the singular, encompassed the plural as well.

43. Mr. NJENGA paid a tribute to the vigour and determination shown by the Chairman and the other members of the Drafting Committee in arriving at a text the Commission would be able to adopt on first reading.

44. The word "individual" in paragraph 1 created no difficulty, since it had been agreed from the outset that the Code would be restricted to the criminal responsibility of individuals, but the words "by another individual" were far more problematic. Aggression was generally committed not by an individual but by armed forces or by a group of individuals and, on that point, the text could be improved. The deletion of the words "by another individual", proposed by Mr. Barsegov, would make paragraph 1 clearer, and the same applied to the first paragraph of the other articles.

45. Unlike Mr. Pellet, he considered that the use of the Definition of Aggression as adopted by the General Assembly in resolution 3314 (XXIX) was justified. It had taken over 40 years of effort to get that resolution adopted by consensus. Had the Commission attempted to draft its own definition of aggression, it would probably have required the same amount of time. The wording of article 15 could perhaps be improved on second reading so far as points of detail were concerned, but any radical departure from its terms would certainly not facilitate the drafting of an acceptable text, and it would be a futile exercise to try to do so.

46. Mr. CALERO RODRIGUES said that the criticisms voiced with regard to the wording of article 15 illustrated the difficulties inherent in the basic object of the draft Code, which was to deal with individual responsibility. Aggression, as that concept was defined, consisted of the use of armed force by a State and it therefore had to be decided which individuals would be held personally responsible for acts that could be carried out only by a State. In that context it seemed difficult to arrive at a formulation that was very different from the one under consideration.

47. He supported Mr. Barsegov's proposal to delete the words "by another individual", from paragraph 1 of article 15.

48. Mr. TOMUSCHAT said that he too supported Mr. Barsegov's proposal, as it would bring the wording of paragraph 1 into line with paragraph 2, which stipulated that aggression was the use of armed force "by a State". Also, there was no need to revert to the question whether the virtual word-for-word quotation of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) had been justified. It was not such a bad definition, and it defined correctly what amounted to aggression. The Commission should stick to what it had decided two years earlier.

49. Mr. ROUCOUNAS said that thus far the Drafting Committee had concentrated mainly on defining the crimes, and had left in abeyance to some extent the question of the perpetrator of the crimes. From the explanations given by the Chairman of the Drafting Committee, he understood that three categories of perpetrators were to be distinguished: an individual who acted as leader or organizer, for example, in the crime of aggression or apartheid; an individual who acted as the agent or representative of a State, for example, in the crime of international terrorism; and, lastly, any individual, (*tout individu*), for example, in the crime of illicit traffic in narcotic drugs or systematic or mass violations of human rights. The Commission should therefore specify in one way or another, possibly in the commentary, which of the crimes listed under part two of the Code were committed by leaders and thus gave rise to the special responsibility of certain agents of the State, which crimes could also be committed by other agents of the State, and which were punishable when committed by "any individual" without further qualification. In his view, the question of the perpetrator should be considered very carefully on second reading.

50. Mr. EIRIKSSON said that he also favoured deletion of the words "by another individual", from paragraph 1 of article 15. However, that deletion would not, of course, have the effect of criminalizing acts by groups. Persons who had acted as part of a group would none the less be prosecuted individually.

51. As to Mr. Pellet's general reservation, he too had made the same reservation when the Commission had adopted the draft article before referring it to the Drafting Committee, since it had seemed inadvisable to him to incorporate a resolution of a political nature into a code of crimes. At that time he had proposed a very simple definition, much like the one to be found in the United Nations Convention on the Law of the Sea, which had been confined to paragraph 2 of article 15. He would not, however, object to the adoption of article 15.

52. Mr. GRAEFRATH said that he supported Mr. Barsegov's proposed deletion but would remind members of the decision taken by the Commission at the outset to limit the scope of the Code to individuals, which was normal for a criminal code. He also believed that the concept of leader or organizer used in paragraph 1 had been taken from the Charters of the Nürnberg and Tokyo Tribunals: there was thus a legal precedent and the wording was not as indefinite as had been suggested.

53. Article 13[12] provided the answer to the question raised by Prince Ajibola since it stipulated that the official position of the individual who committed a crime, and in particular the fact that he had acted as head of State or Government, did not relieve him of criminal responsibility. That was one of the most important decisions the Commission had taken in the matter.

54. Mr. THIAM (Special Rapporteur) said that he endorsed Mr. Barsegov's proposal to delete the words "by another individual", from paragraph 1 of article 15.

55. With regard to Mr. Pellet's statement, he was shocked that a member of the Commission had voiced "absolute opposition" to a draft article. Any member could, of course, express his reservations or misgivings, but none had the right of veto. So far as substance was concerned, Mr. Pellet criticized the article for reproducing the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) which, he considered, had a purely political purpose and bore no relation to the Definition of Aggression under criminal law. The Definition of Aggression was, however, directly linked to the Code since work on the drafting of the 1954 Code had been suspended pursuant to General Assembly resolution 897 (IX) pending the adoption of the Definition of Aggression by the General Assembly. There was no denying that a few small difficulties remained. Some members had taken the view that the list of acts which appeared in the Definition of Aggression adopted by the General Assembly was not sufficiently exhaustive, which was why the words "in particular" had been added between square brackets in paragraph 4 of the article. It should be emphasized that the Drafting Committee had made considerable efforts to prepare a text on such a difficult question—a text which could, in any event, be improved, if necessary, on second reading, as far as points of detail were concerned.

56. Mr. PAWLAK (Chairman of the Drafting Committee) said that the drafting of article 15 had created the most obstacles during the Commission's work on the topic. The Committee had been faced with a choice either of accepting the Definition of Aggression drawn up by the General Assembly or of trying to draft its own definition. It had decided to use the definition that existed already, in the realization that it would be virtually impossible for it to draft a definition likely to enlist from the international community support as broad as that for the definition annexed to resolution 3314 (XXIX), which the General Assembly had adopted by consensus.

57. He was not opposed to deletion of the words "by another individual" from paragraph 1 of article 15 but was not in favour of any other change in that provision.

58. The whole concept underlying the draft Code was the responsibility of individuals. Care should be taken not to revert to the outdated concept, rejected by contemporary international criminal law, of the criminal responsibility of the group, even though, as Prince Ajibola and Mr. Roucounas seemed to suggest, in the case of certain crimes the individuals responsible could perhaps be more clearly specified.

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[12] For text and discussion, see 2236th meeting, paras. 56-63.

59. He had proposed in the Drafting Committee that the words "in particular", which appeared at the beginning of paragraph 4 between square brackets, should be deleted; some members had, however, been opposed to the idea, preferring to leave it to the Commission to decide the question. Those words did not appear in the definition adopted by the General Assembly, which article 15 otherwise reproduced virtually word for word. He would welcome members' views in that connection.

60. Mr. JACOVIDES said that he supported the proposal to delete the words "by another individual" from paragraph 1 of article 15. For the rest, he considered that, although the definition was certainly not perfect, it was the result of a compromise which had been worked out over a period of several years and it would be a mistake to start to tinker with it at that stage. On second reading of the draft, certain minor details could perhaps be revised in the light of the discussion that would be held in the Sixth Committee.

61. He reminded members that, when the Commission had started to draft the Code, several members had wanted to go beyond the responsibility of the individual and to deal with the responsibility of States as well as the responsibility of groups. A compromise had had to be reached so that the work could move ahead, but it would be advisable, as the Commission was completing its first reading of the draft articles, to record that fact in some appropriate form in the report to the General Assembly.

62. The CHAIRMAN said that the report to the General Assembly would refer to the Commission's decision to deal for the time being only with the responsibility of individuals.

63. Mr. EIRIKSSON said he wondered what precisely was the purpose of paragraph 4 (*h*); he believed that it must have some link with the words "In particular", which appeared between square brackets in the opening clause of paragraph 4 but not in the Definition of Aggression adopted by the General Assembly.

64. Mr. GRAEFRATH said that the words "In particular", which appeared between square brackets, in paragraph 4, like the whole of paragraph 5, had been introduced into the text to cover two eventualities: the Security Council might determine that there was an act of aggression on the basis of acts other than those listed in the definition in article 15, or it might find that, notwithstanding the presence of acts listed in the definition, there was no aggression. A delicate problem thus arose of the relationship between the Code, the decisions of a possible criminal court, and the decisions of the Security Council. As that was politically sensitive, the square brackets should be retained to allow States to decide during the discussion in the Sixth Committee on the way in which the relationship between a possible criminal court and the Security Council should be resolved.

65. Prince AJIBOLA said that he was grateful to the Chairman of the Drafting Committee and to other members for their explanations regarding the use of the word "individual" but would still like it to be made clear at some point that, so far as responsibility under the Code was concerned, it mattered little whether the individual had acted on his own behalf, on behalf of the State, or on behalf of a group, and that in the two latter instances the individual would also incur criminal responsibility.

66. Mr. McCAFFREY said that Prince Ajibola's concern was perhaps partly met by article 13. As to the drafting proposals which had just been made, he agreed with deletion of the words "by another individual", from paragraph 1 of article 15, and considered that the words "In particular" in square brackets in paragraph 4 were not really necessary, for two reasons. First, they did not appear in the definition of acts of aggression laid down in article 3 of the Definition annexed to General Assembly resolution 3314 (XXIX) and, secondly, subparagraph (*h*), which had been added to paragraph 4 of draft article 15 and was based directly on article 4 of that Definition, made it clear that the list of acts referred to in paragraph 4 was not exhaustive.

67. In his view, therefore, the words "In particular" could be deleted without difficulty.

68. Mr. THIAM (Special Rapporteur) said it had been suggested that the words "In particular" should be included in paragraph 4 to create a link between the jurisdiction of the Security Council and that of a possible international criminal court. The problem was that an international criminal court might never be able to treat a given act as an act of aggression if that act was not included in the draft Code.

69. Personally, however, he had no definite views on the matter. He would prefer the words "In particular" to be deleted but would not object to their being retained if that was the wish of the majority. His remarks could perhaps appear in the commentary.

70. Mr. PAWLAK (Chairman of the Drafting Committee) said that the question of the inclusion of the words "In particular" in paragraph 4 had not arisen in connection with paragraph 5 alone. In that connection, he would refer members to article 4 of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) which read:

> The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the Charter.

It was that provision that lay behind the introduction of the words "In particular" in paragraph 4. In the circumstances, if the Sixth Committee decided to keep paragraph 5, which appeared between square brackets, the words "In particular" would not be necessary and could be deleted. That was the solution he personally favoured.

71. With regard to the points raised by Prince Ajibola, he would refer him to articles 4 and 5,[13] concerning the motives and responsibility of States, and to article 13,[14] which provided that "The official position of the individual who commits a crime . . . does not relieve him of criminal responsibility". Those articles should partly meet his concern.

[13] Ibid., paras. 17-31.

[14] See footnote 12 above.

72. Prince AJIBOLA said that he was satisfied with those explanations.

73. The CHAIRMAN, summing up the discussion, said that the Commission had to take a decision on two proposals with respect to article 15. In the first place, it was suggested that the words "by another individual", in paragraph 1 of the article, should be deleted. The proposed new text would then read:

"1. An individual who as leader or organizer plans, commits or orders the commission of an act constituting aggression shall, on conviction thereof, be sentenced [to . . .]."

74. Mr. TOMUSCHAT said he did not think it was necessary to replace the former expression "an act of aggression", in paragraph 1, by "an act constituting aggression", since "act of aggression" appeared at several points in the article.

75. Mr. PAWLAK (Chairman of the Drafting Committee), endorsing Mr. Tomuschat's remarks, said that he could agree to deletion of the words "by another individual" only if no other change was made to paragraph 1, which should read:

"1. Any individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced [to . . .]."

It was so agreed.

76. The CHAIRMAN invited members of the Commission to take a decision on the proposal to delete the words "[In particular]", from paragraph 4 of article 15. If he heard no objection, he would take it that the proposal was adopted.

It was so agreed.

77. The CHAIRMAN said that no action was required on the title of part two as there had been no amendment to the wording previously adopted. If he heard no objection, he would take it that the Commission wished to adopt article 15, as amended.

Article 15, as amended, was adopted.

ARTICLE 16 (Threat of aggression)

ARTICLE 17 (Intervention)

ARTICLE 18 (Colonial domination and other forms of alien domination)

78. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 16, 17 and 18 which read:

Article 16. Threat of aggression

1. An individual who as leader or organizer commits or orders the commission by another individual of threat of aggression shall, on conviction thereof, be sentenced [to . . .].

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

Article 17. Intervention

1. An individual who as leader or organizer commits or orders the commission by another individual of intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .].

2. Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

3. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Article 18. Colonial domination and other forms of alien domination

An individual who as leader or organizer establishes or maintains by force, or orders another individual to establish or maintain by force, colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to . . .].

79. Mr. PAWLAK (Chairman of the Drafting Committee) said that it had been decided to introduce articles 16, 17 and 18 together, since the changes made to those articles, which corresponded in turn to former draft articles 13, 14 and 15 provisionally adopted by the Commission,[15] were the direct result of the basic approach he had already explained.

80. With regard to article 16 (Threat of aggression), the text of former article 13 had become paragraph 2, and the beginning of the article included the standard paragraph that now preceded the definition of each crime: "An individual who as leader or organizer . . .". The only change the Drafting Committee had made to paragraph 2 was to replace the opening clause, "Threat of aggression consisting of declarations", by "Threat of aggression consists of declarations".

81. Similarly, in article 17 (Intervention), paragraphs 1 and 2 of former article 14 had become paragraphs 2 and 3; and, in new paragraph 2, the Committee had made the grammatical adjustments required by the restructuring of that provision.

82. In the course of the review of article 17, it had been pointed out that it was conceivable that the leaders or organizers of a State which had intervened in the internal or external affairs of another State might have relied on the collaboration of their counterparts in the victim State, which raised the question whether both groups of individuals should be treated as criminals under the Code. The Drafting Committee had answered that question in the negative, being of the view that the leaders and organizers of the State against which the intervention was directed should be treated in accordance with the domestic law of that State.

83. Some members of the Committee had also reiterated their objections to the article, pointing out in particular that intervention was too vague a concept to form the basis for making an act a crime under the Code and that it was difficult to conceive of individuals committing acts of intervention.

[15] See *Yearbook . . . 1989*, vol. II (Part Two), para. 217.

84. With regard to article 18 (Colonial domination and other forms of alien domination), the definition adopted in former article 15 had been incorporated into the new preliminary clause worked out by the Drafting Committee at the present session.

85. Mr. EIRIKSSON pointed out that the decision to delete the words "by another individual", from paragraph 1 of article 15, had an effect on the wording of articles 16, 17 and 18, where the same words appeared. Deleting them from articles 16 and 17 created a drafting problem which could be solved by replacing the words "by another individual of", in paragraph 1 of both articles, by the words "of an act constituting . . .", as had been proposed for article 15.

86. Mr. PELLET said that he had no objection to Mr. Eiriksson's proposal regarding paragraph 1 of article 16. He wondered, however, whether the word "act" was well chosen and whether it could apply, for instance, to a communication. It would in any event be superfluous to add it to paragraph 2. The wording of paragraph 2 seemed to be quite well drafted but, since he was firmly opposed to article 15, he could not agree to article 16 either.

87. Mr. BEESLEY said that, while he agreed with Mr. Eiriksson on the need to harmonize the draft articles, he too would prefer not to introduce the word "act" in paragraph 2 of article 16. He had no definite opinions on the matter, however, and would abide by the majority view. He also noted that, in article 18, deletion of the words "another individual" would make it necessary to replace the words "to establish or maintain" by "the establishment or maintenance".

88. Mr. BARSEGOV said he considered that Mr. Eiriksson's proposal should, on the contrary, apply to all the articles. The words "an act constituting . . ." seemed particularly appropriate in the legal context and could be used everywhere. That drafting problem could perhaps be solved on second reading of the draft.

89. Mr. McCAFFREY said that he supported Mr. Eiriksson's proposal but only with respect to the opening clause of each of the two draft articles. The expression "an act constituting . . ." seemed to him to be entirely appropriate, at least in English, where a declaration and a communication were also "acts".

90. He wondered, however, whether, for the sake of proper grammar, the indefinite article "a" should not be added before the word "threat", in paragraph 1 of article 16.

91. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in view of the amendment the Commission had decided to make to paragraph 1 of article 15, he would have no objection to the proposed changes to paragraph 1 of article 16, which would then read:

> "1. An individual who as leader or organizer commits or orders the commission of an act constituting a threat of aggression shall, on conviction thereof, be sentenced [to . . .]."

92. With the deletion of the words "by another individual", paragraph 1 of article 17 would read:

> "1. An individual who as leader or organizer commits or orders the commission of an act constituting intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .]."

93. In article 18, the words "to establish or to maintain" would be replaced by "the establishment or maintenance".

94. Those three changes were the logical consequence of the changes made to article 15 and seemed perfectly acceptable to him.

95. Mr. AL-BAHARNA said that he agreed with Mr. Eiriksson's suggestion regarding article 17. If the words "by another individual" were deleted, the paragraph did not read well. It was therefore preferable to add the words "of an act constituting" after "the commission". On the other hand, it was necessary to add those words to paragraph 1 of article 16.

96. Mr. PAWLAK (Chairman of the Drafting Committee) said that such matters were, after all, a question of style, but for his own part he would prefer to add the words "an act constituting . . ." both in article 16 and in article 17 since the text would be clearer. If there was no major objection, he would therefore support Mr. Eiriksson's proposal.

97. Mr. PELLET said he did not think that an act constituting a threat of aggression could be "committed". A threat was not of itself an act. It would be more logical to say "An individual who as leader or organizer threatens to commit an act of aggression . . .". It was there that the problem arose. Admittedly, it would be difficult to change the rest of the article but an awkward turn of phrase at the outset would be unfortunate. He therefore proposed that paragraph 1 should be worded to read:

> "1. An individual who as leader or organizer threatens to commit an act of aggression or orders the commission of an act constituting a threat of aggression shall, on conviction thereof, be sentenced [to . . .]".

98. Mr. BEESLEY said that, while he understood Mr. Pellet's point of view, he appealed to him not to press his proposal. A threat of aggression should be treated as a serious matter, with grave implications, which in itself already constituted an act of aggression. He was not shocked, therefore, by the proposed wording.

99. Mr. GRAEFRATH said he too felt that Mr. Pellet's proposed changes might alter the substance of the article. He would prefer to retain the present wording.

100. Mr. RAZAFINDRALAMBO likewise urged Mr. Pellet to withdraw his proposal, which could disrupt the harmony established between article 16 and the other articles in the Code. Threat of aggression was a concept that amounted to the characterization of a crime in itself. Furthermore, paragraph 2 of the article spoke of "threat of aggression" and those words formed a whole. He would, however, prefer to retain the original wording of article 16 and not introduce the words "of an act constituting . . .", either in paragraph 1 or in paragraph 2. That would place undue emphasis on the word "act", in the

French version, which already appeared at the end of paragraph 1. Neither declarations nor communications, however, were acts.

101. Mr. EIRIKSSON said that, although he was not really in a position to analyse the precise tone of Mr. Pellet's proposal, he realized that it did pose a problem. He would remind members of the difficulties that had arisen when it had been necessary, in the provision that now formed the subject of paragraph 3 of article 3, to make a choice between the noun "attempt" and the verb "attempts". In any event, in proposing the addition of the words "of an act constituting" it was not his intention to modify the substance of the articles in question.

102. Mr. PELLET said he continued to think that a threat was not an act in itself, but since he objected in principle to article 16, in any event, he did not feel he had the right to impose his views as to the way in which it should be worded.

103. The CHAIRMAN, speaking as a member of the Commission, said that the declarations, communications and demonstrations referred to in paragraph 2 of article 16, could be regarded equally as acts of aggression and as threats of aggression.

104. Mr. PAWLAK (Chairman of the Drafting Committee) said he considered, in the light of the discussion, that it would be best to make the fewest possible changes to article 16. He therefore proposed that the Commission should adopt the following wording for paragraph 1:

> "1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to . . .]."

Paragraph 2 would remain unchanged.

105. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 16 as amended by the Chairman of the Drafting Committee.

Article 16, as amended, was adopted.

106. The CHAIRMAN invited the Commission to adopt articles 17 and 18.

107. Mr. PELLET said that he was absolutely opposed to those articles.

108. Mr. CALERO RODRIGUES pointed out that the question of the words which appeared between square brackets in paragraph 2 of article 17 had still not been dealt with.

109. The CHAIRMAN suggested, in the light of those comments, that the Commission should revert to articles 17 and 18 at the next meeting.

It was so agreed.

The meeting rose at 1.10 p.m.

2238th MEETING

Wednesday, 10 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (A/CN.4/440 and Add.1,[1] A/CN.4/L.456, sect. E, A/CN.4/L.467, ILC(XLIII)/Conf.Room Doc.5)

[Agenda item 2]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on State responsibility (A/CN.4/440 and Add.1).

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the chapter dealing with the regime of countermeasures was the most difficult one in the whole topic of State responsibility, even if confined to delicts. It also formed the very core of part 2 of the draft articles, which was itself central to the topic. The codification of the regime of countermeasures was characterized by two features, the first being the drastic reduction in, if not total absence of, any analogies with municipal law. Whereas it had been possible in the case of substantive consequences to draw on municipal law, when it came to instrumental consequences it was necessary to contend with an entirely different structure. The second feature was that in no other area was the lack of an adequate institutional framework for present or conceivable future regulation of State conduct so keenly felt. He was thinking, in particular, of two aspects of the sovereign equality of States—the propensity of any State to refuse to accept any higher authority, and the contrast between the equality of States in law and their inequality in fact. The self-evident nature of that remark in no way detracted from its importance.

3. Practice in the matter was abundant, but often the recourse to unilateral measures did not conform to the existing rules, still less to what was desirable in the matter of the progressive development of international law, and it was difficult at times to identify the precise content of some of the general rules. Uncertainty was manifest in the doctrine of the so-called "self-contained" regimes,

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[1] Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

the United States of America.[14] Those elements should be kept, regardless of the exact title of the article. A key element of the definition lay in the use of force or organized terror against another State. Drafting improvements to article 17 and a decision on the words in square brackets should be left for the second reading.

57. Mr. PELLET said he could not accept article 17 in its present form. Taken literally, it would mean that the President of the United States of America would have to be indicted by an international criminal court for a crime against the peace and security of mankind. It was precisely because he felt that that would be unreasonable that he objected to the article. The Commission must take a responsible stance, in the light of international realities. He did not support either United States intervention in Nicaragua, or acts of intervention by other countries, but was disturbed by the idea that they could be characterized as crimes against the peace and security of mankind. Indeed the very title of the article invited misinterpretation and misuse for political ends. He proposed that it should be replaced by "subversive activities". As to the content of the article, he agreed with Mr. Calero Rodrigues that, if the article was retained, the words in square brackets should be deleted.

58. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that the words "by another individual" in paragraph 1 should be deleted, and replaced by "an act".

59. Mr. ARANGIO-RUIZ, referring to paragraph 1, said he agreed with the views expressed by Mr. Calero Rodrigues and Mr. Pellet on the question of intervention. It was a singularly difficult concept to define. Inevitably, article 17 was somewhat vague, since a crime was a highly specific matter. However, the actions of the United States of America or any other particular country were not relevant to the condemnation of intervention as such.

60. Mr. EIRIKSSON said that he had a number of reservations about the article, but they related to the title rather than to the substance.

61. The CHAIRMAN, speaking as a member of the Commission, said that the difficulty of characterizing the crime of intervention was well known. Acts carried out with the consent of the second State would of course escape the rubric of intervention. Paragraph 2 sought to define the scope of the article, and to indicate the criminal elements in intervention. It did not take a political stance. As for paragraph 3, he felt, as a member of the Drafting Committee, that it did not properly belong in the article. However, it was a wise decision to refer the article as a whole to the General Assembly for comments and advice, with a view to making improvements on second reading.

62. Mr. BARSEGOV said that paragraph 3 was drawn from General Assembly resolution 36/103, containing the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. Likewise, the definition of aggression in the draft articles was based on the relevant General Assembly resolution.

[14] See 2209th meeting, footnote 6.

63. Mr. McCAFFREY said that although he had not spoken during the discussion, he wished to place on record that his views were unchanged since the Commission's previous adoption of article 17, without the new paragraph 1.[15]

64. The CHAIRMAN suggested that the Commission should adopt article 17 with the amendment to paragraph 1 proposed by the Chairman of the Drafting Committee. He endorsed the latter's proposal to retain paragraph 2 in its present form. Paragraph 3 would likewise be retained.

Article 17, as amended, was adopted.

The meeting rose at 1.05 p.m.

[15] Adopted as article 14 (Intervention) at the forty-first session, in 1989.

2239th MEETING

Thursday, 11 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/435 and Add.1,[2] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

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

ARTICLE 18 (Colonial domination and other forms of alien domination) (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of article 18.

[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... 1991*, vol. II (Part One).

2. Mr. PAWLAK (Chairman of the Drafting Committee) said it had been proposed (2237th meeting) that the words "another individual" should be deleted and that the words "to establish or maintain" should be replaced by the words "the establishment or maintenance". As thus amended, article 18 would read:

"Article 18. Colonial domination and other forms of alien domination

"An individual who as leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to . . .]."

3. Mr. THIAM (Special Rapporteur) said that he agreed with those changes.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 18, as amended.

Article 18, as amended, was adopted.

ARTICLE 19 (Genocide)

5. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 19 which read:

Article 19. Genocide

1. An individual who commits or orders the commission by another individual of an act of genocide shall, on conviction thereof, be sentenced [to . . .].

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) imposing measures intended to prevent births within the group;

(*e*) forcibly transferring children of the group to another group.

6. Mr. PAWLAK (Chairman of the Drafting Committee) explained that article 19 (Genocide), as well as articles 20, 21, 22 and 26, had been worked out at the present session. Its scope *ratione personae* extended to all individuals.

7. With regard to the definition of the crime of genocide contained in paragraph 2, it would be recalled that, in plenary, the Commission had generally approved the approach taken by the Special Rapporteur in closely following the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Drafting Committee had, however, felt that the limitative list of acts constituting genocide which was to be found in article II of that Convention should not be made into an open list, as had been suggested by the Special Rapporteur. In the Committee's view, the principle *nullum crimen sine lege* required that the list should be exhaustive. Furthermore, it would be inadvisable to depart from a widely ratified instrument such as the Convention.

8. The Drafting Committee had therefore eliminated the word "including" which had been used in paragraph 1 of the former article 14 (Crimes against humanity), as proposed by the Special Rapporteur.[3] The opening words of article II of the Convention ("In the present Convention . . .") had also been eliminated in order to adapt the definition to the requirements of the Code.

9. With regard to paragraph 2 (*c*), the Drafting Committee had discussed whether the definition of genocide should not encompass the deportation of members of a national, ethnic, racial or religious group with the intent of destroying the group. In that connection, the Committee had considered it undesirable to depart from the provisions of the Convention and had preferred to cover that aspect in article 21 (Systematic or mass violations of human rights).

10. Lastly, he indicated that one member had expressed a reservation on article 19, paragraph 2 (*e*), maintaining that its scope should extend to all members of a group and not only to children. It had also been proposed that the words "by another individual" should be deleted from paragraph 1, as had been done in articles 16, 17 and 18.

11. Prince AJIBOLA said that, in paragraph 1, it might be better to refer to "a crime of genocide" rather than to "an act of genocide", in view of the seriousness of that crime.

12. Mr. TOMUSCHAT said that, for the sake of consistency, the words "act of genocide" should be retained, particularly since the words "act of aggression" and "act of intervention" were being used in articles 16 and 17.

13. He also thought that the words "by another individual" should not be deleted because genocide could be committed by one person, unlike aggression or intervention.

14. Mr. RAZAFINDRALAMBO said he agreed with Mr. Tomuschat that it would be preferable to retain the words "act of genocide" in paragraph 1. However, he did not believe that the deletion of the words "by another individual" in that paragraph would give rise to any real problem, since it was understood that individuals could be involved in an act of genocide.

15. In paragraph 2, he suggested that the words "Genocide means any of the following acts" should be replaced by the words "Genocide consists of any of the following acts . . ." in order to bring the text into line with that of other articles, particularly article 20 (Apartheid).

16. Mr. BARSEGOV said he also considered that the deletion of the words "by another individual" would make the text more homogeneous without changing the

[3] *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/419 and Add.1, para. 30.

meaning of the article. Genocide was, of course, committed by a State, but through the intermediary of individuals. It was not because those words had been deleted that those individuals would no longer be responsible.

17. Mr. PAWLAK (Chairman of the Drafting Committee) said that it would be better to bring article 19 into line with articles 16, 17 and 18 by deleting the words "by another individual".

18. As to Prince Ajibola's proposal that the words "an act of genocide" should be replaced by the words "a crime of genocide", he noted that article 2 of the draft Code had already been adopted by the Commission and dealt with the characterization of an act or omission as a crime. If the two articles were taken together, it was only logical that the word "act" in article 19 should be retained; in any case, all the acts mentioned in the Code were crimes. One single exception had been made in that regard, namely in article 20, the words "crime of apartheid" had been retained by reference to the International Convention on the Suppression and Punishment of the Crime of Apartheid. He would have the opportunity to come back to that point during the consideration of article 20.

19. Prince AJIBOLA again noted that, in his view, some acts were basically crimes. That was the case of genocide, which differed, for example, from intervention in that it constituted a crime from the outset, whereas there might well be a peaceful intervention or an intervention decided by common consent.

20. If, for the sake of uniformity, however, the Commission decided to retain the present wording, he would not object to it.

21. Mr. BARSEGOV said that article 19 raised a very important issue of principle, namely, that of deportation as a means of committing genocide. He was thinking, for example, of mass deportations of populations driven from territories which were their ancestral lands. That was obviously a politically delicate issue which was supposed to be covered by paragraph 2 (*c*). The Chairman of the Drafting Committee had indicated, during the discussion of that subparagraph, that that was to be clearly reflected in the commentary. In his own view, it was essential to say so specifically.

22. Mr. NJENGA said he agreed with Prince Ajibola that genocide was essentially a crime in the same way as apartheid. The expression "crime of genocide" was, moreover, commonly used.

23. Mr. EIRIKSSON said he did not think that a substantive debate on paragraph 1 of the articles on genocide and apartheid should be started at the current stage. The Drafting Committee had tried to find introductory wording that could be used for each of the articles of part two of the draft Code. A number of solutions were possible, including the one suggested by Prince Ajibola, but, taking particular account of article 3 of part one, the Committee had decided to use the word "crime" in the title of part two so as to indicate that all the acts referred to in articles 15 to 26 constituted crimes. It had not considered it necessary to repeat it in the articles themselves. In his view, it would be necessary, for the sake of consistency, to use the word "act" instead of the word "crime" in article 20 as well. Moreover, the conventions on which certain articles were based, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, were not always models of uniformity. If distinctions were made between the articles, there would be a danger of creating problems of substance and upsetting the structure of the text.

24. Mr. PELLET said that he agreed with Mr. Eiriksson on the advisability of using the word "act" both in article 19 and in article 20. The use of the word "crime" was not logical. It was under the Code that was being drafted that certain acts would be characterized as crimes against the peace and security of mankind.

25. Unlike Mr. Barsegov, who would like the list in article 19, paragraph 2, to be as full as possible, he believed that the Commission should not try to be exhaustive because there was the risk that it might leave out some particularly unacceptable acts it had not thought of. Article 18, which had just been adopted without any problem, did not contain a list and its wording was entirely satisfactory. He was opposed to any addition to the lists contained in articles 19 and 20, which he thought were already too long; they could be only illustrative in nature, no matter what might be said.

26. Mr. DÍAZ GONZÁLEZ said that he would also prefer the use of the words "crime of genocide" by reference to the Convention on the Prevention and Punishment of the Crime of Genocide. He pointed out that, at the beginning of paragraph 2, the word "Genocide" was used by itself and that it was therefore not consistent with paragraph 1.

27. Mr. CALERO RODRIGUES stressed that, from the standpoint of criminal law, individuals committed acts and the law then characterized those acts as crimes.

28. Mr. PAWLAK (Chairman of the Drafting Committee) said he also considered that, since all the acts referred to in the Code constituted crimes, there was no need for repetition by replacing the word "act" by the word "crime". Those in favour of that change should bear in mind that they were drafting a criminal code and that, if the rights of the defence were to be respected, they must refer a priori to acts and not to crimes. It would also not be appropriate to make any distinction between the acts referred to in the various articles, which were all very serious.

29. With regard to the point which Mr. Barsegov had raised and to which he himself had referred in his introduction to article 19, he pointed out that the question of deportation had been dealt with in article 21 (Systematic or mass violations of human rights). However, it might be useful to mention in the commentary that article 19, paragraph 2 (*c*), was meant to be broad in scope and to cover deportation as well.

30. As to the advisability of drawing up an exhaustive list of acts of genocide, he recalled that it was from the standpoint of criminal law that the Drafting Committee had decided to be specific and to delete the word "in-

cluding", which appeared in the former article 14 proposed by the Special Rapporteur. The Commission could, however, come back to that question during its examination of the draft articles on second reading if that approach was considered unsatisfactory.

31. The CHAIRMAN, speaking as a member of the Commission, said that, paradoxically, Prince Ajibola and Mr. Calero Rodrigues were both right. However, although he agreed with Prince Ajibola, he stressed that genocide had at all times been regarded as a crime under international law, as the Convention on the Prevention and Punishment of the Crime of Genocide had confirmed. In that sense, genocide was different, for example, from apartheid: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid was the first instrument which had made apartheid a crime.

32. Mr. NJENGA said that it would be more correct to refer to the "crime of genocide". He considered that the Commission should not spend any more time on that question and expressed the hope that it would avoid the same debate on article 20.

33. Mr. THIAM (Special Rapporteur) said that the question had been discussed at length in the Drafting Committee, some members favouring the use of the words "crime of genocide" and others, the words "act of genocide". It had finally been decided that the word "act" should be retained for the sake of harmonization. In fact, substance counted more than form. Genocide was, of course, a crime, since it was covered by the Code. To refer to an "act of genocide" did not mean that genocide was not a crime.

34. Prince AJIBOLA recalled that the Commission had held a lengthy discussion of the question whether, in the English version of the title of the draft articles, the word "offences", a generic term covering all breaches of criminal law, should be replaced by the word "crimes". In the end, the term "crimes" had been chosen. There could thus be no question now of referring simply to "acts".

35. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Commission could adopt article 19 as proposed by the Drafting Committee, with the deletion from paragraph 1 of the words "by another individual". It was understood that genocide was a crime, and even a grave crime, but all the other acts characterized as crimes in the draft Code were defined as "acts".

36. In reply to Mr. Díaz González, he said that it was naturally the crime of genocide itself which was defined, not the act.

37. The CHAIRMAN thanked Prince Ajibola for his comments, which seemed to have attracted some support in the Commission. He stressed that the Commission was now considering the draft articles on first reading only and that it would have every opportunity to come back to that question later during the consideration on second reading.

38. If he heard no objection, he would take it that the Commission wished to adopt article 19 as proposed by the Drafting Committee, subject to the deletion of the words "by another individual" from paragraph 1.

Article 19, as amended, was adopted.

ARTICLE 20 (Apartheid)

39. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 20, which read:

Article 20. Apartheid

1. An individual who as leader or organizer commits or orders the commission by another individual of the crime of apartheid shall, on conviction thereof, be sentenced [to . . .].

2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

(*a*) denial to a member or members of a racial group of the right to life and liberty of person;

(*b*) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

(*c*) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

(*d*) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;

(*e*) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;

(*f*) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

40. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 20 (Apartheid) had also been entirely worked out by the Drafting Committee at the present session. It would be recalled that, in his seventh report, the Special Rapporteur had presented two alternative texts for the article;[4] one was a short version consisting of a very general definition and the other, a longer version modelled on article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The Drafting Committee had preferred the second version because it was closer to the definition of apartheid that was generally accepted, namely, discrimination based on race, and also because it was incorporated in an international instrument. The definition of apartheid which the Committee was now proposing was a simplified version of article II of the 1973 Convention, to which two basic changes had been made. First, since the 1973 Convention had been drafted to fit the particular situation which had existed in southern Africa, the Committee had reworded the definition of apartheid so as to look to the future as well. Secondly, the Committee had considered that the definition should be limited to the description of the crime of apartheid only and that the examples should be deleted, since they could not be exhaustive.

[4] Ibid.

41. As in the other articles, paragraph 1 specified that the crime should be linked to individuals—either to leaders or to organizers who committed or ordered the commission of the crime by others. As it had decided in the case of other articles, the Commission might want to delete the words "by another individual".

42. The *chapeau* of paragraph 2 gave a general definition of apartheid, namely, acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing and maintaining domination by one group over any other racial group and systematically oppressing it. It should be stressed that the words "any other racial group" applied to one or more racial groups. In the Drafting Committee's view, there was no reason to refer each time to "group or groups", as the 1973 Convention did, since the commission of a crime against one group was sufficient to be considered a crime under the Code. In conformity with the approach adopted for the other articles, apartheid was defined by reference to acts listed in subparagraphs (*a*) to (*f*), which were simplified versions of subparagraphs (*a*) to (*f*) of article II of the 1973 Convention; the examples had been deleted and only the description of the acts had been retained.

43. The Drafting Committee had decided to retain the title of the article as: "Apartheid".

44. Lastly, in view of the discussion which had taken place on article 19, the Commission should, for the sake of uniformity and logic, consider the possibility of replacing the word "crime" in paragraph 1 by the word "act", without prejudice to the characterization of apartheid as a crime.

45. Mr. NJENGA said that his willingness to agree that the term "act" should be maintained in article 19 did not mean that he agreed that the words "crime of apartheid" should be replaced by the words "act of apartheid" in article 20. He stressed that apartheid was not an act or a succession of acts: it was a system, a systematic policy of racial discrimination based on the oppression of a racial group. It would be absurd to speak of an "act of apartheid" and he could not accept that term.

46. Prince AJIBOLA said that the arguments of uniformity and logic put forward by the Chairman of the Drafting Committee in order to propose, in the light of the discussion on article 19, that the word "crime" used by the Drafting Committee should be replaced by the word "act" were inadmissible. The law did not worry about logic or uniformity. The Commission's concern should be to submit to the General Assembly not so much a word perfect document, but one which reflected the law as perceived by the jurists composing the Commission. Everyone knew that apartheid was a crime. Since that was the case, why not say so clearly?

47. He had no firm opinion on the proposal to delete the words "by another individual".

48. Mr. Sreenivasa RAO said that it was important to retain the word "crime" in the present instance, since apartheid was different from the other crimes in that it was not an act, but a system.

49. Mr. PELLET said that he had strong reservations about article 20 for a number of reasons which could be summed up as one, namely, that the Drafting Committee had tried to follow the wording of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. That was, however, a special-purpose Convention and it was intended exclusively to combat apartheid as practised until quite recently in South Africa. As a result, article 20 failed to take account of the intolerable aspect of systematic policies of racial discrimination, no matter where and against whom, they were practised. That was apparently the only reason why the Drafting Committee had, contrary to the principle it had adopted for other articles, used the words "crime of apartheid", but that was not a valid reason.

50. He also found that paragraph 2 was very poorly drafted. First of all, it defined apartheid as consisting of "acts based on policies and practices of racial segregation and discrimination", when, in reality, apartheid consisted of those very policies and practices, which the article should have condemned and which were a crime. Moreover, the list was inappropriate, inasmuch as it probably did not cover all possible acts of apartheid. The Drafting Committee seemed to be aware of that fact, judging by the use in two places, in subparagraphs (*d*) and (*e*), of the words "in particular", which suggested that the Committee believed that there were probably other such acts without being able to define them. Subparagraphs (*c*) and (*d*) placed emphasis on legislative measures, something that was highly debatable, since the problem was not to know the source of those measures, but rather what they were. In fact, administrative measures of systematic discrimination were just as inadmissible as legislative measures. Reference should also have been made to constitutional apartheid, which was or would be the most serious. His reservations did not, however, amount to opposition.

51. Mr. EIRIKSSON said that the words "act of apartheid" were politically more acceptable and that, for reasons of drafting logic, a definition of the "crime of apartheid" might be included in paragraph 2. Of course, reference could simply be made to "apartheid". In any event, matters could be explained in the commentary.

52. Mr. JACOVIDES, noting that everything had already been said on the question at one point or another, proposed that the Commission should adopt the article as it stood, on the understanding that the commentary would give all the necessary details.

53. Mr. CALERO RODRIGUES said that the proposals that the word "crime" should be replaced by the word "act" or that reference should quite simply be made to "apartheid" would raise more problems than they would solve. In any case, the law was not logical, as Prince Ajibola had pointed out. He was therefore in favour of the adoption of the text as proposed by the Drafting Committee.

54. Mr. PAWLAK (Chairman of the Drafting Committee) said he could agree that the word "crime" should be retained. He nevertheless maintained his proposal that, for the sake of uniformity, the words "by another individual" should be deleted from paragraph 1.

55. Mr. EIRIKSSON referring to, but not insisting on, the model adopted for article 22, proposed that the *chapeau* of paragraph 2 should be amended to read: "The crime of apartheid consists of any of the following acts . . .".

56. Mr. THIAM (Special Rapporteur) said that the Commission could adopt that proposal, which met the concerns of Prince Ajibola and other members of the Commission.

57. Mr. TOMUSCHAT said that, on second reading, the Commission should take another look at the words "the following acts based on", which were inappropriate, since the acts in question were the expression, or the instruments, of policies and practices of racial segregation and discrimination.

58. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was certainly not a political organ and that it worked on the basis of legal elements. As it happened, article I of the International Convention on the Suppression and Punishment of the Crime of Apartheid stated that apartheid was a crime against humanity, whereas, according to article I of the Convention on the Prevention and Punishment of the Crime of Genocide, genocide was "a crime under international law". Moreover, apartheid had been constitutionally established in 1948. Since the Constitution was a legislative act under the system in force in South Africa, apartheid was a legislative measure. After 1948, of course, other measures had been taken to strengthen the system. Lastly, the words "legislative measures and other measures" could also be taken to mean administrative measures.

59. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20, subject to the deletion of the words "by another individual" from paragraph 1.

Article 20, as amended, was adopted.

ARTICLE 21 (Systematic or mass violations of human rights)

60. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 21, which read:

Article 21. Systematic or mass violations of human rights

An individual who commits or orders the commission by another individual of any of the following shall, on conviction thereof, be sentenced [to . . .]:

— violation of human rights in a systematic manner or on a mass scale consisting of any of the following acts:

(*a*) murder;

(*b*) torture;

(*c*) establishing or maintaining over persons a status of slavery, servitude or forced labour;

(*d*) deportation or forcible transfer of population;

(*e*) persecution on social, political, racial, religious or cultural grounds.

61. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the list of crimes against humanity proposed by the Special Rapporteur included slavery, forced labour, expulsion or forcible transfer of populations, persecution and murder. The Drafting Committee had considered that, instead of dealing with those crimes in separate articles, it could bring them all under a single article, which would then deal with crimes other than those referred to in separate articles. The fact that all those crimes had a common feature, namely, that they were all violations of human rights, had made that approach easier. All violations of human rights, whatever their degree, were abhorrent and intolerable, but, in order to be included in the Code as crimes against the peace and security of mankind, they had to be sufficiently serious.

62. Article 21, like other articles, began with a *chapeau* to relate the crime to an individual. As in the case of apartheid, any individual could commit the crime. The indented part of the *chapeau* set out the general principle and the criteria in accordance with which the acts listed should be evaluated. Under the *chapeau*, such acts must first be violations of human rights and, secondly, they must be systematic or on a mass scale. The latter criterion was intended to exclude from the scope of the article single acts which were violations of human rights, such as a murder or a single case of torture. Subparagraphs (*a*) to (*e*) listed the acts to which the *chapeau* applied. He emphasized that the list in the subparagraphs had to be read together with the *chapeau* because the crimes in question had to be committed in a systematic manner or on a large scale.

63. Some of the acts listed in the subparagraphs were already defined in existing human rights conventions. Others did not yet have conventional definitions, but, in the Drafting Committee's view, they were important enough to come under the Code.

64. Subparagraph (*a*) listed murder. The crime was self-explanatory and was defined in national criminal codes. In the Committee's view, systematic and mass murder was a crime against the peace and security of mankind.

65. Subparagraph (*b*) listed torture, which was defined in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. There had been general agreement among the members of the Drafting Committee that torture was of a highly destructive nature and should therefore be included in the Code.

66. Subparagraph (*c*) listed slavery, servitude and forced labour. The crime of slavery was defined in the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. In addition, article 8 of the International Covenant on Civil and Political Rights prohibited slavery, as well as servitude, a concept which included bondage and forced labour. A number of ILO Conventions defined and dealt with forced labour. The Drafting Committee had considered that slavery was a classic case of a crime against the peace and security of mankind and should therefore be listed in the Code.

67. Subparagraph (*d*) dealt with deportation and forcible transfer of population. The Drafting Committee had noted that, in most cases, deportation or forcible transfer of population occurred in time of war. However,

such crimes had been committed and still occurred in peacetime and should therefore be included. The commentary to the article would provide further elaboration and clarification, since there was no conventional definition for it.

68. Subparagraph (*e*) dealt with persecution on social, political, racial, religious or cultural grounds. Persecution had been listed in the 1954 Code and was referred to in the International Convention on the Suppression and Punishment of the Crime of Apartheid, but there was no conventional definition of it. Many members of the Drafting Committee had considered that many human beings had been and were being persecuted on social, political, racial, religious or cultural grounds. Persecution ran counter to the most basic human rights that formed the foundation upon which civilized human beings built their communities and lived peaceably together. It was therefore appropriate that systematic or large-scale persecution should constitute a crime under the Code. There was no conventional definition of persecution and the commentary would therefore explain what it meant and give examples of the forms it could take.

69. A few members of the Drafting Committee, while not disagreeing with the statement that systematic persecution was a very serious crime, had expressed concern because the term "persecution" itself was not legally defined and its content was not entirely clear. In their view, the Code should include only crimes that could be easily defined. For that reason, two members had expressed reservations about subparagraph (*e*).

70. The title of the article had been taken from its *chapeau* and read: "Systematic or mass violations of human rights".

71. Mr. THIAM (Special Rapporteur) pointed out that, in subparagraph (*a*), the word "murder" should be replaced by the words "wilful killing".

72. Mr. JACOVIDES said that the text originally proposed by the Special Rapporteur for paragraph 4 of article 14 read:

> "4. (*a*) Expulsion or forcible transfer of populations from their territory;
>
> "(*b*) Establishment of settlers in an occupied territory;
>
> "(*c*) Changes to the demographic composition of a foreign territory."[5]

He wished to know why the second and third points had not been repeated in subparagraph (*d*) of the text under consideration. If the Commission had good reasons not to retain them, it should at least refer to them in the commentary to article 21. The commentary should also refer to the denial of the right of persons displaced systematically or on a mass scale to return home.

73. Mr. PELLET said that the points raised by Mr. Jacovides came under article 22 (War crimes), in so far as those types of crimes were serious violations of the law applicable in international armed conflict and, in particular, the law governing wartime occupation, rather than violations of human rights.

74. Mr. JACOVIDES said that crimes such as those referred to in paragraph 4 (*b*) and (*c*) of the original article 14 could be committed both in time of war and in time of peace. As it now stood, article 22 was also silent on those acts.

75. Mr. TOMUSCHAT said that the practice of systematic disappearances in certain countries was at present one of the main concerns with regard to human rights. He realized that, at the current stage, it was not possible to add that crime to those listed in article 21, particularly since it might be covered by subparagraph (*e*). He nevertheless suggested that the commentary should mention the question and that the Commission should come back to it on second reading.

76. Prince AJIBOLA said that the word "murder" in subparagraph (*a*) was not very appropriate because it belonged more to the realm of internal law. In the present context, it was the term "pogrom" that came to mind more readily.

77. Mr. THIAM (Special Rapporteur) said that, in order to follow the terminology used in the relevant international instruments, he had proposed that the term "murder", which was too narrow in scope, should be replaced by the term "wilful killing" which covered both murder and manslaughter.

78. Mr. PAWLAK (Chairman of the Drafting Committee) said that the use of the term "murder" had been discussed at length in the Drafting Committee. As he had stressed when introducing article 21, that term had to be read together with the provisions of the *chapeau*. Reference was therefore being made not to an isolated wilful killing, but to wilful killings committed during a pogrom or in connection with other human rights violations.

79. One of the problems involved in the drafting of the Code had been that of choosing the crimes to be covered. Since it was obviously impossible to deal with all those crimes, only the most serious should be listed, if they were committed systematically or on a mass scale.

80. The comments made by Mr. Jacovides could be looked at during the consideration of the Code on second reading, but he believed that subparagraph (*d*) on deportation or forcible transfer of population also covered changes to the demographic composition of a foreign territory. He suggested that the words "of population" in that subparagraph should be replaced by the words "of a population".

81. Mr. PELLET said that he had no objection to the drafting suggestion made by the Chairman of the Drafting Committee, even though he found the French text more satisfactory. The wording proposed by Prince Ajibola was symptomatic of a drafting flaw: since Prince Ajibola had not taken part in the work of the Drafting Committee, he was concerned by the wording of article 21. The Drafting Committee could maintain that that article dealt with systematic or mass violations of human

[5] Ibid.

rights by the practice of murder or torture in a systematic manner or on a mass scale, but that article could also be interpreted as meaning that a murder or an act of torture was in itself a systematic and mass violation of human rights and, in that respect, article 21 was not sufficiently clear.

82. Mr. JACOVIDES said that the Chairman of the Drafting Committee had only partly met his concern. The demographic composition of a territory could be changed both in time of war—and that would be a war crime—and in time of peace, in which case it could be said that there had been a systematic and mass violation of human rights. His comment on the establishment of settlers in an occupied territory had not elicited any response. Those two points should be dealt with in article 21, as should the right of displaced populations to return home. If that was not possible, all those questions should be considered again on second reading and, for the time being, referred to in the commentary.

83. Mr. McCAFFREY, referring to the English text, said that, from the drafting point of view, it was preferable to say "transfer of populations" rather than "transfer of a population", which implied the transfer of an entire population. In the Drafting Committee, he had proposed that the words "violation . . . consisting of any of the following acts" should be replaced by the words "flagrant and systematic or mass violations of human rights by committing any of the following acts:". Although he would not press that proposal, which had not met with the approval of the Drafting Committee, he had wanted to refer to it again so that the members of the Commission could bear it in mind in case the present text continued to give rise to problems.

84. Mr. THIAM (Special Rapporteur) said he did not think that the Commission had to wait until the consideration of the draft on second reading in order to improve its wording. The important thing was to stress that murder and torture had to be practised in a systematic manner and on a mass scale in order to constitute a crime against the peace and security of mankind. He proposed that subparagraphs (*a*) and (*b*) should be replaced by the following:

"(*a*) the systematic and mass practice of murder;

"(*b*) the systematic use of torture;".

85. Mr. PELLET said that, of the two drafting proposals made by Mr. McCaffrey and the Special Rapporteur, the first had the advantage of covering subparagraph (*c*) as well. If it did not meet with any opposition, it would considerably improve the text of article 21.

86. Mr. CALERO RODRIGUES, supported by Mr. GRAEFRATH, suggested that, since the discussion had shown that the wording of article 21 stood in need of improvement, a small working group composed of the Chairman of the Drafting Committee, the Special Rapporteur and Mr. McCaffrey should redraft the text for submission to the Commission.

It was so agreed.

87. Mr. GRAEFRATH said that Mr. McCaffrey's proposal could give rise to a problem by implying that article 21 related to an act committed in a systematic manner, whereas that was not its purpose, since it dealt with systematic and mass violations of human rights, not with the systematic and mass perpetration of the act in question. The working group would have to take that drawback into account.

88. The CHAIRMAN, speaking as a member of the Commission, suggested that the working group should also take account of the following text:

> "Any individual who commits or orders the commission by another individual of the following acts: systematic or mass violations of human rights consisting of murder, torture, the act . . . persecution on social, political, racial, religious or cultural grounds, shall, on conviction thereof, be sentenced [to . . .]."

It would be more logical to list the crimes before referring to the penalty that was applicable to them.

89. Mr. BARSEGOV said that he supported Mr. Jacovides' proposal that a reference to changes to the demographic composition of a foreign territory and to the establishment of settlers in an occupied territory should be added to subparagraph (*d*). In a number of resolutions, the General Assembly and the Security Council had declared that the forcible changing of the demographic composition of a foreign territory was unlawful and a violation of human rights and, in particular, the right of self-determination.

90. Mr. PAWLAK (Chairman of the Drafting Committee) asked Mr. Barsegov which instruments he was referring to. If he was thinking of the Convention on the Prevention and Punishment of the Crime of Genocide, that aspect was covered by article 19, paragraph 2 (*c*), of the Code.

91. Mr. BARSEGOV said that deportations and forcible and arbitrary changes to the demographic composition of a territory, except, of course, for population exchanges pursuant to international agreements, could either form part of the acts declared to be crimes by article 19 (Genocide) or come under article 21 (Systematic or mass violations of human rights). Since the Commission had decided not to refer to them in article 19 and article 21 mentioned deportations and forcible transfers of population as violations of human rights, the Commission would be entirely justified in dealing in that article with changes to the demographic composition of a territory. The resolutions he had had in mind were resolutions adopted in specific cases, such as that of Palestine, for example.

92. Mr. PELLET said that, to his knowledge, the question of changes to the demographic composition of a territory had been mentioned only in the resolutions concerning the occupation of Arab territories by Israel. He was not opposed to the idea of referring to the question in the Code and was even in favour of it, but he took the view that that question had its proper place not in article 21, but in article 22, because it related to a violation of the law of international armed conflict. If only for reasons of simple logic, moreover, he did not see how the Commission could refer in article 21 to the right of populations to return because the crime in question was

deportation or the forcible transfer of population and the denial of the right to return was the consequence.

93. Mr. JACOVIDES said it was clear that the situations which article 21 should cover had nothing to do with those dealt with in agreements between States. He also pointed out that the case of the occupation of Arab territories by Israel was not the only example that could be cited in that regard. He suggested that article 21 (*d*) should be amended in the light of article 14, paragraph 4, which he had read out earlier.

94. Mr. BARSEGOV said that he understood Mr. Jacovides' concern about the denial of the right to return, but that concern created problems for other members of the Commission. He suggested that the starting-point should be the idea that that concern was met by recognition of the unlawful nature of the actual act of population transfer. An act could not be considered unlawful if its consequences were not also considered unlawful. Moreover, the question of return must be discussed in connection with State responsibility.

95. Mr. THIAM (Special Rapporteur) said that, although the General Assembly had placed considerable emphasis on the points he had listed in paragraph 4 of the text to which Mr. Jacovides had referred, the Drafting Committee was of the opinion that the establishment of settlers related more to the question of war crimes and changes to demographic composition than to the crime of genocide. On second reading, the Commission would have to discuss those problems in greater detail.

96. Mr. EIRIKSSON said that the lack of any obvious reasons to explain why the Drafting Committee had not included a particular crime should be reflected in the commentary, which should also indicate why the Drafting Committee had considered it appropriate to refer to a given crime in a particular article of the Code rather than in another. That would be better than trying to fill any possible gaps.

97. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the consideration of article 21 should be suspended until the proposed small working group had completed its work. The idea of referring in the Code to the establishment of settlers had all his sympathy, but, as the Special Rapporteur had already pointed out, it was difficult to commit such a crime in time of peace, so that it had to be made a war crime. Furthermore, the Drafting Committee had endeavoured to be as specific as possible and to prevent crimes from overlapping between one article and another. The commentary could not replace the article, since its role was simply to explain the article.

The meeting rose at 12.55 p.m.

2240th MEETING

Thursday, 11 July 1991, at 3.10 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/435 and Add.1,[2] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

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

ARTICLE 21 (Systematic or mass violations of human rights) (*concluded*)

1. The CHAIRMAN invited the Chairman of the Drafting Committee to report on the results achieved by the small working group of members which had been set up at the previous meeting to attempt to draft a new version of article 21.

2. Mr. PAWLAK (Chairman of the Drafting Committee) read out the text for article 21, as prepared by the small working group of members:

"Article 21. Systematic or mass violations of human rights

"An individual who commits or orders the commission of any of the following violations of human rights in a systematic manner or on a mass scale, shall, on conviction thereof, be sentenced [to . . .]:

"(*a*) murder;

"(*b*) torture;

"(*c*) establishing or maintaining over persons a status of slavery, servitude or forced labour;

"(*d*) deportation or forcible transfer of population;

"(*e*) persecution on social, political, racial, religious or cultural grounds."

[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 . . . 1991*, vol. II (Part One).

3. He said that the *chapeau* of the article, which had been awkwardly worded, had been amended, and the words "by another individual" had been deleted, for the sake of consistency with other articles in the draft. The *chapeau* now included the previously indented reference to a violation of human rights in a systematic manner or on a mass scale and was followed, as before, by an enumeration of such violations comprising five different categories of crimes.

4. Mr. BARSEGOV said that the new text was a valuable attempt to achieve a generally acceptable solution. However, there was a certain shift in emphasis, since all the acts listed in subparagraphs (*a*) to (*e*) must now be committed in a systematic manner or on a mass scale. The latter concept was now transferred to the acts themselves. He had no objection to that, except with regard to subparagraph (*d*) "deportation or forcible transfer of population". The new text implied that one act of deportation would not be sufficient.

5. Mr. TOMUSCHAT, recalling the comment by Mr. McCaffrey at the previous meeting, said that the word "population" should appear in the plural. As to subparagraph (*d*), he agreed with Mr. Barsegov that an act of deportation or forcible transfer of population was itself a systematic and large-scale violation of human rights. Hence, the *chapeau* of the article was not suited to subparagraph (*d*), but only to murder, torture, slavery and persecution. Subparagraph (*d*) should therefore be treated separately.

6. Mr. THIAM (Special Rapporteur) said he, too, agreed with Mr. Barsegov. To solve the difficulty, all the acts listed in subparagraphs (*a*), (*b*), (*c*) and (*e*) should be placed together in one paragraph. A second paragraph should then deal with deportation and forcible transfer of population.

7. Mr. EIRIKSSON said an alternative would be to make it clear that the acts referred to in subparagraph (*d*) constituted, by their very nature, systematic and mass violations of human rights, and therefore met the requirement stated in the *chapeau*. The point could be brought out in the commentary, without doing harm to the text.

8. Mr. NJENGA said he agreed with that suggestion and also with the point that the word "population" should appear in the plural. However, the wording of the new *chapeau* failed to convey the meaning properly. The words "shall, on conviction thereof, be sentenced [to . . .]" should be placed at the end of the article.

9. Mr. THIAM (Special Rapporteur) said that to single out one of the acts in the commentary as an exception from the clear rule stated in the *chapeau*, as suggested by Mr. Eiriksson, would conflict with the literal meaning of the text. A commentary could elucidate a text, but must not introduce new meanings. The only solution was to place the different categories of acts in two paragraphs; deportation and forcible transfer of population should feature in a separate second paragraph.

10. The CHAIRMAN said that the purpose of Mr. Eiriksson's proposal was simply to dispel doubt, not to alter the text. In his own view, the *chapeau* of the new version was awkwardly worded. The reference to conviction and sentencing should be placed at the end of the article.

11. Mr. RAZAFINDRALAMBO concurred with the Special Rapporteur that a commentary could not alter the meaning of articles which were already clear and precise. The intended meaning must be conveyed by the text itself. As the Special Rapporteur had suggested, the crimes should be grouped in separate paragraphs, deportation and forcible transfer of population having a paragraph to itself, to indicate the systematic and mass character of such crimes. The word "population" should be in the singular; in French the plural form would imply that the crime of forcible transfer must be committed against several populations.

12. The CHAIRMAN said that in his view, the objection voiced by Mr. Razafindralambo would apply equally to the English version.

13. Mr. PELLET said it was unclear whether the crime of persecution, referred to in subparagraph (*e*), was also inherently of a mass character. To solve the difficulty, he suggested transposing subparagraphs (*d*) and (*e*) and placing the word "or" before "deportation or forcible transfer of population". With regard to the Special Rapporteur's observation that the commentary could not be used to add meaning to the text, the problem with the present text lay in the choice between two possible meanings, and the commentary could make clear which meaning was intended.

14. Mr. THIAM (Special Rapporteur) said he would not object to the drafting change suggested by Mr. Pellet. A commentary could indicate the existence of a problem in a text; in no circumstances, however, could the commentary alter the meaning.

15. Mr. BARSEGOV said he could agree to Mr. Pellet's suggestion. However, adding the word "or" would imply some kind of choice or contradistinction, thereby creating further confusion. As to the term "population", the concept was a collective one and the singular must be used in Russian to refer to the inhabitants of a country or region, or a nationality. He was concerned that if the plural was used, the meaning would be that the populations of several places had to be deported before the crime constituted a mass violation of human rights.

16. Mr. GRAEFRATH proposed a rewording of article 21, to read:

> "An individual who commits or orders the commission of any of the following violations of human rights:
>
> "— murder
>
> "— torture
>
> "— establishing or maintaining over persons a status of slavery, servitude or forced labour
>
> "— persecution on social, political, racial, religious or cultural grounds,
>
> in a systematic manner or on a mass scale; or
>
> "— deportation or forcible transfer of population
>
> "shall, on conviction thereof, be sentenced [to . . .]."

17. That text would resolve the difficulty by keeping the reference to deportation separate.

18. Mr. EIRIKSSON, replying to the observations by the Special Rapporteur, said he was well aware that the meaning of the text could not be changed by the commentary. His only intention was to separate the acts which, if repeated, would be of a systematic or mass character, from those which, by their very nature, were of such a character. That was already the Commission's own understanding of article 21, and a commentary could clarify it. Splitting the text into two paragraphs might cause difficulty, because the title of the article required the presence of a systematic and large-scale element throughout. Perhaps a working group should be constituted to frame an acceptable version of the article.

19. Mr. TOMUSCHAT said he welcomed Mr. Graefrath's proposal. As the Special Rapporteur had rightly said, the text must be clear in itself. The need for interpretation must be avoided.

20. Mr. PAWLAK (Chairman of the Drafting Committee) said that the text proposed by Mr. Graefrath would be perfectly acceptable. None of the language descriptive of the crimes was lost, and it was certainly a more felicitous version than the previous one. As for the term "population", the plural could indeed denote the transfer of several populations; hence it would be best to retain the singular.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the new version, proposed by Mr. Graefrath.

Article 21, as amended, was adopted.

ARTICLE 22 (Serious war crimes)

22. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 22, which read:

Article 22. Serious war crimes

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of this code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(*a*) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [in particular wilful killing, torture, mutilation, taking of hostages, deportation or transfer of civilian population and collective punishment];

(*b*) use of unlawful weapons;

(*c*) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(*d*) large-scale destruction of civilian property;

(*e*) wilful attacks on property of exceptional religious, historical or cultural value.

23. Mr. PAWLAK (Chairman of the Drafting Committee) said that, after some further discussion, the Drafting Committee had decided to make two changes to article 22. The title, "War crimes", had been altered to "Serious war crimes" in order to bring it more into line with the text of the article itself which referred to "an exceptionally serious war crime". The second change lay in the deletion of the words "by another individual"—a change which had been made already in previous articles.

24. It would be recalled that, in 1989, at the Commission's forty-first session, the Special Rapporteur had introduced in the seventh report[3] an article on war crimes to be included among the crimes against peace. The Drafting Committee had discussed the article at the forty-second session in 1990, but had been unable to succeed in drafting a text acceptable to all members. At the present session, the Committee had spent a considerable amount of time in considering the text and had finally been able to propose an article on "Serious war crimes". He mentioned the article's odyssey simply to emphasize its complexity and the extensive discussion and redrafting that had been required in the Committee to reach the compromise formula now proposed.

25. The Drafting Committee had taken the view that an article on war crimes should select from among war crimes only those whose degree of seriousness would rank them as crimes against the peace and security of mankind. Therefore, article 22 was concerned not with the so-called "ordinary" war crimes nor with the so-called "grave breaches" described in the 1949 Geneva Conventions and Additional Protocol I thereto. For the purposes of the Code, the Committee felt that what would more closely approximate to its understanding of the kind of crime in question was "an exceptionally serious violation" of principles and rules of international law applicable in armed conflict, the formulation that appeared in the *chapeau* of paragraph 2.

26. Secondly, the Drafting Committee had considered that it was in the nature of a criminal code, such as the present one, to describe a crime rather than to give examples. Such a method of drafting was consistent with that used in the previous articles. The subparagraphs therefore described the categories of exceptionally serious violations that could constitute crimes under the Code. In selecting the categories of war crimes, the Committee had taken into account the Hague Rules, the four 1949 Geneva Conventions and Additional Protocol I thereto.

27. The article consisted of two paragraphs. Paragraph 1, as in other articles, tied the crime to an individual, and paragraph 2 defined the crime.

28. The *chapeau* of paragraph 2 set out the general rule for war crimes for the purposes of the draft Code, namely an "exceptionally serious violation of principles and rules of international law applicable in armed conflict". Hence, two criteria were identified: first, a violation of principles and rules of international law applicable in armed conflict, and second, a violation that must be exceptionally serious, something which could apply to the degree of violation of the rule or to the consequences of the violation. The words "exceptionally seri-

[3] *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/419 and Add.1, para. 3.

ous", though not entirely precise, conveyed some idea of the degree of gravity of the violation. The expression "principles and rules of international law applicable in armed conflict" was intended to include conventional and customary rules, such rules as might be agreed by the belligerents, as well as those that were universally recognized.

29. The Drafting Committee had also preferred to speak of "armed conflict", a term that was used in article 2 (*b*), of Additional Protocol I. Some constructive ambiguity was useful, particularly in view of the fact that common article 3 of the 1949 Geneva Conventions applied to non-international armed conflict. In any case, the wording of the *chapeau* did not in any way expand on or affect the scope of principles or rules of international law applicable in armed conflict.

30. Among the exhaustive categories of war crimes, subparagraph (*a*) included any act of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons. Many members of the Committee had thought that that general description included very many acts, such as wilful killing, torture, unjustifiable delay in repatriation of prisoners of war, and so on. Some members of the Committee, while not denying that understanding, insisted on listing some examples of specific acts and the examples appeared in square brackets in the proposed text. In their view, the listing could help the judge or the decision maker to grasp what the general description of the act was intended to include. Those who disagreed with the listing of examples felt that it was not exhaustive and there was no reason to single out certain acts; besides, non-exhaustive lists were contrary to the methods of drafting so far used in the Code. In their opinion, the list could be included in the commentary to the article. Since the two views could not be reconciled, the examples had been placed in square brackets, so as to leave the decision to the Commission.

31. Subparagraph (*b*) dealt with the use of unlawful weapons. Like the rest of the subparagraphs it should be read together with the *chapeau* of the paragraph. The Committee was of the opinion that the use of certain unlawful weapons could constitute a war crime if it was an exceptionally serious violation of principles and rules of international law applicable in armed conflict. Subparagraph (*c*) referred to methods or means of warfare which were either intended, or could be expected, to cause widespread, long-term and severe damage to the natural environment. The words "may be expected to cause" related to situations in which the user knew of the devastating effects on the environment, yet went ahead and used the methods or means in question. The category in subparagraph (*d*) was large-scale destruction of civilian property, when such destruction was considered an exceptionally serious violation of principles and rules of international law applicable in armed conflict. Subparagraph (*e*) mentioned wilful attacks on property of special religious, historical or cultural value—again, when they were considered exceptionally serious violations of principles and rules of international law applicable in armed conflict.

32. He wished to emphasize once more that the subparagraphs must all be read together with the *chapeau* of the article in order to understand the real intention of the article and to avoid misinterpretation. Lastly the title, "Serious war crimes", indicated that the intention of the article was to cover such crimes for the particular purposes of the draft Code.

33. Mr. JACOVIDES suggested inserting two further examples in the passage between square brackets at the end of paragraph 2 (*a*), namely the establishment of settlers in an occupied territory, and changes to the demographic composition of a foreign territory.

34. Mr. NJENGA said that article 22 as proposed by the Drafting Committee was, on the whole, acceptable.

35. The two concepts of "serious war crimes" and "grave breaches" were very close and it was difficult to distinguish between them. He earnestly hoped that, by making that distinction, the Commission would not be seen as trying to diminish the principle of "grave breaches" as defined in article 147 of the fourth Geneva Convention of 1949. The text of the article under consideration was very similar to article 147, except that some crimes had been omitted, a fact that could give rise to problems of interpretation. Actually, two of the omissions were serious and could be included in paragraph 2 (*a*), namely biological experiments and compelling protected persons to serve in the armed forces of a hostile Power.

36. It was essential to give examples, which were very important for an understanding of the intention of article 22. They provided guidance for the court on the situations envisaged. Accordingly, he would urge that the examples in paragraph 2 (*a*) be retained without square brackets.

37. Lastly, the commentary must make it perfectly clear that there was no intention of diminishing in any way the provisions of the four Geneva Conventions of 1949.

38. Mr. PAWLAK (Chairman of the Drafting Committee) said that, personally, he would have preferred to have a full list of examples in paragraph 2, but the discussion in the Committee had led to the adoption of the text now being proposed.

39. The wording "acts of inhumanity, cruelty or barbarity . . .", in subparagraph (*a*) was very broad. Perhaps the square brackets around the examples in paragraph 2 (*a*) could be deleted, but it would be for the Commission to decide on that point. In any event, the two examples suggested by Mr. Jacovides, as well as the two mentioned by Mr. Njenga, could usefully be added.

40. On the question of terminology, he urged the Commission not to make any change but to retain the term "serious war crimes". Any attempt to introduce the concept of "grave breach" would complicate the situation by putting the draft Code in the straitjacket of the 1977 Additional Protocol.

41. Mr. EIRIKSSON said he had no objection to article 22, but a clear description was needed of the intention. The contents would be difficult to understand even for experts in the law of armed conflict. Hence it was important for the commentary to include all the explana-

tions given by the Chairman of the Drafting Committee. In particular, the Commission had to be careful not to prejudge in any way the existing body of law on war crimes and the law applicable to armed conflicts, which had so far proved satisfactory.

42. It was advisable to include some further examples in order to complete article 22. It covered most of the grave breaches dealt with in the Geneva Conventions, particularly in the case of paragraph 2 (*a*). The problem, however, was that some of the items listed in the passage in square brackets did not traditionally belong to the law of armed conflict.

43. He hoped that, between the first and second readings of the draft Code, suggestions would be forthcoming from competent outside bodies that would help to improve the text of article 22. A comprehensive commentary was essential.

44. The CHAIRMAN said it was clear that every effort would be made to ensure that the commentary was as comprehensive as possible. The proposed text for article 22 represented a policy decision, in particular with regard to the illustrations. He preferred to call them "illustrations", rather than "examples", since in criminal law it was not appropriate to legislate by analogy. All the offences mentioned in article 22, however, fell under the rubric of armed conflict. Members could, of course, propose additions to the list of illustrations.

45. Mr. THIAM (Special Rapporteur) suggested that the title should be reworded to read: "Extremely serious war crimes". It would thus be more in line with the text of the article. He would point out that the serious war crimes mentioned in article 22 covered less ground than the "grave breaches" of the Geneva Conventions.

46. Mr. PELLET said that the article was very unsatisfactory. He did not wish to call into question the compromise formulation adopted in the Drafting Committee, but did want to place on record the reasons for his strong reservations.

47. His first objection was that the proposed text was inconsistent. The article referred to the violation of principles and rules of international law "applicable in armed conflict". Nevertheless, both the title and the body of the article used the expression "war crimes", a term he himself would have preferred to eliminate, because article 22 covered both more than, and less than, the traditional concept of war crimes. Actually, it covered only some war crimes but also certain offences which fell outside the scope of war crimes.

48. The usual concept of a war crime was any violation of the rules and customs of war. As explained by the Chairman of the Drafting Committee, article 22, for its part, was intended to cover only exceptionally serious violations, and not all violations, of the laws of war. Traditionally, "war" designated a conflict between sovereign States and was only one of the forms of international armed conflict. Article 22, however, was intended to cover not just inter-State war but all forms of international armed conflict, in other words, armed struggle for national liberation as well.

49. Consequently, article 22 seemed illogical and inconsistent with developments in international law over the past 30 years. He was not opposed in substance to the principle that article 22 tried to embody. The most appropriate course would be to avoid using the term "war crimes" at all and to refer simply to exceptionally serious violations of the rules applicable in armed conflict.

50. His second objection concerned the list of examples in paragraph 2. There was, of course, always a danger in including a list, if only because it could never be exhaustive. In the present instance, the non-exhaustive character of the list was clear from the words "in particular". Indeed, the list itself appeared to have been drawn up somewhat haphazardly and without any obvious criterion for distinguishing the items it included from those covered by the concept of "grave breaches" of the Geneva Conventions and Additional Protocol I thereto. In the circumstances, his own suggestion would be to eliminate the whole list figuring in square brackets, and not the square brackets alone. A further reason for objection on that point was that article 22 demanded from a State at war a greater measure of respect for human rights than did article 21 from a State in time of peace. He found that approach quite extraordinary and altogether unacceptable. Both the title and text of article 21 referred clearly not to all violations of human rights but to "systematic or mass violations" of human rights. Article 22, on the other hand, made an isolated act of wilful killing or torture punishable as a war crime and thus covered a much wider area.

51. He was not opposed to the proposal by Mr. Jacovides to include serious violations of the law governing wartime occupation, but a provision on the subject could not possibly be added to the list in paragraph 2 (*a*); if accepted, it should constitute a separate subparagraph. He none the less reiterated his opposition to the inclusion of any list at all.

52. Lastly, he disagreed with the way in which subparagraphs (*c*) and (*d*) of paragraph 1 were taken from Additional Protocol I. The original provisions of the Protocol had to be construed in the light of the necessities of the laws of war in general. It was a very important proviso that had disappeared in the process of copying the provisions for the purposes of article 22. It was important to remember that the rules governing armed conflict formed a whole and were interdependent. Subparagraphs (*c*) and (*d*) repeated two of those rules, taking them out of their proper context. The subparagraphs had been hastily adopted in the Drafting Committee, without much thought as to the consequences.

53. Mr. OGISO said that he had a number of reservations with regard to article 22. The Chairman of the Drafting Committee had proposed adding the word "serious" to the title of the article. However, doing so implied that there were three categories of war crimes: (*a*) ordinary war crimes; (*b*) serious war crimes; and (*c*) exceptionally serious war crimes. He did not see the wisdom in having three categories of war crimes. In particular, the use of the expression "exceptionally serious war crimes" might raise questions as to whether or not a particular act was an exceptionally serious crime. The defi-

nition in paragraph 2 of an exceptionally serious war crime was mere tautology and did not clarify the matter. Furthermore, the descriptions of war crimes contained in paragraph 2 (*a*) to (*e*) made no distinction between serious and exceptionally serious war crimes. In all, the word "exceptionally" tended to confuse the issue and should be eliminated from the article, which would then encompass two categories—ordinary and serious war crimes—and would thus correspond to the 1949 Geneva Conventions.

54. He would add to the list in square brackets contained in paragraph 2 (*a*) an item on the unjustified detention of prisoners of war after the cessation of hostilities, a suggestion that he had already made in the Drafting Committee. He was making that suggestion not to criticize what had happened in the past, but to prevent such a crime from occurring in the future.

55. Paragraph 2 (*b*), on the use of unlawful weapons, was acceptable, on the understanding that the commentary would clarify the conditions under which weapons were considered unlawful and whether the prohibition would apply between the parties to the same convention forbidding the use of those particular weapons.

56. Mr. THIAM (Special Rapporteur) said that he appreciated the fact that his colleagues wished to make their reservations known on what was clearly a difficult and controversial matter. Mr. Pellet, in particular, had made a number of comments, vehemently at times. In that connection, he wished to point out that some of Mr. Pellet's assertions were not entirely accurate. It was not true that the Drafting Committtee had given only hasty consideration to article 22. In fact, it had begun its consideration of that article in 1990 and, in the absence of a satisfactory solution, had returned to it at the present session. Indeed, article 22 was the one on which the Committee had spent the most time.

57. In his report, he had raised the issue of whether the expression "war crimes" should be replaced by the wording "violations of the law applicable in armed conflict". After extensive debate, the Commission had finally decided to keep the term "war crimes" since its usage was well established and it was employed in conventions that were still in force. At the same time, it was understood that reference would be made in the body of the article to serious violations of the law applicable in armed conflict. He agreed fully that article 22 should contain a reference to exceptionally serious violations. From the outset, the Commission had defined crimes against the peace and security of mankind as exceptionally serious crimes and there had been no objections to using that expression. In any case, that wording would demonstrate clearly that the crimes being dealt with in article 22 were not necessarily all the acts classified as "grave breaches" under the Geneva Conventions, but rather, crimes of an exceptionally serious nature.

58. The Commission could have avoided the enumeration of particular examples in paragraph 2 (*a*), but it had preferred by a large majority to keep that list in spite of the fact that it was not exhaustive.

59. Mr. Pellet had also observed that, by using the words "exceptionally serious", the Code was more severe in regard to the application of article 22 than of article 21. Personally, he saw no real problem in using that expression. The categories of war crimes and crimes against humanity often coincided in practice.

60. Mr. PAWLAK (Chairman of the Drafting Committee) said he wished to remind members that Mr. Pellet had been an active participant in the Drafting Committee's work on article 22 and had contributed and agreed to the final compromise article it had adopted. While he could accept Mr. Pellet's reservations, he could not accept the assertion that article 22 was of no value whatsoever.

61. In response to the observations of Mr. Ogiso, he would point out that article 22 did not refer to three categories of war crimes; it was limited to one category alone, namely, exceptionally serious war crimes. The definition provided under paragraph 2 was not really tautological since it was followed by several subparagraphs specifying the violations covered. Furthermore, the principles and rules of international law applicable in armed conflict were broadly understood and numerous references were made to them in existing conventions and customary international law. The Drafting Committee had considered the possibility of adding a reference to prisoners of war to the list in square brackets. However, it had decided that the matter was implicitly covered by the general description contained in paragraph 2 (*a*). In any case, he would not object if the Commission decided to add that item to the list.

62. Finally, in paragraph 2 (*a*), the word "the" should be inserted before the words "civilian population".

63. Mr. GRAEFRATH said that the title of the article should remain as it stood. By adding the word "serious", the Commission would simply be introducing an unnecessary new element, especially since the expression "serious war crimes" did not appear in the body of the text. "War crimes" was indeed the traditional wording. The Drafting Committee had decided to use it despite the fact that the international community now spoke not about rules of war but about rules applicable in armed conflict. He did not object to the use of the term "war crimes", since it was being used in the article to refer exclusively to violations of the rules applicable in armed conflict.

64. At its previous session, the Commission had elaborated a detailed list of war crimes. However, the list had not found its way into article 22. Instead, the Drafting Committee had included in paragraph 2 (*a*) several examples of specific war crimes. In his view, such a non-exhaustive list simply urged members to suggest supplementary items and did harm to the entire article. He would therefore prefer to eliminate the list in square brackets in paragraph 2 (*a*) and incorporate the more detailed list from the previous session in the commentary. In paragraph 2, the word "exceptionally" which came before the words "serious war crime" should be eliminated. The references to "serious war crimes" and "exceptionally serious violations" were adequate for the purposes of that paragraph.

65. Mr. CALERO RODRIGUES said that he wished to associate himself with the comments made by the Spe-

cial Rapporteur and the Chairman of the Drafting Committee in response to Mr. Pellet, who had, to all intents and purposes, charged that the Drafting Committee worked in a haphazard and hasty fashion. That was not at all the case: while it made mistakes at times, the Drafting Committee applied itself very seriously to its work.

66. The issue of the three categories of war crimes, mentioned by Mr. Ogiso, probably arose from the fact that the Chairman of the Drafting Committee had proposed changing the title of article 22 to "Serious war crimes". He agreed with Mr. Graefrath that there was no need to add a new formulation. The title should either remain as it stood or be amended to read "Exceptionally serious war crimes".

67. He was not particularly in favour of keeping the list in square brackets under paragraph 2 (*a*). The list was not comprehensive and was not essential to paragraph 2, which already spelled out in its subparagraphs the parameters for the determination of violations of rules applicable in armed conflict. Nevertheless, if the Commission insisted on keeping the list in square brackets, it was free to add items to that list provided they corresponded to the definition contained in the *chapeau* of paragraph 2 (*a*), which had been carefully worked out by the Drafting Committee.

68. Mr. BEESLEY said that, in principle, he endorsed views expressed by Mr. Graefrath. He agreed that the article should not refer to three different categories of war crimes. As to paragraph 2, there was no need for the words "exceptionally serious" to be repeated and they could be deleted in the second instance. In general, paragraph 2 might benefit from further consideration. For example, the list of acts in paragraph 2 (*a*) to (*e*) was far from exhaustive. One item which might have been included was the forcible use of children in situations of armed conflict. He, too, shared the concerns expressed about the list in square brackets in paragraph 2 (*a*) and, while he was in favour of eliminating the list entirely, he would not block its inclusion. The wording of subparagraph (*c*) was also problematic. As it stood, the subparagraph was so restrictive in meaning that it could hardly apply to any real situations.

69. Lastly, article 22 was one of the most difficult in the draft Code and members should not be too concerned about the differences that emerged in the course of the discussion.

70. The CHAIRMAN assured Mr. Beesley that the Drafting Committee had given careful consideration to the wording of paragraph 2 (*c*).

71. Mr. EIRIKSSON said that the title of article 22 should be "Exceptionally serious war crimes" rather than "Serious war crimes".

72. The logic behind the drafting of paragraph 2 was that the inclusion of detailed descriptions of various acts and exhaustive lists of examples would have meant reproducing an enormous amount of legal material on armed conflict. The paragraph had therefore been elaborated so that, in the case of a particular act, it would first be determined whether the act could be considered a violation of rules applicable in armed conflict, as defined in paragraph 2 (*a*) to (*e*). Once the nature of the act had been established, it remained to determine whether the violation was an exceptionally serious one. For that reason, the wording "exceptionally serious violation" had to remain in paragraph 2.

73. Mr. PELLET said he agreed with Mr. Graefrath and Mr. Calero Rodrigues that it was more logical to refer in the title to "Exceptionally serious war crimes" than to "Serious war crimes". It was not permissible within the same article to treat one concept in two different ways. The article dealt with exceptionally serious crimes, as was clearly indicated in paragraphs 1 and 2, and therefore the title had to be in line with the content of the article. He also agreed with the view that the entire list in square brackets should be eliminated from paragraph 2 (*a*). If the list was to be incorporated in the commentary, it should be made very clear that the acts in question only constituted crimes against the peace and security of mankind if they were exceptionally serious violations.

74. He had been misunderstood if he had given the impression that he was engaging in overall criticism of the Drafting Committee's work, including its work on article 22. He was not calling into question the compromise solution that had been adopted. On the contrary, he wished to pay tribute to the Committee's conscientious and intensive efforts under the guidance of its Chairman. Nevertheless, he had always had and continued to have enormous reservations with regard to paragraph 2 (*c*). His doubts might have been allayed had he received a response to the issue he had raised in the Drafting Committee about the way in which paragraph 2 (*c*) had been taken from Additional Protocol I. He was still waiting for a reply.

75. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to amend the title of the article to read "Exceptionally serious war crimes" and to delete the words "by another individual" from paragraph 1.

It was so agreed.

76. Mr. THIAM (Special Rapporteur), referring to subparagraph 2 (*a*), suggested that the list of crimes which appeared between square brackets should be deleted and referred to instead in the commentary, along with the crimes mentioned by Mr. Jacovides, Mr. Njenga and Mr. Ogiso.

77. Mr. BARSEGOV said he could not agree to that suggestion. In his view, the list of crimes should remain in the body of the article and it should be left to the Sixth Committee to decide whether such a list was necessary, and also whether it was satisfied with the general concept of barbarity or whether it wished to define that term. In addition, the article should be expanded and made more specific. In particular, it should contain the fullest possible description of the acts that constituted war crimes and the list that appeared between square brackets should include the two crimes mentioned by Mr. Jacovides and Mr. Njenga. He would not object to the inclusion of the unjustified detention of prisoners of war after the cessation of hostilities, but a time limit

should be specified beyond which such detention would become unlawful. A reference in the commentary to the crimes in question would be inappropriate, since the commentary was not binding.

78. Mr. CALERO RODRIGUES said that the list which appeared between square brackets could be deleted and transferred to the commentary. After all, there was nothing unusual, on first reading, about indicating the Commission's disagreement on a particular point. However, inclusion of the list in the body of the article would draw the attention of Governments to the matter. On balance, therefore, it would perhaps be best to follow the line suggested by Mr. Barsegov.

79. Mr. EIRIKSSON said that he would be reluctant to adopt subparagraph 2 (*a*) in the form in which it was drafted. He therefore proposed that, to cover Mr. Njenga's point, the words "biological experiments" should be added and, to cover Mr. Barsegov's point, the words "unjustifiable delay in the repatriation of prisoners of war" should be added.

80. The CHAIRMAN, appealing to members not to delay the adoption of the report of the Drafting Committee any further, said that members would have an opportunity to comment further on the points raised when the Commission came to consider its report to the General Assembly.

81. Mr. CALERO RODRIGUES suggested that paragraph 2 (*a*) should be adopted as drafted, on the understanding that a suitable form of wording would be worked out later to take account of the points raised during the discussion.

82. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 22, as amended, on the understanding expressed by Mr. Calero Rodrigues.

Article 22, as amended, was adopted.

ARTICLE 23 (Recruitment, use, financing and training of mercenaries)

ARTICLE 24 (International terrorism)

83. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts proposed by the Drafting Committee for articles 23 and 24, which read:

Article 23. Recruitment, use, financing and training of mercenaries

1. An individual who as an agent or representative of a State commits or orders the commission by another individual of any of the following, shall, on conviction thereof, be sentenced [to . . .]:

— recruitment, use, financing or training of mercenaries for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determinationas recognized under international law.

2. A mercenary is any individual who:

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

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

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

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

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

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

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

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

(ii) undermining the territorial integrity of a State;

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

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

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

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

Article 24. International terrorism

An individual who as an agent or representative of a State commits or orders the commission by another individual of any of the following shall, on conviction thereof, be sentenced [to . . .]:

— undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

84. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as previously adopted, under articles 23 and 24, on mercenaries and on international terrorism, the crimes in question came within the terms of the Code if they were committed by agents or representatives of States. The Drafting Committee was aware that some members of the Commission and even members of the Sixth Committee could make a case for extending the scope *ratione personae* of the two articles to persons or groups unconnected with the State. The Committee had, however, thought that it should not depart from the approach taken by the Commission to the two articles in 1990. He therefore suggested that the articles should be retained as drafted.

85. With regard to article 23, the Committee had inserted the standard opening clause before the definition of the crime as initially adopted. Paragraphs 2 and 3 were unchanged except that the word "person", in the first line of each paragraph, had been replaced by the word "individual", for reasons of consistency. The semicolon at the end of paragraph 2 (*e*) of the article should be replaced by a full stop.

86. Mr. CALERO RODRIGUES proposed that the words "by another individual", in paragraph 1, should be deleted.

87. Mr. TOMUSCHAT proposed that, to bring the article into line with previous articles, the word "acts" should be added after the words "the following", in paragraph 1.

88. Mr. CALERO RODRIGUES, supported by the Special Rapporteur and Mr. TOMUSCHAT, suggested

that the words "shall, on conviction thereof, be sentenced [to . . .]" should be transferred to the end of paragraph 1.

89. Prince AJIBOLA said that he would prefer a shorter, tidier definition of mercenaries. In particular, paragraph 2 (*b*) should end at the words "private gain"; otherwise the provision it embodied would be far too long and vague.

90. Mr. PAWLAK (Chairman of the Drafting Committee) said that he, too, would have liked a shorter definition. However, the text had been taken from the International Convention against the Recruitment, Use, Financing and Training of Mercenaries as elaborated by the Sixth Committee and it had been felt that to adopt a different text would be tantamount to criticizing what had been worked out in a lengthy process. Accordingly, he would advise that, for the first reading of the Code, the text of the article should be retained as drafted, with any minor editing changes needed to bring it into line with other provisions of the Code. It could then probably be shortened, and adapted to the special needs of the Code, on second reading.

91. Mr. PELLET said that he wished to enter a general reservation to article 23.

92. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 23 as amended by Mr. Calero Rodrigues, Mr. Thiam and Mr. Tomuschat.

Article 23, as amended, was adopted.

93. Mr. PAWLAK (Chairman of the Drafting Committee) said that the standard opening clause of article 24 had been inserted before the definition of the crime as adopted in 1990. In addition, the Drafting Committee suggested that paragraph 2 of the text as initially adopted should be deleted in the light of article 3, which covered participation and complicity. Once again, the words "by another individual", in the second line of the article, should be deleted.

94. Mr. TOMUSCHAT proposed that the general structure of the article should follow that of article 23.

95. Prince AJIBOLA said it was gratifying to note that, rather than speak simply of "individuals", the article referred to an individual "as an agent or representative of a State", which was the proper language to adopt.

96. Mr. NJENGA asked whether, under the terms of the article, terrorism was confined to State terrorism.

97. Mr. THIAM (Special Rapporteur) said that Mr. Njenga had raised a pertinent question. It would be inadvisable at that stage, however, to alter a text that had already been adopted. Of course, on second reading, a reference to individuals *per se* should be introduced and the whole question of the participation of individuals in terrorism should be considered very carefully, with special reference to the fact that they might, for instance, be members of groups or associations that had an interest in committing acts of terrorism. Nevertheless, it was a difficult issue, since bodies such as political parties and liberation movements might be involved. For the time being, therefore, it would suffice simply to note that there was a problem, on the understanding that the matter would be dealt with in more detail on second reading.

98. Mr. NJENGA said that a definition of terrorism which was confined to the agents or representatives of States would be very narrow. The attention of the Sixth Committee should be drawn to the matter.

99. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 23 reflected the position taken by the Commission and the Drafting Committee in 1990, though he himself had in fact spoken at that time of the need to cover a broader spectrum of individuals. The Commission could, as had been suggested, always revert to the matter on second reading.

100. Mr. SOLARI TUDELA, agreeing that international terrorism could not be confined to State agents said that was why, in the Drafting Committee, he had entered a reservation to the article. True, the Convention for the Prevention and Punishment of Terrorism and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment both contained such a limitation, but that had been as a result of a policy decision. Such a limitation might be appropriate for a political document but it had no place in a legal code.

101. Prince AJIBOLA said that Mr. Njenga had raised a very serious point but one that could easily be dealt with by simply removing a few words.

102. Mr. PELLET said he, too, had always felt that the limitation in article 24 to agents and representatives of the State was unfortunate. The solution was not as easy as Prince Ajibola had suggested, however, for the removal of a few words might solve the problem with regard to paragraph 1, but not in the case of paragraph 2. In the time that remained to the Commission it would be very difficult to find an appropriate solution, in his view.

103. The CHAIRMAN said that the report of the Commission to the General Assembly would contain an explanation of the reasons why it was considered that the article should not be confined to State terrorism. If he heard no objection, he would take it that the Commission agreed to adopt article 24 with the transposition of the wording suggested by Mr. Calero Rodrigues.

Article 24, as amended, was adopted.

The meeting rose at 6.10 p.m.

2241st MEETING

Friday, 12 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov,

Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*)* (A/CN.4/437,[1] A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR[2] (*concluded*)

1. The CHAIRMAN said that Mr. Al-Baharna had requested to be allowed to address the Commission on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. His absence from Geneva had prevented him from doing so before the closure of the debate on that item. If he heard no objection, he would take it that the Commission agreed to Mr. Al-Baharna's request.

2. Mr. AL-BAHARNA thanked the Commission for allowing him to make his comments after the Special Rapporteur had summed up the discussion on the topic.

3. He said that as he had already commented on the articles in chapters I to III[3] he would refer to them only to the extent required by the changes proposed by the Special Rapporteur in the seventh report. He would, however, comment in detail on chapter IV, on liability.

4. He wished first to make a general observation regarding methodology. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was quite unlike others on the agenda and, indeed, it differed from every other topic the Commission had considered so far. International law, as traditionally understood and applied in inter-State relations, probably offered little assistance to the Commission in expounding the principles and norms governing the topic. The Commission therefore had to adopt a non-traditional approach. It was authorized to do so by its Statute, under the terms of which its function was not solely the codification but also the development of international law, something which required it to be innovative and bold in enunciating the applicable principles and norms.

5. With regard to the issues discussed in the seventh report, the Special Rapporteur first raised the question of the nature of the instrument to be formulated, namely whether the rules should be mere guidelines or mandatory. The Commission had had to tackle a similar problem in regard to the topic of the law of treaties and had rightly decided in favour of the convention approach. That approach applied equally to the topic under consideration.

6. The Special Rapporteur considered that the time had perhaps come to change the title of the topic since replacement of the word "acts" by "activities" would broaden the scope considerably. His own view was that the title was somewhat abstract, because the phrase "acts not prohibited by international law" did not pinpoint the subject-matter of the topic. It was restrictive too because the topic went beyond enunciation of the principle of liability. The Commission should therefore examine the question of the title with a view to making it less abstract and broader in scope.

7. The Special Rapporteur then went on to consider whether the two types of activities covered by article 1—activities involving risk and activities with harmful effects—should be treated separately or together, suggesting that for the time being they should be treated together but that the option of separate treatment should be kept open. That suggestion seemed reasonable.

8. As to whether article 1 should refer only to new activities, namely, to those to be undertaken in the future, he believed that the exclusion of current activities from the purview of the draft would be a step backward for it would reduce the operational significance of the draft articles and leave the innocent victim without an effective remedy. He trusted, therefore, that ongoing activities would be brought within the scope of article 1.

9. With regard to article 9, on reparation, the Special Rapporteur raised the question of the relationship between the liability of the State and the liability of private operators under the regime of civil liability. He would revert to that point when he came to chapter IV, but, for the present, he expressed his agreement with the suggestion made in the report that article 9 should be retained and a new article should be added to explain the interrelationship between the liability of the State and that of private operators.

10. The principle of non-discrimination, laid down in article 10, was probably the most innovative in the draft articles. Although he had been somewhat sceptical in that regard at the Commission's previous session, upon reflection he had come to the view that it might be desirable to include the principle in the draft, for it could contribute to the development of international law.

11. The Special Rapporteur had proposed in his sixth report[4] that subparagraphs (*a*) to (*d*) should be added to article 2 (Use of terms) with a view to explaining the scope of the draft articles. While he supported the proposal in principle, he had expressed the view at the previous session that the matter was too important to be dealt with in the general article on use of terms and suggested that the substance of the subparagraphs should be

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* Resumed from the 2228th meeting.

[1] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook ... 1990*, vol. II (Part Two), chap. VII.

[3] *Yearbook ... 1990*, vol. I, 2183rd meeting, paras. 3-21.

[4] *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1.

embodied in a separate article which would come immediately after article 1. He had not changed his view on that point and the same criticism applied, *mutatis mutandis*, to subparagraph (*g*), which laid down the definition of transboundary harm. The best place for that provision was probably as a new subparagraph in article 1.

12. He agreed with the Special Rapporteur's approach in the seventh report regarding the definition of "appreciable" or "significant" harm as laid down in article 2, subparagraph (*h*), submitted by the Special Rapporteur in his sixth report. With respect to the provisions on prevention, discussed in chapter III, he was likewise in general agreement with the recommendation that article 18 should be deleted.

13. With regard to article 20 (Prohibition of the activity), the Special Rapporteur stated in his report that:

> This question is similar to that of significant harm or risk; unfortunately, such thresholds are not a priori quantifiable.

It was an explanation that provided only part of the answer, the other part being provided by the definition of the terms "activities involving risk" and "transboundary harm" laid down in article 2, subparagraphs (*a*) and (*g*), respectively. Those definitions could probably be further streamlined to allay the concerns of States so far as the thresholds of harm or risk were concerned.

14. He shared the Special Rapporteur's view that the liability of the State should be residual and that the chapter should be entitled "State liability".

15. In the draft articles, the concept of liability was divided into civil liability, on the one hand, and State liability, on the other. While he agreed with that division, a question arose as to the scope of civil liability and State liability and the relationship between the two. State liability was in fact international responsibility incurred directly or indirectly by the State for transboundary harm caused by the activities in question. A State would be directly liable for the harm caused where it operated directly or where the activity was carried out in its name. Indirect State liability would then be liability that it incurred on a residual basis in certain circumstances where the harm was caused by agencies other than the State, in other words, where the private operator was unable to satisfy the injured party in full with regard to the harm caused or where the private parties could not be identified. In that respect, three points had to be considered. First, the Commission should formulate precise criteria to be used to determine the status of the operator, in other words, to determine whether the activities could be regarded as those of a private venture or a public operation. Secondly, although the Special Rapporteur had referred in the report to the need to specify the cases in which the State would incur residual liability it was far from clear what precisely was meant by residual liability. He said that civil liability could be supplemented by State liability and then spoke of the assumption of responsibility by the State for reparation. In his own view, it should be made clear whether residual liability was to be regarded as a legal guarantee requiring the State of origin to pay reparation or compensation, where the private operator was unable to do so, or whether it was a legal consequence arising out of activities conducted on the State's territory. In the former case, it would be invoked only in specified and exceptional cases, and in the latter case, residual liability would at all times be coexistent with the civil liability of the operator, in which event the State would necessarily be a party to any judicial proceedings and not merely the guarantor of reparation on a residual basis. Of course, if the private operator satisfied the claim for compensation in full, State liability would not be relevant for that specific claim, although it would in theory always arise.

16. Furthermore, greater clarification was required in connection with the subject-matter of the negotiations between the States concerned. It might not be sufficient to provide that States should negotiate on matters regarding the determination of the legal consequences of the harm. The factual causes, the author and the consequences of the harm were matters which States would have to settle by negotiation before the question of reparation could be dealt with in a realistic manner. Thus, the statement in the report to the effect that negotiations should not be concerned with the question of whether or not reparation should be paid but rather with the kind of reparation to be made was in effect yielding to a demand without negotiation on issues of paramount importance: the possibility that a State might deny having caused harm could not be entirely ruled out.

17. He also wished to invite attention to that part of the report where the Special Rapporteur confirmed the right of the injured parties, including the affected State, to institute proceedings before the courts of the State of origin or the affected State and proposed that in the event that either of the States concerned refused to negotiate compensation. To his mind, the right to use what the Special Rapporteur termed "the other channel", namely, domestic court procedures, should be regarded as the primary right and not as a right which arose only if the State refused to negotiate. His preference for that initial recourse to the domestic courts was based upon consideration of convenience of access and utility, especially where private operators were concerned.

18. With regard to the establishment of an internationalized approach for damage caused to the environment, he was in agreement with the Special Rapporteur's suggestion that the Commission should investigate the possibility of establishing international tribunals and commissions as provided for in the 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and the report of the 1991 Intersessional Working Group of Experts of the Standing Committee on Civil Liability for Nuclear Damage under article XI of the 1963 Vienna Convention on Civil Liability for Nuclear Damage.

19. Both the substance and the drafting of article 22 might have to be modified. In the first place, if the organization was empowered to take action, as suggested in the report, it would be necessary to describe and define its powers. Secondly, it might not be necessary to confine the taking of action by international organizations to cases where there was a plurality of States, and the scope and role of such organizations should perhaps be enhanced, especially where environmental damage had resulted.

20. Concerning article 23, on reduction of compensation, the Special Rapporteur was suggesting that the pas-

sage in square brackets should be transferred to the commentary, a suggestion he supported. However, the question of whether article 23 should be limited to State liability, as the Special Rapporteur proposed, was debatable. The principle underlying article 23 could apply equally to cases of civil liability.

21. The Special Rapporteur suggested that the provisions of article 24 could be transferred to form part of the article on harm in general. For his own part, he was a little sceptical about that suggestion, for harm to the environment should be treated separately from other types of harm. With regard to article 25, he was inclined to agree with the view that the article could be divided into two parts to provide for the joint and several liability of private operators. As to the alternatives, alternative B appeared to be more acceptable than alternative A.

22. The limitation clause laid down in article 27 might require some revision, in view of some of its difficulties, and the Commission might wish to strike a balance between the 5-year and 30-year periods.

23. Chapter V, which dealt with civil liability, continued to be the most controversial part of the draft. The Special Rapporteur's comments and suggestions represented the core of the idea behind civil liability and, although it was difficult to accept wholeheartedly the comments made, they did reflect a keener understanding of the norms required for the development of international law with regard to the topic under consideration. The Special Rapporteur stressed that the affected State could decide to represent the individuals injured without waiting for them to initiate, much less exhaust, the local remedies. It should none the less be noted that legislation to that effect would have to be adopted; articles 28 and 29 did not, however, address the issue squarely.

24. The observations made in the report about identification of the persons responsible did not appear to be adequately reflected in article 30, which was a general provision on the application of national law rather than on the channelling of responsibility, and still less a criterion of control, as mentioned by the Special Rapporteur.

25. As to the "Miscellaneous" section, he agreed with the essential notions behind the supplementary provisions. Article 31 would have to be harmonized with the corresponding provisions of the draft on jurisdictional immunities of States and their property. Article 32 appeared to deal satisfactorily with the more important criteria governing the enforcement of foreign judgements, especially those relating to jurisdictional competence, finality and advance notice.

Draft Code of Crimes against the Peace and Security of Mankind[5] (*concluded*) (A/CN.4/435 and Add.1,[6] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

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

ARTICLE 25 (Illicit traffic in narcotic drugs)

26. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 25, which read:

Article 25. Illicit traffic in narcotic drugs

1. An individual who commits or orders the commission by another individual of any of the following shall, on conviction thereof, be sentenced [to . . .]:

—undertaking, organizing, facilitating, financing or encouraging of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context.

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

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

27. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 25 opened with the standard clause used in other articles. He proposed that paragraph 1 should be reworded to take account of the discussion which had taken place at the previous meeting on the deletion of the words "by another individual". The word "of", after the word "encouraging", should also be deleted. Several solutions were, of course, possible but the best course would probably be to follow as closely as possible the presentation adopted the previous day with respect to the other articles. Paragraph 1 would then read:

> "An individual who commits or orders the commission of any of the following shall, on conviction thereof, be sentenced [to . . .]:
>
> "—undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context."

Paragraphs 2 and 3 would remain unchanged.

28. In the form in which it had initially been adopted, the scope *ratione personae* of the article had extended to "agents or representatives of a State and other individuals". The Drafting Committee had noted that, since the reference to "other individuals" was all-embracing, it was superfluous to mention the agents or representatives of a State. The Drafting Committee therefore suggested that the words "agents or representatives of a State", should be deleted from the text adopted by the Commission in 1990.

29. Prince AJIBOLA said that the definition of illicit traffic contained in paragraph 3 was too broad. It did not cover, for instance, the production, manufacture, extrac-

[5] 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.

[6] Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

tion and preparation of drugs, which should be the subject of another paragraph. All activities connected with drugs were, of course, offences, which was why paragraph 1 referred to the undertaking, organizing, facilitating, financing or encouraging of such traffic, but not all of them amounted to illicit traffic.

30. The words "whether within the confines of a State or", in paragraph 1, and the words "internal or", in paragraph 3, should be deleted, since it was for States to punish acts committed within the confines of their territory or in violation of their internal law.

31. Mr. PAWLAK (Chairman of the Drafting Committee) pointed out that article 25 had already been adopted at the previous session. Only the introductory clause had been changed to bring it into line with the other articles. It had perhaps not been necessary to define the various acts listed in that clause but it had seemed advisable, for the purposes of the Code and to facilitate the task of any future international court, to provide two definitions, in paragraphs 2 and 3, which were borrowed from the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. He would point out that the Commission was at that stage considering the draft article on first reading; if the Sixth Committee or Governments considered that the definition was too broad, the Commission could revert to the matter on second reading.

32. Personally, he considered that what was most important was the scope *ratione personae* of the draft article. In his view, the words "An individual . . ." gave the article broader scope than did the wording used by the Special Rapporteur in former article X.[7]

33. Prince AJIBOLA said that, without wishing to stand in the way of adoption of the article, he thought it necessary to be clear about the meaning to be given to the word "traffic", in the title. Everybody knew what traffic was, but that word should not be given other connotations by including in it, for instance, as did paragraph 3, production and manufacture, which were very different matters. Furthermore, domestic law generally provided for a scale of penalties according to whether the convicted person had engaged in drug trafficking or was a producer or manufacturer. Even if there were already conventions on the matter, there was no need to feel bound by them. The duty of a lawyer was to strive ceaselessly to improve on the law. He trusted that the article would be the subject of a closer analysis of the various offences and would take account of their nature and gravity. It was inconceivable that an international criminal court would concern itself with, for instance, the sale of an infinitesimal amount of drugs.

34. Mr. PAWLAK (Chairman of the Drafting Committee) pointed out that the Code provided only for illicit traffic in narcotic drugs on a large scale.

35. The CHAIRMAN said that the views of Prince Ajibola, who had been personally involved in the drafting of legislation on traffic in narcotic drugs in his own country, were very important, and his remarks were highly relevant. It would, however, be difficult for the Commission to depart from existing conventions, for it would look as if it was amending those conventions. The international criminal court would, of course, have discretion to interpret the article and all would depend on how the indictment was drawn. He would also call Prince Ajibola's attention to the fact that the domestic law of some countries drew no distinction between the different types of drug offences, all being treated equally. The Commission might, however, wish to revert to the wording of the article on second reading with a view to making it clearer.

36. Mr. EIRIKSSON said that wording very similar to that used in article 18 could be adopted for paragraph 1 of article 25, since the description of the crime was fairly short, as it was in article 18. He therefore proposed that paragraph 1 of article 25 should be reworded to read:

> "An individual who undertakes, organizes, facilitates, finances, encourages or orders the undertaking, organizing, facilitating, financing or encouraging of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context, shall, on conviction thereof, be sentenced [to . . .]."

37. Mr. GRAEFRATH, supported by Mr. NJENGA and Mr. BEESLEY, expressed agreement with Mr. Eiriksson's proposed amendment to paragraph 1 of article 25.

38. Mr. PAWLAK (Chairman of the Drafting Committee) reminded members that, when he had introduced the article, he had pointed out that the introductory clause could be worded in a number of ways. It should be realized that Mr. Eiriksson's proposal, if adopted, would add several words to the formulation adopted in previous articles.

39. Mr. THIAM (Special Rapporteur) said that he could support the new wording, which, in his view, made the paragraph less cumbersome and more understandable.

40. Mr. ROUCOUNAS said that Mr. Eiriksson's proposed text was too repetitious. Some more concise and elegant form of wording should be found.

41. Mr. TOMUSCHAT said that article 25 raised another problem which should perhaps be considered on second reading. The article, which was based on the relevant clauses of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, dealt with the undertaking and organizing of illicit traffic in narcotic drugs and also with facilitating, financing or encouraging such traffic. The latter were, however, forms of assistance. A general provision on assistance was already contained in article 3 so that, if article 25 was read in the context of that article, there would in effect be two levels of assistance (helping to facilitate, finance or encourage illicit traffic) which would be tantamount to enlarging the scope of article 25 significantly.

42. Mr. THIAM (Special Rapporteur) said that, while he was sympathetic to Mr. Tomuschat's views, he would

[7] Adopted at the forty-second session, see *Yearbook . . . 1990*, vol. II (Part Two) for text and commentary.

point out that the article had already been adopted except for the *chapeau*, which was all that could be changed. In that connection, he had taken due note of Mr. Roucounas' remark and therefore proposed wording to read:

> "An individual who undertakes, organizes, facilitates or finances illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context, or who encourages or orders the commission of such acts, shall . . ."

43. Mr. EIRIKSSON said that the Special Rapporteur's proposal was excellent and considered that it could also be used for articles 23 and 24. The indented paragraph in paragraph 1 could then be deleted, which was an undoubted improvement and simplification so far as presentation was concerned and also introduced greater clarity into the provision.

44. Mr. MAHIOU said he supported Mr. Eiriksson's proposal as amended by the Special Rapporteur.

45. Mr. PAWLAK (Chairman of the Drafting Committee) said that he found the Special Rapporteur's proposal difficult to accept in view of the introduction of the words "of such acts", at the end of the sentence. Was the noun "acts", coming after a series of verbs—"undertakes, organizes, facilitates, and . . .", really appropriate? Would it not be better to speak of "actions"?

46. Mr. THIAM (Special Rapporteur) said he did not think that the word "acts" posed a problem in that context. It was indeed "acts" that were involved.

47. Mr. CALERO RODRIGUES said that, while he recognized the merits of Mr. Eiriksson's proposal, he would suggest, given the drafting problems to which it apparently gave rise, for instance, the repetition or use of the word "acts", that the discussion on the article should not be prolonged any further and that the wording proposed by the Chairman of the Drafting Committee should be adopted.

48. Mr. RAZAFINDRALAMBO pointed out that, in the French version, too, the Special Rapporteur's proposal would involve a repetition of the word *acte*, which already appeared at the end of paragraph 1. He would therefore prefer to revert to the original wording.

49. Mr. GRAEFRATH said he, too, considered that details of a drafting nature could be resolved when the articles were considered on second reading.

50. Mr. NJENGA said he, too, considered that the wisest course would be to retain the existing wording and to return to the provision, if necessary, when the draft article was considered on second reading. He would point out that the wording of paragraph 1 which formed the opening clause of the article was modelled on the wording of articles 23 and 24, which had already been adopted by the Commission.

51. Mr. BEESLEY suggested that the text proposed by the Chairman of the Drafting Committee should be adopted and that the various observations made in connection with the article should be reflected in the commentary.

52. Prince AJIBOLA said that the Commission had two choices: either it could leave the wording of paragraph 1 as it stood and return to the article when the draft was considered on second reading, or it could ask for a new draft provision to be prepared in writing, before the end of the meeting, on which it could take a decision.

53. Mr. PAWLAK (Chairman of the Drafting Committee) said that it would be difficult to prepare a new draft text in a few minutes when the article had already been considered by the Drafting Committee at length.

54. Furthermore, he noted that most of the remarks made on the article came from members of the Drafting Committee, who had had an opportunity to express their views in the Committee.

55. Mr. EIRIKSSON observed that, as a member of the Drafting Committee, he had approved the text originally drafted. Since that text had now been amended, however, he felt fully entitled to put forward new suggestions.

56. Mr. THIAM (Special Rapporteur) suggested, in a spirit of compromise, that the Commission should leave the text proposed by the Chairman of the Drafting Committee as drafted and return to it, if necessary, on second reading.

57. The CHAIRMAN, noting that the Commission was unable to reach agreement, suggested that members' views should be reflected in the report and in the commentary to the article, and that the various proposals should be noted so that they could be taken into account on second reading. If he heard no objection, he would take it that the Commission wished to adopt article 25 as amended by the Chairman of the Drafting Committee (para. 27 above).

Article 25 was adopted.

ARTICLE 26 (Wilful and severe damage to the environment)

58. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 26, which read:

Article 26. Wilful and severe damage to the environment

An individual who wilfully causes or orders another individual to cause widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to . . .].

59. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in his seventh report,[8] the Special Rapporteur had proposed that the Code should cover " any serious and intentional harm to a vital human asset such as the human environment". The proposal had met with a favourable response in the Commission, although some members had suggested that, in working out an article on the subject, account should be taken of article 19 of part 1 of the draft articles on State responsibility, while

[8] *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/419 and Add. 1, para. 30.

others had felt that it should be based on article 55 of Additional Protocol I to the 1949 Geneva Conventions.

60. In formulating the article, the Drafting Committee had borne in mind that the Code was intended to cover only the most serious forms of criminal behaviour. To that end, the Special Rapporteur had proposed that the article should be confined to the causing of serious harm to the environment. The text proposed by the Drafting Committee reinforced the criterion of seriousness by requiring that the damage caused should be "widespread, long-term and severe", a form of wording borrowed from article 55 of Additional Protocol I. The Drafting Committee had queried the exact purport of the word "long-term", which appeared in the English version of article 55. It had finally been interpreted to mean "lasting", as was confirmed by the French version of article 55, which used the word *durable*.

61. The scope of the article was further limited by the requirement that the causing of the damage must be wilful. There had been general agreement in the Drafting Committee that the causing of accidental damage, even as a result of negligence, should not come within the terms of the article. On the other hand, the concept of intent proposed by the Special Rapporteur had been deemed to be too broad and difficult to interpret. In the view of the Drafting Committee, the causing of damage that was a likely consequence of an act committed for a different purpose should not fall within the ambit of the Code, and only such harm as was the direct consequence of a deliberate act should be covered. That notion was conveyed by the word "wilful".

62. The Drafting Committee, having noted that, in plenary, the concept of vital human asset had been considered to be vague and likely to cause difficulties of interpretation, had limited the scope of the article to the "natural environment", which also borrowed from article 55 of Additional Protocol I.

63. The title of the article followed the wording of the article and was self-explanatory.

64. One member of the Drafting Committee had reserved his position on the article.

65. For the sake of harmonization with the other articles which had been adopted, he proposed that the words "another individual" should be deleted.

66. Prince AJIBOLA proposed that the Commission should adopt the article as drafted on the understanding that it would be refined on second reading.

67. Mr. BEESLEY said that he was not opposed to adoption of the article although he had certain reservations in that regard. They arose from the fear that, probably inevitably, a lengthy investigation would be necessary before it was possible to determine accurately whether or not the harm caused to the natural environment was widespread, long-term and severe, and that might divest the article of its substance. The Drafting Committee's proposed text was, however, the best possible one in the circumstances.

68. Mr. JACOVIDES said that he shared Mr. Beesley's reservations. He also supported Prince Ajibola's proposal that, at that late stage in its work, the Commission should adopt article 26 as drafted, on the understanding that it would endeavour to improve it on second reading.

69. Mr. NJENGA, supported by Mr. McCAFFREY, said that he was prepared to accept the article, which should certainly be included in the Code, provided it was reconsidered carefully on second reading. Like Mr. Beesley, he was afraid, in particular, that the requirement that the harm must be, *inter alia*, long-term in order for it to fall within the ambit of the Code might preclude any likelihood of the article being applied.

70. Mr. PAWLAK (Chairman of the Drafting Committee) reiterated that the word "long-term" was taken from article 55 of Additional Protocol I to the 1949 Geneva Conventions, which the Commission was not, however, obliged to follow.

71. Mr. BARSEGOV said that, as a member of the Drafting Committee, he had supported the article; he was opposed to its being shortened and particularly to deletion of the concept of the long-term nature of the harm. For damage wilfully caused to the environment to fall under the Code, it must be widespread, long-term and severe.

72. Mr. GRAEFRATH observed that no text would ever be entirely satisfactory: the more it was studied, the more it was likely to be changed.

73. The wording of article 26 was taken from article 55 of Additional Protocol I to the 1949 Geneva Conventions. That instrument, however, dealt with the situation in wartime whereas the Code dealt with the situation in peacetime. It was, therefore, only reasonable to ask whether the Commission should reproduce its provisions as they stood. In the light of the reservations that had been expressed, he would propose that the words "long-term" should be placed between square brackets to draw the General Assembly's attention to the problem and elicit a reaction.

74. Mr. BEESLEY said that was a very sound suggestion which he strongly supported.

75. Mr. NJENGA said that he would have preferred to delete the words "long-term" but could agree to their being placed between square brackets.

76. Mr. TOMUSCHAT, supporting Mr. Graefrath's proposal, said that the choice was a political one and it was for the Member States of the United Nations to take a clear stand on the matter. The Commission could only draw their attention to it.

77. Prince AJIBOLA urged members to adopt the article as submitted by the Chairman of the Drafting Committee. Personally, he considered that there was more than one word or expression that needed to be shown in square brackets; indeed, some even called for a question mark. The Commission would have all the time it needed to consider the text carefully and to refine it on second reading.

78. Mr. BARSEGOV said he did not see why a provision that would be valid in wartime would not be valid

in peacetime. The article was an innovation in international law. It could have very important consequences for States and should therefore be as specific as possible. To call into question any one of the conditions that had to be met in order for the damage to fall within the ambit of the Code would be to call into question the article as a whole. Perhaps, however, the article was not necessary in that form; perhaps the time was not ripe. In that case, the possibility of placing the whole article between square brackets could be envisaged.

79. Mr. ROUCOUNAS said he was not at all persuaded by the argument that the text should be shortened because it was taken from an instrument that applied in times of armed conflict and hence was not valid in peacetime. There was no reason why provisions designed to protect the environment in times of armed conflict should not be extended to situations that could occur in peacetime. Accordingly, the harmonization with article 55 of Additional Protocol I should be maintained, unless some other form of wording was used in part 1 of the draft articles on State responsibility.

80. He saw no point in placing a particular word between square brackets. On the other hand, the problems to which the drafting of the article had given rise should be clearly explained in the Commission's report to the General Assembly and in the commentary to the article.

81. The CHAIRMAN pointed out that the concept of "widespread, long-term and severe damage" was a matter of scientific evidence, on which scientists would be invited to give their opinion to the court.

82. Mr. THIAM (Special Rapporteur) said that all the arguments, both for and against, had been considered at length. The damage had been qualified precisely in such a way as to provide safeguards. For instance, the word "long-term" was necessary because, if the damage was not long-term, it could not be serious; and, for the damage to be serious, it had to be long-term. He therefore proposed that the text should be retained in the form in which it had been introduced by the Chairman of the Drafting Committee.

83. The text he himself had originally proposed had been based on article 19 of part 1 of the draft articles on State responsibility. The Drafting Committee had none the less taken the view that, in the case of a crime, it was not possible to adopt the expression used in article 19, "on a large scale". It had therefore endeavoured to characterize the crime in question by referring to existing international instruments on criminal law, namely, Additional Protocol I to the 1949 Geneva Conventions.

84. In the circumstances, it was not possible to do better. The objections and reservations which had been expressed would, of course, be reflected in the commentary. Accordingly, there was no need to have resort to square brackets.

85. Mr. PELLET said that he was not at all enthusiastic about article 26, but he unreservedly endorsed Mr. Barsegov's comments, as well as, in the main, those of Mr. Roucounas.

86. Mr. BEESLEY said that, if he had understood correctly, Mr. Barsegov's suggestion was that the whole article should be placed between square brackets, something to which he was strongly opposed. There was a difference between placing a particular word or phrase between square brackets—which was regular practice in the Commission in order to draw attention to a difference of views—and placing a whole article between square brackets. In the present instance, the Commission was agreed on the need for the article, which, though it had given rise to reservations, had not met with any objections.

87. The CHAIRMAN said he believed that Mr. Barsegov's proposal was conditional.

88. Mr. OGISO asked whether damage would be deemed to be "wilful" if, for instance, in spite of warnings by scientists, a State or an operator continued to operate a defective nuclear reactor, with consequential widespread, long-term and severe damage.

89. Mr. SHI said that he supported the Special Rapporteur's proposal to maintain the article as drafted. Also, for the reasons given by Mr. Barsegov, if it was agreed that the word "long-term" should be placed between square brackets he would propose that the entire article should be placed between square brackets.

90. Mr. BARSEGOV said that the Chairman and Mr. Shi had correctly interpreted his idea.

91. Mr. PAWLAK (Chairman of the Drafting Committee) said his personal opinion was that the example of damage to which Mr. Ogiso had referred would fall within the ambit of the Code inasmuch as it would be damage caused wilfully. He reiterated that the Drafting Committee had wanted to limit the article to widespread, long-term and severe damage wilfully caused to the environment.

92. The CHAIRMAN, agreeing with Mr. Pawlak, said that there was no question in that case of strict liability. The discussion would be reflected in detail in the summary records of the meeting, in the commentary to the article, in the Commission's report to the General Assembly, and in his own verbal report to the Sixth Committee. The Commission would also have an opportunity to reconsider the article on second reading in the light of the observations made.

93. If he heard no objection, therefore, he would take it that the Commission agreed to adopt article 26 as proposed by the Drafting Committee with the deletion of the words "another individual".

Article 26, as amended, was adopted.

ARTICLE 22 (Serious war crimes) (*concluded*)

94. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the Commission had adopted article 22 at its previous meeting on the understanding that further examples would be added to those listed between square brackets in subparagraph (*a*) of paragraph 2 of the article. He suggested that the Commission should consider the text drafted in cooperation with interested members, taking each example in turn. The first example proposed

was "unjustifiable delay in the repatriation of prisoners of war after the cessation of hostilities".

95. Mr. BARSEGOV said that he had already had occasion to support Mr. Ogiso's proposal to include a reference in paragraph 2 (*a*) of article 22 to "unjustifiable delay in the repatriation of prisoners of war". However, the addition of the words "after the cessation of hostilities" significantly altered the sense of the proposal. How could something which was not a violation of international law be characterized as a crime? Under international law, acts of war could cease either de facto or by virtue of a truce but without the state of war having ended. Consequently, if the Commission wanted to make the proposed form of wording clearer, it should add the words "after the conclusion of a peace treaty or any other form of cessation of the state of war"; otherwise it might be inferred that prisoners should be repatriated immediately after a truce. It was no mere chance that the text the Commission wished to quote, paragraph 4 (*b*) of article 85 of Additional Protocol I to the 1949 Geneva Conventions, did not contain the words "after the cessation of hostilities". Under the terms of that provision, only when a peace treaty was concluded, the parties to the conflict had agreed on the repatriation of prisoners of war, and the state of war had come to an end *de jure*, would a delay in the repatriation operations be contrary to international law.

96. Mr. OGISO said he felt bound to explain why he had proposed the addition of the words "after the cessation of hostilities". At the end of the Second World War, Japanese prisoners of war, numbering over 600,000, had been held in very difficult conditions while the peace treaty between Japan and the country holding them had still not been signed. If the release of prisoners of war was conditional on the conclusion of a peace treaty, the same situation could recur, and he considered it unacceptable. In the light of that experience, the addition of the words "after the cessation of hostilities" was absolutely essential.

97. Mr. TOMUSCHAT, referring to article 118 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War, whereby "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities" said that Mr. Barsegov's proposal was unacceptable. It was only very recently that Germany had signed a peace treaty with the Allies in the Second World War. The Commission should abide by the very clear rule enunciated in the third Geneva Convention and should not attempt to change the law, particularly since the Convention had been accepted by the entire community of nations and in particular by the States which had been at war with the Axis Powers.

98. Mr. ROUCOUNAS said that the question had arisen at the end of the Second World War of the application of the 1949 Convention relative to the Treatment of Prisoners of War which was silent as to the conditions of repatriation and certain provisions of which had been circumvented. That was what lay at the root of article 118 of the third Geneva Convention. To bring the Code into line with existing international law, the Commission could perhaps reproduce word for word the terms used in that Convention.

99. The examples referred to in paragraph 2 (*a*) of article 22 should not appear between square brackets, since that might arouse doubts in the reader's mind as to the rules of international law in force. Furthermore, in addition to unjustifiable delay in the repatriation of prisoners of war, changes to the demographic composition of a territory and other acts should be added to those crimes. He realized, however, that the Commission could only consider including in the Code those war crimes and grave breaches of humanitarian law which, by their very nature, were also included among the crimes against the peace and security of mankind. Such crimes could not be the subject simply of a footnote or of a reference between square brackets.

100. Mr. BARSEGOV said that Mr. Ogiso had referred to sad events connected with the Second World War. However sad war and its consequences might be, that was not the point. The aim was to draft legal norms for the future, not to make political statements on the past. He was not opposed to the idea of quoting existing texts, but he proposed that the words "after the conclusion of a peace treaty or any other form of cessation of the state of war" should be added at the end of the first proposed addition to paragraph 2 (*a*). Post-war political realities had shown that it had not always been possible to conclude a peace agreement immediately, although the Governments of the countries concerned had put an end to the state of war. Hence, even before a peace treaty was signed, prisoners of war had been exchanged under agreements reached between the States concerned. If a party to a conflict did not announce that it was ending the state of war and simply re-established peace discreetly, no enemy country that considered itself to be still at war would release its prisoners of war. It was necessary, therefore, either to quote the texts in force or to explain matters.

101. The CHAIRMAN suggested that the words "in accordance with the 1949 Geneva Convention relative to the Treatment of Prisoners of War" should be added to the words "any unjustifiable delay in the repatriation of prisoners of war".

102. Mr. OGISO said he could accept that suggestion if the words in question were added after the phrase "after the cessation of hostilities".

103. Mr. PELLET expressed strong opposition to such a solution, which would reintroduce the Geneva Conventions into the Code when the Commission had thus far taken care to avoid referring to them. Such a reference would call into question the delicate balance the Commission had managed to achieve. He would also point out that unjustifiable delay in the repatriation of prisoners of war was not included among the grave breaches of the Geneva Conventions: the Commission was therefore adding new crimes to the list of grave breaches, a course he could certainly not support.

104. Mr. ROUCOUNAS said that the Commission and Drafting Committee had indeed decided not to refer to the Geneva Conventions and Additional Protocols in the *chapeau* to the articles, and, so, it was not possible to refer to them in that particular instance. It would be better to adopt the wording used in article 118 of the third Ge-

neva Convention. He also noted that, under paragraph 4 (*b*) of article 85 of Additional Protocol I, any unjustifiable delay in the repatriation of prisoners of war did indeed amount to a grave breach under the Protocol.

105. Mr. NJENGA said that, prisoners of war should not be used after the cessation of hostilities as leverage to expedite the conclusion of a peace treaty. In his view, the words "after the cessation of hostilities" meant the end of a conflict and not just a suspension of hostilities, as was being suggested. Mr. Ogiso's proposal was perfectly acceptable.

106. Mr. EIRIKSSON said that an act could not be criminalized unless it violated in an exceptionally serious manner the principles and rules of international law applicable in armed conflict, which was why it was always necessary to refer to the characterizations found in that body of laws. The more the Commission stayed within the context of established norms and the more accurate it was, the less likely it was to prejudice the principles and rules of international law applicable in armed conflict. To take the repatriation of prisoners of war, for example, there was a difference between the proposal to add the words "after the cessation of hostilities" and article 118 of the third Geneva Convention, which referred to "the cessation of active hostilities". The reference to the principles and rules of international law presupposed, however, that the Code would adopt as its own all the restrictions and exceptions recognized under that body of law. In adding examples of war crimes to the list already contained in article 22, the Commission should take care not to include crimes that would not come within the ambit of the 1949 Geneva Conventions and the 1977 Additional Protocols.

107. Mr. PAWLAK (Chairman of the Drafting Committee) said he would point out, in regard to Mr. Roucounas' comment, that in the absence of a consensus the purpose of the square brackets in paragraph 2 (*a*) was to inform the Sixth Committee that some members of the Commission wished to refer to a particular crime. The Commission had also agreed to add other examples of war crimes, and the wording used should follow as closely as possible that of the rules and principles of international law. Since Mr. Ogiso's proposal was very similar to article 85 of Additional Protocol I it could very well be incorporated in article 22 with the addition of the words "after the end of active hostilities". If that proposal was accepted, it would not bind the Commission but it would reflect the views that had been expressed.

108. The CHAIRMAN said that, as the Commission had decided earlier, the examples mentioned in square brackets did not bind the Commission. Members were free to propose the inclusion in paragraph 2 (*a*) of a particular act which they considered fell within the category of war crimes, provided they kept to examples taken from existing instruments.

109. On the understanding that the necessary explanations would be given in the commentary to article 22 and in the Commission's report to the General Assembly, he would take it, if he heard no objection, that the Commission agreed to adopt the first proposal to add the phrase "any unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities".

It was so agreed.

110. Mr. EIRIKSSON said it should be noted that many members of the Drafting Committee saw no need to give examples after the general clause in paragraph 2 (*a*).

111. Mr. PAWLAK (Chairman of the Drafting Committee) said the second proposal was that reference should be made to "biological experiments".

112. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the second proposal, namely, that the words "biological experiments" should be added to paragraph 2 (*a*).

It was so agreed.

113. Mr. PAWLAK (Chairman of the Drafting Committee) said the third proposal was that the words "compelling a protected person to serve in the forces of a hostile power" should be added to paragraph 2 (*a*).

114. Mr. EIRIKSSON said that he would have liked to identify the source of the proposal. The main difficulty was that the Code did not define what was meant by "protected person", nor did it refer at any point to "power". Since the proposed phrase was to appear between square brackets, however, he would not raise any objection to its adoption.

115. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the third proposal, namely, that the words "compelling a protected person to serve in the forces of a hostile power" should be added to the list in paragraph 2 (*a*) of article 22.

It was so agreed.

116. Mr. PAWLAK (Chairman of the Drafting Committee) said the fourth proposal was that the words "establishment of settlers in an occupied territory" should be added to paragraph 2 (*a*).

117. Mr. PELLET, supported by Mr. MAHIOU, Mr. CALERO RODRIGUES and Mr. NJENGA, said that, though he was not very enthusiastic about the exercise in which the Commission was engaged, he was bound to recognize that the proposal filled a gap in article 22. He wondered, however, whether the right place for it was in subparagraph (*a*). In fact, occupation in wartime did not necessarily involve "acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons". Some acts were directed against the dignity of occupied peoples, as was the case with the establishment of settlers. Pending a final decision in the matter, the proposed addition should form the subject of a separate subparagraph and should also be placed between square brackets.

118. Mr. EIRIKSSON, said that, bearing in mind humanitarian law, which had been constantly referred to during the discussion, he wondered whether it would not be advisable to merge the proposal under consideration,

and the following proposal, concerning changes to the demographic composition of a foreign territory, with the wording used in paragraph 2 (*a*) ("Deportation or transfer of civilian population") and with paragraph 4 (*a*) of article 85 of Additional Protocol I which read:

> The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

119. Mr. BARSEGOV said that he supported the proposed addition. The establishment of settlers often went hand in hand with forcible emigration of the local population, and such actions lay at the root of massive human rights violations. Illegal expulsion of one people by another by force nullified the right to self-determination.

120. Mr. JACOVIDES said that his own preference would have been to have the three elements together under article 21 as originally provided for in paragraph 4 of draft article 14 proposed by the Special Rapporteur namely, "(*a*) expulsion or forcible transfer of populations from their territory; (*b*) establishment of settlers in an occupied territory; (*c*) changes to the demographic composition of a foreign territory". Since that was not possible, however, he was willing to accept Mr. Pellet's suggestion. Perhaps another separate subparagraph for (*c*) could be envisaged.

121. Mr. ROUCOUNAS said he agreed that there should be a separate subparagraph for the proposed addition, but the use of square brackets should be avoided.

122. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the fourth proposal, namely, to add the words "establishment of settlers in an occupied territory", as a new subparagraph (*b*), the following subparagraphs being renumbered accordingly.

It was so agreed.

123. Mr. PAWLAK (Chairman of the Drafting Committee) said the fifth proposal was that the words "changes to the demographic composition of a foreign territory" should be added to paragraph 2 (*a*) of article 22.

124. Mr. PELLET said that, since that addition concerned article 22, it would be better to speak of "occupied territory" rather than "foreign territory". Furthermore, since an occupied territory was concerned, the proposal should be incorporated in the new subparagraph (*b*).

125. Mr. EIRIKSSON said that it would be advisable to identify the body of law referred to in the paragraph. Not only the deportation and transfer of the civilian population, referred to in paragraph 2 (*a*) of article 22, but also the acts covered by paragraph 4 (*a*) of article 85 of Additional Protocol I, as well as genocide and wilful killing, had an effect on the demographic composition of a territory.

126. Mr. JACOVIDES, supported by Mr. THIAM (Special Rapporteur), said that his proposal used the actual words of paragraph 4 of article 14 submitted by the Special Rapporteur, but he had no objection to Mr. Pellet's suggestion, which was logical.

127. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the proposed addition should be included in new subparagraph (*b*), with or without square brackets.

128. Mr. JACOVIDES agreed with the suggestion that the proposed addition should be included in subparagraph (*b*) but considered that it should be without square brackets.

129. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the fifth proposal, namely, to add to paragraph 2 (*b*), without square brackets, the words "changes to the demographic composition of an occupied territory".

It was so agreed.

130. Mr. TOMUSCHAT said he was surprised that the last two additions could appear without square brackets whereas a crime as serious as deportation remained between square brackets.

131. Mr. PELLET said that, as he understood the position, no member was opposed to the newly adopted subparagraph (*b*) appearing without square brackets, but there was no apparent agreement to delete the square brackets around paragraph 2 (*a*).

132. Once again he felt bound, at that stage of the proceedings, to stress that neither the Drafting Committee nor the Commission had proceeded in an acceptable manner in establishing the list. The Commission had begun by laying down a principle but had then decided to draw up a non-exhaustive list, as was apparent from the words "in particular". How had that list been drawn up? The Commission had taken as its starting point the list of grave breaches in the 1949 Geneva Conventions, adding to it, and then removing from it, the grave breaches listed in Additional Protocol I of 1977. The list had then been shortened, which was logical, in view of the wording of the *chapeau* and of the expression "exceptionally serious". The short list had been drawn up on the basis of impressions and feelings, and was certainly not the result of objective legal thinking. Next, each member of the Commission had added this or that crime to the list, according to his own feelings and experience, without the precautions that were normal when adopting instruments that dealt with international armed conflict being taken. Crimes had been listed without being accompanied by the carefully thought-out qualifying elements that appeared in the relevant conventions. He much regretted that way of going about things. However, given the working methods adopted, Mr. Jacovides had been right to make his proposals, which filled a gap. The list which appeared between square brackets in paragraph 2 (*a*), however, caused him great concern.

133. Mr. THIAM (Special Rapporteur) said that the problem of the definition of war crimes had always been a difficult one from the point of view of method, since opinions were divided between the general criterion system and the list system, as was evident in practice and in doctrine. That was why he had proposed two alternatives

for the article on war crimes, one global, based on a general definition, and the other drawn up on the basis of a list, with the choice being left to the Commission. The Commission, however, had been unable to decide in favour of either alternative and had in fact merged them. In any event, the definition of crimes was always rooted in feeling. Making a particular act a crime was not the outcome of legal thinking but a reflection of general opprobrium.

134. Mr. GRAEFRATH said it was regrettable that the list of crimes in paragraph 2 (*a*) appeared between square brackets: it was selective and arbitrary, and contained only a certain number of examples of crimes defined in the draft. There were certainly other serious war crimes which fell within the terms of the provision, and reference should be made to all of those crimes in the commentary but not in article 22.

135. Mr. EIRIKSSON said he regretted that, in order not to waste the Commission's time, he had been obliged to accept last-minute additions in a rush, without having been able to consult members properly. Had the Commission had time to consider it, he would have liked to make a proposal that the new subparagraph (*b*) should be replaced by a provision quoting paragraph 4 (*a*) of article 85 of Additional Protocol I; that would have avoided any overlap between subparagraph (*a*) and new subparagraph (*b*). As the provision would certainly not have been controversial, there would have been no need for it to be placed between square brackets.

136. The CHAIRMAN said it was unfair to say that the Commission had worked in a rush: the first proposal, for instance, had already been submitted by Mr. Ogiso to the Drafting Committee, where it had been discussed at great length. Other proposals had appeared in earlier reports of the Special Rapporteur and had been duly considered at the appropriate time.

137. Mr. NJENGA said that there should be no objection to any changes the Commission wished to make to texts submitted to it by the Drafting Committee. He, too, agreed that paragraph 2 (*b*) should not be in square brackets.

138. The CHAIRMAN said that the five amendments proposed by the Chairman of the Drafting Committee would be incorporated into the text of article 22, as previously adopted.

139. Mr. TOMUSCHAT said that as the Commission had come to the end of its consideration of the draft Code on first reading, he wished to commend the Special Rapporteur who, by his untiring efforts, had successfully concluded the drafting of a set of articles. It now remained to be seen how States would respond to that work. They should take a clear stand on whether or not they really wanted a Code. For his own part, he would have preferred a leaner Code. In general, States considered that only a hard core of crimes should be prosecuted at the international level: opinions were, for instance, divided on intervention, other than armed intervention.

140. For those reasons he wished to enter a general reservation with respect to paragraph 2 of article 3. The Commission had been very careful in defining the author of a crime. In the case of aggression in particular, the Code provided expressly that an individual must act as leader or organizer. On the other hand, if the Commission made any act of assistance a punishable crime, the distinction drawn in the *chapeau* to the article on aggression fell away. Thus any person serving in an army would "assist" in the act of aggression. The effect of paragraph 2 of article 3 would therefore be to enlarge significantly the potential group of authors of crimes against the peace and security of mankind. He suggested that the Commission should examine the provision very carefully on second reading in the light of the replies it received from Governments.

141. Mr. EIRIKSSON pointed out that he had entered a general reservation to each article of the draft Code, the reason being that it was difficult to comment on a particular article until the total package was complete. The same problem had arisen for Governments. They now had an opportunity to make a political assessment of the Commission's work in that regard.

142. Mr. ROUCOUNAS expressed his satisfaction at the conclusion of the consideration of the draft Code on first reading. He congratulated the Special Rapporteur, the Chairman and the other members of the Drafting Committee.

143. Mr. BEESLEY said that he had already made clear his reservations on a number of articles and also his support for the draft. The draft Code was a respectable contribution to the progressive development of international law.

ADOPTION OF THE DRAFT CODE ON FIRST READING

144. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Sixth Committee would undoubtedly provide the Commission with the guidance that would enable it to resolve on second reading any outstanding issues and in particular those relating to the establishment of an international criminal court. The Drafting Committee suggested that the Commission should adopt the draft Code as a whole on first reading.

145. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the proposal by the Chairman of the Drafting Committee that the draft articles, as amended, as a whole, should be provisionally adopted on first reading, on the understanding that the comments made by members during the consideration of the articles submitted by the Drafting Committee would be duly reflected in the summary records.

The draft Code of Crimes against the Peace and Security of Mankind, as a whole, was adopted on first reading.

146. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed, in accordance with articles 16 and 21 of its Statute, that the draft Code of Crimes against the Peace and Security of Mankind should be transmitted, through the Secretary-General, to Governments and that they should be re-

quested to submit their comments and observations to the Secretary-General by 1 January 1993.

It was so agreed.

147. The CHAIRMAN said that the Chairman of the Drafting Committee had indicated, on several occasions, during the presentation of his report, that the views of Governments would be particularly welcome on specific points that remained to be resolved. He suggested that the Special Rapporteur should, in cooperation with the Commission's Rapporteur, highlight those points in its report to the General Assembly, in accordance with the request contained in paragraph 5 (*b*) of General Assembly resolution 45/41 of 28 November 1990.

TRIBUTE TO THE SPECIAL RAPPORTEUR

148. The CHAIRMAN said that the Commission, its successive Drafting Committees and their Chairmen could be proud of having achieved one of the goals the Commission had set itself at the beginning of the current quinquennium. The Special Rapporteur had played an important role in the achievement of what at times had appeared to be an unattainable goal. He therefore proposed that the Commission should adopt a draft resolution that read:

"*The International Law Commission*,

"*Having adopted* provisionally the draft Code of Crimes against the Peace and Security of Mankind,

"*Expresses* to the Special Rapporteur, Mr. Doudou Thiam, its deep appreciation for the outstanding contribution he has made to the preparation of the draft by his untiring dedication and his professional abilities, which have enabled the Commission to bring to a successful conclusion its first reading of the draft Code of Crimes against the Peace and Security of Mankind."

The draft resolution was adopted.

149. Mr. THIAM (Special Rapporteur) thanked members of the Commission for their support, encouragement and advice and in particular the members and Chairmen of the successive Drafting Committees. He also expressed appreciation for the valuable assistance he had always received from the secretariat.

The meeting rose at 1.25 p.m

2242nd MEETING

Monday, 15 July 1991, at 10.50 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

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

CHAPTER IV. ***Draft Code of Crimes against the Peace and Security of Mankind*** (A/CN.4/L.464 and Add.1-4)

B. Consideration of the topic at the present session (A/CN.4/L.464 and Add.1-3)

1. CONSIDERATION OF THE NINTH REPORT OF THE SPECIAL RAPPORTEUR (A/CN.4/L.464 and Add.1-3)

(a) *Penalties applicable to crimes against the peace and security of mankind* (A/CN.4/L.464/Add.1)

Paragraph 1

2. Mr. NJENGA suggested that the word "moreover" should be deleted from the second sentence.

It was so agreed.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 6

Paragraphs 2 to 6 were adopted.

Paragraph 7

3. Mr. RAZAFINDRALAMBO said that the words "draft provision prepared and then withdrawn" in the first sentence should be replaced by the words "draft provision subsequently withdrawn". In the third sentence of the French text, the words *des biens* should be replaced by the words *de biens*, since paragraph 7 dealt with some rather than all property belonging to private individuals.

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

4. Mr. SHI said that he had a general comment to make on paragraphs 9 to 35 which reflected the debate on penalties that had taken place in plenary. The Commission had already adopted all the draft articles on first reading, including those on penalties. He therefore doubted whether opinions expressed during the general debate should be included in the draft report. In his view, para-