

Document:-  
**A/CN.4/SR.2146**

**Summary record of the 2146th meeting**

Topic:  
**Other topics**

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(Rapporteur), Mr. FRANCIS and Mr. YANKOV (Special Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete paragraph (9), which it regarded as being unnecessary in the commentary, since it would be indicated in the introduction to chapter II of the report that the Commission had not discussed the question of the legal relationship between the present articles and customary rules on the same subject and that that question would be decided when the final version of the future instrument was prepared.

*It was so agreed.*

*The commentary to article 32, as amended, was approved.*

*The meeting rose at 1.10 p.m.*

## 2146th MEETING

*Thursday, 20 July 1989, at 3 p.m.*

*Chairman: Mr. Bernhard GRAEFRATH*

*Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

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

**CHAPTER II. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)** (A/CN.4/L.435 and Add.1-4 and Add.4/Corr.1)

**D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)** (A/CN.4/L.435/Add.1-4 and Add.4/Corr.1)

*Commentary to article 12 (The diplomatic courier declared persona non grata or not acceptable) (concluded)*

Paragraph (6) (concluded)

1. Mr. EIRIKSSON recalled that the Commission had left open the possibility of reverting to paragraph (6), approved at the 2144th meeting, pending a decision on the commentary to article 21, which had now been approved.

2. Mr. YANKOV (Special Rapporteur) proposed that the last five sentences of paragraph (6) should be replaced by the following text:

“Paragraph 2 of article 12 refers to the refusal or failure of the sending State to carry out its obligations under paragraph 1. It is therefore concerned with the termination of the functions of the courier. It is only after the sending State has failed to comply with its obligation to recall the courier or terminate his functions that the receiving State may cease to recognize the person concerned as a dip-

lomatic courier and treat him as an ordinary foreign visitor or temporary resident. The second part of the first sentence of paragraph 2 of article 21 refers to the cessation of the courier’s privileges and immunities when he has not left the territory of the receiving State within a reasonable period.”

*It was so agreed.*

*Commentary to draft Optional Protocol One on the Status of the Courier and the Bag of Special Missions (A/CN.4/L.435/Add.4)*

Paragraph (1)

3. Mr. YANKOV (Special Rapporteur) said that the word “approach”, in the third sentence, should be replaced by “régime”.

4. Mr. McCAFFREY proposed that the words “The Commission felt that”, in the fifth sentence, should be deleted.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraphs (2) to (5)

*Paragraphs (2) to (5) were approved.*

*The commentary to draft Optional Protocol One on the Status of the Courier and the Bag of Special Missions, as amended, was approved.*

*Commentary to draft Optional Protocol Two on the Status of the Courier and the Bag of International Organizations of a Universal Character (A/CN.4/L.435/Add.4).*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

5. Mr. CALERO RODRIGUES proposed that the word “felt”, in the second sentence, should be replaced by “believed”.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were approved.*

*The commentary to draft Optional Protocol Two on the Status of the Courier and the Bag of International Organizations of a Universal Character, as amended, was approved.*

*Section D, as amended, was adopted.*

**A. Introduction (A/CN.4/L.435)**

Paragraphs 1 to 32

*Paragraphs 1 to 32 were adopted.*

Paragraph 33

6. Mr. McCAFFREY said that the words “as much as possible coherent legal régime”, in the first sentence, should be replaced by “as coherent a legal régime as possible”.

*It was so agreed.*

*Paragraph 33, as amended, was adopted.*

Paragraphs 34 and 35

*Paragraphs 34 and 35 were adopted.*

Paragraph 36

7. Mr. McCAFFREY said that the word “their”, at the end of the second sentence, should be replaced by “his”.

*It was so agreed.*

*Paragraph 36, as amended, was adopted.*

\* Resumed from the 2144th meeting.

Paragraphs 37 to 42

*Paragraphs 37 to 42 were adopted.*

Paragraph 43

8. Mr. McCAFFREY proposed that a cross-reference to paragraph 43 should be made in the commentary to article 32, possibly by means of a footnote.

*It was so agreed.*

*Paragraph 43 was adopted.*

New paragraph 43 bis

9. Mr. YANKOV (Special Rapporteur) said that the following new paragraph 43 bis should be added:

“The Commission did not include in the draft articles a provision on the relationship between the present articles and the rules of customary international law. Nevertheless, a view was expressed in the Commission that an additional provision on this matter might be deemed appropriate in a future instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.”

*New paragraph 43 bis was adopted.*

Paragraphs 44 to 47

*Paragraphs 44 to 47 were adopted.*

*Section A, as amended, was adopted.*

**B. Recommendation of the Commission (A/CN.4/L.435)**

Paragraphs 48 to 50

*Paragraphs 48 to 50 were adopted.*

Paragraph 51

10. Mr. BENNOUNA (Rapporteur) said that the words “a binding instrument with the same legal hierarchy within the international legal order”, at the end of the paragraph, should be replaced by “a multilateral binding instrument”.

*Paragraph 51, as amended, was adopted.*

Paragraph 52

11. The CHAIRMAN suggested that the last sentence should be deleted.

12. Mr. EIRIKSSON, agreeing with that suggestion, proposed that the words “which may express a firm commitment of the participating States, thus facilitating and expediting, at a later stage, a quicker process of ratification and of entry into force”, in the second sentence, should also be deleted. He also wondered whether the statement in the third sentence, and in particular the reference to international organizations, was sufficient justification for convening a conference at the plenipotentiary level.

13. Mr. McCAFFREY said that he did not think the Commission had the necessary standing to discuss the issue, nor did he like the way in which paragraph 52 was framed. He therefore proposed that the paragraph should be deleted in its entirety.

14. Mr. FRANCIS said that he was in favour of retaining paragraph 52, but it should be couched in more neutral terms, omitting any reference to the Sixth Committee of the General Assembly.

15. Mr. BARSEGOV said that he saw no reason why the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier should receive less favourable treatment than other drafts.

In his view, it would be entirely appropriate to consider the matter at a plenipotentiary conference and he would be opposed to any decision to the contrary.

16. Mr. TOMUSCHAT said that a compromise solution might be to delete the part of paragraph 52 beginning “The careful study by Governments . . .”.

17. Mr. MAHIOU said that he fully endorsed that idea. Mr. Barsegov need not be concerned about deletion of the reference to a plenipotentiary conference, for the convening of such a conference was recommended in paragraph 48.

18. Mr. YANKOV (Special Rapporteur) said that he could accept the deletion of the last part of paragraph 52 but would not agree to the drastic step of deleting the entire paragraph. There was substantive material in the paragraph that must be retained. If he had developed a number of lines of reasoning, it was to counter the reservations he had detected in his 10 years of work on the topic—for the draft articles were, in a sense, the Commission’s unwanted child.

19. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the portion of paragraph 52 beginning with the words “The careful study by Governments . . .”, in the second sentence.

*It was so agreed.*

*Paragraph 52, as amended, was adopted.*

*Section B, as amended, was adopted.*

20. Mr. DÍAZ GONZÁLEZ drew the attention of the Secretariat to the need to correct the Spanish text of chapter II of the report and ensure that the proper terminology was used throughout: for example, the word *estafeta* should be replaced by *correo*.

**C. Resolution adopted by the Commission (A/CN.4/L.435)**

21. The CHAIRMAN invited the Commission to consider the draft resolution in section C, which read:

*“The International Law Commission,*

*“Having adopted the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,*

*“Desires to express to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation of the invaluable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion and incessant labour, which have enabled the Commission to bring this important task to a successful conclusion.”*

22. The Commission had now concluded its work on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It could look back at the important work it had accomplished in a relatively short period of time and thank the Special Rapporteur who had made it all possible. Over the years, Mr. Yankov had nourished and protected the Commission’s child—even if it was an unwanted one. The scholarly research, patience and diplomatic skill that had gone into that effort were well known to all. He wished to thank Mr. Yankov, who had devoted so much energy, experience and expertise to his important task. Now that that task was concluded, it was to be hoped that the draft articles could be elevated to the status of a universal convention.

23. Mr. BENNOUNA, speaking on behalf of members of the Commission from African countries, congratulated the Special Rapporteur, whose knowledge and experience, added to his innate calm and courtesy, had enabled the Commission to reach its goal. The scepticism prevailing at the outset of the Commission's work had not made the Special Rapporteur's task easy. It was now to be hoped that a diplomatic conference would be convened for the adoption of the draft articles.

24. Mr. DÍAZ GONZÁLEZ, speaking on behalf of members of the Commission from Latin-American countries, said that the road to completion of the draft articles had not been an easy one. A number of Governments, including his own, had been reluctant to condone the Commission's work on the topic. Yet, thanks to the efforts of the Special Rapporteur, the Commission now had yet another concrete achievement to present to the General Assembly. It was to be hoped that the Special Rapporteur's efforts would culminate in the adoption of the draft articles at a diplomatic conference.

25. Mr. BARBOZA said that, in completing its work on the draft articles, the Commission had made an important contribution to the codification of international law. The draft instrument it had produced was well crafted and it was to be hoped that it would be adopted at a diplomatic conference, as other instruments in the same field had been. The Commission's achievement would not have been possible without the patient, able and, indeed, exemplary stewardship of the Special Rapporteur.

26. Mr. SHI, speaking on behalf of members of the Commission from Asian countries, expressed deep appreciation to Mr. Yankov, in whom the Commission had found all the qualities required of an excellent Special Rapporteur. He had dedicated himself to work on the topic with unflagging zeal and an open mind. He deserved thanks for all his efforts, as did the Secretariat for its invaluable assistance.

27. Mr. PAWLAK, speaking on behalf of members of the Commission from Eastern European countries, congratulated the Special Rapporteur on his productive efforts, which had materialized in the adoption of a set of draft articles that constituted an intelligent and well balanced approach to the topic. He merited thanks for the devotion and expertise he had brought to bear on his task.

28. Mr. ROUCOUNAS, speaking on behalf of members of the Commission from Western European and other States, congratulated the Special Rapporteur on the accomplishment of his task and commended him for his perseverance and technical expertise. The contribution to the codification of international law represented by the draft articles was already widely appreciated.

29. Mr. McCaffrey, referring to the draft resolution before the Commission, suggested that the words "technical expertise" should be inserted between the words "tireless devotion" and "and incessant labour".

30. Mr. PAWLAK suggested that the word "technical" in that amendment should be replaced by "professional".

*Mr. McCaffrey's amendment, as modified by Mr. Pawlak, was adopted.*

*The draft resolution, as amended, was adopted.*

*Section C, as amended, was adopted.*

*Chapter II of the draft report, as amended, was adopted.*

31. Mr. YANKOV (Special Rapporteur) expressed his gratitude to the Chairman and to all his colleagues, whose avid interest in the drafting work had been his strongest asset. It meant a great deal to know that, even through arduous negotiations and disagreements, they could still remain friends. He was pleased to think that the accomplishment of his task also marked the end of the Commission's work on the entire topic and represented yet another concrete achievement to present to the international community.

32. He wished to pay a tribute to those members and former members of the Secretariat who had given him such valuable assistance over the years, beginning with Mr. Torres Bernárdez and culminating most recently with Mr. Ramamontaldo. The Secretariat staff and members of the Codification Division with whom he had been associated were prime examples of people who worked in the service of the international community and sought to promote international law. He was honoured to have been part of the Commission's important work, and hoped that the draft articles would be successfully adopted by the international community.

**CHAPTER III. Draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.436 and Add.1-3)**

**A. Introduction (A/CN.4/L.436)**

Paragraphs 1 to 8

*Paragraphs 1 to 8 were adopted.*

Paragraph 9

33. Mr. McCaffrey remarked that, in comparison with other chapters of the draft report, the introduction to the chapter under consideration, and in particular paragraph 9, contained a somewhat disproportionate amount of substance. In his view, only the first sentence of the paragraph should be retained.

34. Mr. BARSEGOV said that he disagreed. The historical summary provided in paragraph 9 covered an important stage in the consideration of the topic. Referring to the word "offences" in the first sentence, he said he wondered whether, in view of the General Assembly's decision in that regard, it would not be more appropriate to speak of "crimes".

35. Mr. CALERO RODRIGUES suggested that a footnote should be added to paragraph 5 indicating that, in 1987, the General Assembly had decided to amend the title of the topic in English to read: "Draft Code of Crimes against the Peace and Security of Mankind".

*It was so agreed.*

36. Mr. THIAM (Special Rapporteur) said that the text of paragraph 9 corresponded, in shortened form, to that included in earlier reports. He proposed that the paragraph should be adopted without change.

*It was so agreed.*

*Paragraph 9 was adopted.*

Paragraph 10

*Paragraph 10 was adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.436 and Add. 1-3)**

Paragraphs 11 to 14 (A/CN.4/L.436)

*Paragraphs 11 to 14 were adopted.*

Paragraphs 1 to 57 (A/CN.4/L.436/Add.1)

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

37. Mr. THIAM (Special Rapporteur) said that the word "only", before the words "grave breaches" in the second sentence, should be deleted.

38. Mr. BARSEGOV drew attention to serious errors in the Russian text of paragraph 5, adding that the Russian text of chapter III as a whole required careful revision.

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 and 7

*Paragraphs 6 and 7 were adopted.*

Paragraph 8

39. Mr. THIAM (Special Rapporteur) said that the words "The Special Rapporteur", at the beginning of the paragraph, should be replaced by "However, he" and that the words "cast a wide net", in the third sentence, should be replaced by "adopt a broad interpretation of that Law".

*Paragraph 8, as amended, was adopted.*

Paragraphs 9 to 11

*Paragraphs 9 to 11 were adopted.*

Paragraph 12

40. Mr. THIAM (Special Rapporteur) said that the third sentence should be amended to read: "The determination of gravity was incumbent on the Commission, which therefore had to provide a list of . . .". In the next sentence, the words "a judicial function" should be replaced by "for a court".

41. After a discussion in which Mr. McCAFFREY, Mr. BARBOZA and Mr. MAHIU took part, Mr. CALERO RODRIGUES proposed that the words "The first was to do so", at the beginning of the second sentence, should be replaced by "On the one hand, that could be done" and that the word "Moreover", at the beginning of the fourth sentence, should be replaced by the words "On the other hand".

*It was so agreed.*

*Paragraph 12, as amended, was adopted.*

Paragraph 13

42. Mr. THIAM (Special Rapporteur) said that the words "One member", at the beginning of the paragraph, should be replaced by "Some members".

*Paragraph 13, as amended, was adopted.*

Paragraph 14

43. Mr. THIAM (Special Rapporteur) said that the words "one member", in the first sentence, should be replaced by "it was".

*Paragraph 14, as amended, was adopted.*

Paragraph 15

44. Mr. TOMUSCHAT said that the word "had", between the words "in particular" and "pointed out" in the second sentence, should be deleted.

*It was so agreed.*

*Paragraph 15, as amended, was adopted.*

Paragraph 16

45. Mr. McCAFFREY said that, since the statement reported in paragraph 16 had not been made by the Special Rapporteur, the words "In reply", at the beginning of the sentence, should be replaced by "With reference".

*It was so agreed.*

*Paragraph 16, as amended, was adopted.*

Paragraph 17

*Paragraph 17 was adopted.*

Paragraph 18

46. Mr. THIAM (Special Rapporteur) said that the words "humanitarian law", in the penultimate sentence, should be replaced by "the law of war".

47. Mr. McCAFFREY said that the words "There had been", at the beginning of the paragraph, should be replaced by "There was" and that the word "had", between the words "members" and "however" in the penultimate sentence, should be deleted.

*It was so agreed.*

*Paragraph 18, as amended, was adopted.*

Paragraph 19

*Paragraph 19 was adopted.*

Paragraph 20

48. Mr. BENNOUNA (Rapporteur) proposed that the words "internal and external conflicts", in the first sentence, should be replaced by "internal conflicts and external intervention in those conflicts" and that the words "as well as to armed conflict within States", at the end of the paragraph, should be deleted.

49. Mr. McCAFFREY said that, while he did not object to that proposal, he none the less considered that statements made during the debate should be reflected faithfully in the Commission's report.

50. Mr. THIAM (Special Rapporteur) said that he would review the text of paragraph 20 with the help of the secretariat.

*Paragraph 20 was adopted on that understanding.*

Paragraph 21

*Paragraph 21 was adopted.*

Paragraph 22

51. After a brief discussion in which Mr. THIAM (Special Rapporteur) and Mr. CALERO RODRIGUES took part, Mr. TOMUSCHAT proposed that the words "related to the protection of victims of", in the first sentence, should be replaced by "covered not only", with consequential deletion of the word "to" in the remaining part of the sentence.

*It was so agreed.*

*Paragraph 22, as amended, was adopted.*

Paragraph 23

*Paragraph 23 was adopted.*

Paragraph 24

52. Mr. McCAFFREY proposed that the word "crimes" should be replaced by "offences" and that the word "offences" should be replaced by the words "war crimes".

*It was so agreed.*

*Paragraph 24, as amended, was adopted.*

Paragraph 25

53. Mr. BENNOUNA (Rapporteur) said that paragraph 25 should be merged with the preceding paragraph.

*Paragraph 25, as amended, was adopted.*

Paragraphs 26 to 29

*Paragraphs 26 to 29 were adopted.*

Paragraph 30

54. Mr. McCAFFREY, supported by Mr. TOMUSCHAT, proposed that only the first sentence of the paragraph should be retained, the remainder being deleted.

*It was so agreed.*

*Paragraph 30, as amended, was adopted.*

Paragraphs 31 to 34

*Paragraphs 31 to 34 were adopted.*

Paragraph 35

55. Mr. THIAM (Special Rapporteur) said that the words "which would not be listed in the draft code", at the end of the paragraph, should be deleted.

*Paragraph 35, as amended, was adopted.*

Paragraphs 36 to 39

*Paragraphs 36 to 39 were adopted.*

Paragraph 40

56. Mr. BENNOUNA (Rapporteur) said that paragraph 40 should be deleted. Its sole purpose was to correct a terminological error that affected only the English text.

*It was so agreed.*

Paragraphs 41 to 48

*Paragraphs 41 to 48 were adopted.*

Paragraph 49

57. Mr. THIAM (Special Rapporteur) said that the words "competent body", in the second sentence, should be replaced by "appropriate body".

58. Mr. TOMUSCHAT proposed that the words "had been implemented by States", in the third sentence, should be replaced by "had crystallized". It was the emergence of the rule that was material, rather than the fact that it was implemented by States.

*It was so agreed.*

59. Mr. THIAM (Special Rapporteur) said that the last sentence should be shortened by deleting the part beginning: "because, among other things . . .". The sentence would thus simply refer to the opposition of certain members of the Commission to the attribution of responsibility for the crime of first use of nuclear weapons.

60. Mr. CALERO RODRIGUES pointed out that it would not be accurate to speak of a "crime" where responsibility had not been attributed. The last sentence should state that some members were opposed to considering or characterizing the first use of nuclear weapons as a crime.

61. The CHAIRMAN suggested that the last sentence of paragraph 49, as shortened by the Special Rapporteur, should be amended to read: "Some members were particularly opposed to characterizing the first use of nuclear weapons as a crime."

*It was so agreed.*

*Paragraph 49, as amended, was adopted.*

Paragraph 50

62. Mr. BARSEGOV pointed out that the use of nuclear weapons was a major crime against the peace and security of mankind, as grave as genocide. The last part of paragraph 50, reading "but also a crime against peace and a crime against humanity", should be replaced by the words "but also a crime against humanity".

*It was so agreed.*

63. Mr. McCAFFREY suggested inserting the words "what they characterized as" after the words "could not conceive that", in the first sentence, in order to indicate that the opinion expressed in that sentence was attributable to the "Other members" mentioned.

*It was so agreed.*

*Paragraph 50, as amended, was adopted.*

Paragraph 51

64. Mr. McCAFFREY proposed that the words "in the list of war crimes", in the second sentence, should be replaced by "in the list of war crimes, or in a separate article".

*It was so agreed.*

*Paragraph 51, as amended, was adopted.*

Paragraphs 52 to 57

*Paragraphs 52 to 57 were adopted.*

Paragraphs 1 to 58 (A/CN.4/L.436/Add.2)

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

65. Mr. TOMUSCHAT pointed out that it would be necessary to correct the tenses of some of the verbs in paragraph 4 and in the following paragraphs.

*Paragraph 4 was adopted.*

Paragraph 5

*Paragraph 5 was adopted.*

Paragraph 6

66. Mr. CALERO RODRIGUES proposed that the somewhat awkward expression "natural persons", in the first sentence, should be replaced by "individuals".

*It was so agreed.*

*Paragraph 6, as amended, was adopted.*

Paragraph 7

67. Mr. TOMUSCHAT proposed that the lengthy quotation of the views of the United Nations War Crimes Commission should be deleted.

68. Mr. PAWLAK said that he was strongly opposed to that proposal. The quotation from such an authoritative source was most valuable and should be retained.

69. Mr. RAZAFINDRALAMBO said that the quotation could perhaps be replaced by a reference in a footnote, without reproducing the actual text.

70. Mr. THIAM (Special Rapporteur) pointed out that the United Nations War Crimes Commission had been the official body entrusted, during and after the Second World War, with the investigation and prosecution of war crimes. Its pronouncements were therefore of great importance in

shaping the doctrine of the International Law Commission on the subject.

71. Mr. BARSEGOV urged that the valuable quotation in question be retained.

72. Mr. DÍAZ GONZÁLEZ said that the passage cited was no ordinary quotation; it came from a most authoritative source.

*Paragraph 7 was adopted.*

Paragraph 8

73. Mr. McCAFFREY proposed that the first sentence, which contained a quotation from Meyrowitz, should be deleted.

74. Mr. TOMUSCHAT said that quotations from writers had a place in the reports of special rapporteurs, but, in the Commission's own report to the General Assembly, such quotations should be avoided.

75. Mr. BARSEGOV pointed out that the short quotation served to set out the question of mass crimes. If the quotation were to be deleted, that useful element in the first sentence would be lost. Besides, Meyrowitz was one of the leading scholars on the subject of crimes against the peace and security of mankind.

76. Mr. PAWLAK said that it was essential to reflect the important distinction between mass crimes and crimes against individuals, which was the subject of the passage quoted.

77. The CHAIRMAN, speaking as a member of the Commission, agreed that the reference to the distinction between mass crimes and crimes against individuals should be retained.

78. Mr. YANKOV said that perhaps quotations could be made more brief, or their substance could be summarized, so as to respond to the request of the General Assembly for shorter reports.

79. Mr. DÍAZ GONZÁLEZ said that not all quotations could be treated alike. The one from Meyrowitz in paragraph 8 was necessary, in view of the limited material on the subject available to the Commission. He would, once again, emphasize the importance of the question of sources.

80. Mr. MAHIOU proposed that the quotation from Meyrowitz should be transferred to a footnote.

*It was so agreed.*

*Paragraph 8, as amended, was adopted.*

Paragraphs 9 to 13

*Paragraphs 9 to 13 were adopted.*

Paragraph 14

81. Mr. THIAM (Special Rapporteur) said that the second sentence should end with the words "destruction of human culture". The remainder of the sentence should be replaced by a new sentence reading: "In addition, the motive of the crime was an important element."

*Paragraph 14, as amended, was adopted.*

Paragraphs 15 to 21

*Paragraphs 15 to 21 were adopted.*

Paragraph 22

82. Mr. McCAFFREY queried the use of the expression "The great majority of members", in the second sentence.

The usual expression was "most members."

83. Mr. THIAM (Special Rapporteur) said that the use of the expression was borne out by the facts: there had indeed been a large majority in favour of the second alternative text.

*Paragraph 22 was adopted.*

Paragraph 23

84. Mr. THIAM (Special Rapporteur) said that the words "some members", in the third sentence, should be replaced by "one member".

85. Mr. MAHIOU said that a consequential amendment in the last sentence would be to replace the words "these members" by "that member".

*It was so agreed.*

*Paragraph 23, as amended, was adopted.*

Paragraphs 24 to 26

*Paragraphs 24 to 26 were adopted.*

Paragraph 27

86. Mr. THIAM (Special Rapporteur) said that the last part of the last sentence, reading "which would dispel the doubts of several States about acceding to the Convention on that crime", should be deleted.

*Paragraph 27, as amended, was adopted.*

Paragraph 28

*Paragraph 28 was adopted.*

Paragraph 29

87. Responding to a comment by Mr. THIAM (Special Rapporteur), Mr. CALERO RODRIGUES suggested that the word "ordinary", in the fourth sentence, should be deleted.

*It was so agreed.*

*Paragraph 29, as amended, was adopted.*

Paragraph 30

*Paragraph 30 was adopted.*

Paragraph 31

88. After a brief discussion in which Mr. CALERO RODRIGUES, Mr. PAWLAK and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that the authentic text for the first sentence should be the French, and that the other language versions, particularly the English, should be brought into line with it.

*It was so agreed.*

*Paragraph 31 was adopted.*

Paragraphs 32 to 34

*Paragraphs 32 to 34 were adopted.*

Paragraph 35

*Paragraph 35 was adopted subject to a correction in the Russian text.*

Paragraph 36

89. Mr. PAWLAK proposed that the words "conquered Powers", in the first sentence, should be replaced by "countries occupied by the Allied Powers".

*It was so agreed.*

*Paragraph 36, as amended, was adopted.*

Paragraph 37

*Paragraph 37 was adopted.*

Paragraph 38

90. Mr. BENNOUNA (Rapporteur) suggested that paragraph 38 should be combined with paragraph 39.

91. Mr. TOMUSCHAT, supported by Mr CALERO RODRIGUES, said that paragraph 38 formed an introduction to paragraphs 39 to 41 and should remain separate.

*Paragraph 38 was adopted.*

Paragraphs 39 and 40

*Paragraphs 39 and 40 were adopted.*

Paragraph 41

92. Mr. THIAM (Special Rapporteur) said that the words "another crime, namely" should be inserted between the words "consequence of" and "the expulsion" in the second sentence.

*Paragraph 41, as amended, was adopted.*

Paragraphs 42 to 45

*Paragraphs 42 to 45 were adopted.*

Paragraph 46

93. Mr. TOMUSCHAT suggested that the quotation from a decision of the Supreme Court of the British Zone should be deleted, as it was redundant.

94. Mr. THIAM (Special Rapporteur) said that the quotation was an important element of jurisprudence and should not be deleted. If necessary, it could be incorporated in a footnote.

95. Mr. McCAFFREY said that he fully agreed with Mr. Tomuschat and would further point out that chapter III of the draft report contained a large number of passages reflecting the opinions of the Special Rapporteur, something that he himself had been criticized for including in chapter VII. Mr. Díaz González had pointed out (2141st meeting) that such practice created confusion in the Sixth Committee of the General Assembly: representatives were led to comment on the special rapporteur's opinions, rather than on the views of the Commission. He was now inclined to agree with that point of view, and would urge that, early during the Commission's next session, the secretariat, the Rapporteur and the special rapporteurs should meet with a view to deciding on a structure for the report in which each of the topics on the agenda was given equal treatment.

96. The CHAIRMAN pointed out that the Rapporteur had already made a similar suggestion, which would certainly be followed.

97. Mr. NJENGA said that paragraph 46 under consideration dealt with the destruction of property, which was a new area of concern for the Commission. The quotation it contained provided justification for the Commission's position and should not be deleted. If necessary, however, it could be incorporated in a footnote.

98. Mr. BARSEGOV said that, on the whole, he was in favour of reducing the length of the Commission's report, but paragraph 46 contained very important material. Destruction of property was often the starting-point for acts of genocide, as anyone familiar with the history of such acts knew.

99. The CHAIRMAN suggested that the quotation in paragraph 46 should be incorporated in a footnote.

*It was so agreed.*

*Paragraph 46, as amended, was adopted.*

Paragraphs 47 to 58

*Paragraphs 47 to 58 were adopted.*

*The meeting rose at 7 p.m.*

## 2147th MEETING

*Friday, 21 July 1989, at 10 a.m.*

*Chairman: Mr. Bernhard GRAEFRATH*

*Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

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

#### **CHAPTER III. Draft Code of Crimes against the Peace and Security of Mankind (continued) (A/CN.4/L.436 and Add.1-3)**

#### **B. Consideration of the topic at the present session (concluded) (A/CN.4/L.436 and Add.1-3)**

Paragraphs 59 to 78 (A/CN.4/L.436/Add.2)

Heading preceding paragraph 59

1. Mr. BARSEGOV proposed that the words "for mankind" should be added after the words "of vital importance" in the heading.

*It was so agreed.*

2. Mr. McCAFFREY proposed that the words "and assets" should be added after the word "property".

*It was so agreed.*

*The heading preceding paragraph 59, as amended, was adopted.*

Paragraphs 59 to 71

*Paragraphs 59 to 71 were adopted.*

Paragraph 72

3. Mr. McCAFFREY proposed that the second sentence should be amended to read: "It was also important to avoid the possibility of over-politicization of the code in national courts."

4. Mr. BARSEGOV proposed the following wording: "... the possibility of over-politicization of the code's application ...".

*Mr. McCaffrey's amendment, as modified by Mr. Barsegov, was adopted.*