Document:-
A/CN.4/SR.2241

Summary record of the 2241st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

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

---

* 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-