

Document:-
A/CN.4/SR.2251

Summary record of the 2251st meeting

Topic:
Other topics

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

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posal had not been considered in detail in the Planning Group, it was agreed that during the next session of the Commission the issue would be discussed and, if necessary, a study would be requested from the secretariat on all the implications of such a decision.”

72. Mr. PELLET said that, first of all, there was no reason to be surprised that the problem was being raised at the end of the session: no other opportunity had arisen to discuss the issue in plenary. What was more, he had listed the members who agreed to the principle of a split session simply because Mr. Díaz González had given the impression that he would support the majority view—there was not the slightest conspiracy or attack on the authority of the Chairman. Moreover, consensus, conservatism’s weapon *par excellence*, should not be abused, since a small number of members objecting was enough to put a stop to any proposal for change. To his mind, Mr. Njenga’s proposal was very reasonable. Personally, he would none the less prefer the Commission at least to request the secretariat to be ready to answer requests for information the members of the Commission might wish to make in 1992 about the financial implications and administrative possibilities of a split session. Lastly, he asked for Mr. Njenga’s proposal to be submitted to the Commission in writing, so that it could be adopted at the following meeting.

73. Mr. MAHIU said that he was ready to endorse Mr. Njenga’s compromise proposal.

74. Mr. THIAM said that he had no objections to Mr. Njenga’s proposal, but he would insist that procedures should be observed in the future.

75. Mr. AL-BAHARNA (Rapporteur) said it was regrettable that the Commission was faced at the end of the quinquennium with a proposal that had not been submitted in accordance with the rules and which was aimed at changing its rules of procedure. As a compromise, he could agree to Mr. Njenga’s proposal and hoped that the Commission would take a decision without further delay.

76. Mr. DÍAZ GONZÁLEZ said he supported the motion by Prince Ajibola to declare Mr. Pellet’s proposal inadmissible. It was wrong to contend that the Commission had not had time to discuss the issue, since there had been occasions when a meeting had risen for lack of speakers. If the majority of members deemed Mr. Njenga’s proposal acceptable, he would not oppose it. Nevertheless, the usual procedure for considering such a proposal should have been followed.

77. Prince AJIBOLA said that, in a spirit of cooperation and consensus, he formally withdrew his motion, but emphasized that the normal procedure should have been followed, even though, personally, he would prefer the Commission’s sessions to be held in two parts. Lastly, he supported Mr. Njenga’s proposal.

78. Mr. THIAM said it might be better for Mr. Njenga’s proposal to refer to the “financial and administrative implications of such a decision”, not “all the implications”, since family or professional considerations, for instance, could not be taken into account by the secretariat.

79. Mr. PAWLAK said that the study which might be requested should indeed be confined to the financial and administrative implications, so as not to impose too heavy a burden on the secretariat.

80. The CHAIRMAN said that the Commission would have Mr. Njenga’s proposal before it in writing at the next meeting.

The meeting rose at 6.30 p.m.

2251st MEETING

Friday, 19 July 1991, at 10.15 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, 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 (continued)

CHAPTER IV. Draft Code of Crimes against the Peace and Security of Mankind (concluded)* (A/CN.4/L.464 and Add. 1-4)

A. Introduction (A/CN.4/L.464)

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.464 and Add.1-3)

CONSIDERATION OF THE NINTH REPORT OF THE SPECIAL RAPporteur (concluded) (A/CN.4/L.464 and Add.1-3)

Paragraphs 8 to 20

Paragraphs 8 to 20 were adopted.

Section B was adopted.

* Resumed from the 2243rd meeting.

C. Tribute to the Special Rapporteur, Mr. Doudou Thiam (A/CN.4/L.464)

Paragraph 21

Paragraph 21 was adopted.

Section C was adopted.

D. Draft Code of Crimes against the Peace and Security of Man-kind (A/CN.4/L.464/Add.4)

1. TEXT OF DRAFT ARTICLES PROVISIONALLY ADOPTED BY THE COMMISSION ON FIRST READING

Section D.1 was adopted.

2. TEXT OF DRAFT ARTICLES 3, 4, 5, 11, 14, 19, 20, 21, 22 AND 26, WITH COMMENTARIES THERETO, AS PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-THIRD SESSION

Commentary to article 3 (Responsibility and punishment)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

1. Mr. THIAM (Special Rapporteur) proposed that a sentence should be inserted after the third sentence to read: "While draft article 3 provides for the criminal responsibility of the individual, article 5 clearly establishes that criminal responsibility of the individual is without prejudice to the international responsibility of States."

Paragraph (2) as amended, was approved.

Paragraph (3)

2. Mr. TOMUSCHAT said that the assertion "While there was no doubt in the Commission", in the third sentence, was not accurate. He therefore proposed that the phrase should be replaced by "Most members agreed" and that the sentence should end with the words "obvious cases of complicity". The words "the same was not true with regard to aiding" should be replaced by "On the other hand, opinions were divided on how to deal with aiding".

Paragraph (3), as amended, was approved.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Motives)

The commentary to article 4 was approved.

Commentary to article 5 (Responsibility of States)

The commentary to article 5 was approved.

Commentary to article 11 (Order of a Government or a superior)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

3. Mr. CALERO RODRIGUES said that the second sentence of the paragraph posed a question. Where was the answer?

4. Mr. THIAM (Special Rapporteur) said that the answer was implicit in the sentence that followed.

5. Mr. CALERO RODRIGUES said it should be made more clear that the third sentence did in fact contain a response to the issue raised in the second sentence.

6. Mr. TOMUSCHAT said that the words "at this stage", in the third sentence, were ambiguous.

7. Mr. THIAM (Special Rapporteur) proposed that the words "at this stage" should be deleted.

Paragraph (4), as amended, was approved.

The commentary to article 11, as amended, was approved.

Commentary to article 14 (Defences and extenuating circumstances)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

8. Mr. GRAEFRATH proposed that the word "also", should be deleted from the fourth sentence.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 14, as amended, was approved.

Commentary to article 19 (Genocide)

Paragraph (1)

9. Mr. THIAM (Special Rapporteur) said that the words *L'énorme gravité*, in the first sentence of the French version, should be replaced by *L'extrême gravité*.

Paragraph (1), as amended, was approved.

Paragraph (2)

10. Mr. TOMUSCHAT said, in reference to the second sentence, that the essential principle was *nullum crimen sine lege* rather than *nulla poena sine lege*.

11. Mr. THIAM (Special Rapporteur) said that he agreed with Mr. Tomuschat's observation. He also proposed that the words *a cru convenable*, in the French text, should be replaced by *a décidé*.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were approved.

Paragraph (7)

12. Mr. EIRIKSSON pointed out that paragraph (7) contained the wording "One member of the Commission was of the opinion". In general, the Commission had moved away from that approach in its other commentaries. The commentary to article 19 might be an appropriate place to add a paragraph which would explain why the Commission had not taken a position with regard to penalties but had, instead, chosen to include in the *chapeau* of the articles dealing with specific crimes the wording "be sentenced [to . . .]". That same paragraph could include a cross-reference to the discussion that had been held on penalties, which was reflected elsewhere in chapter IV.

13. Following an exchange of views in which Mr. GRAEFRATH, Mr. CALERO RODRIGUES, Mr. PAWLAK, Mr. EIRIKSSON and Prince AJIBOLA took part, Mr. THIAM (Special Rapporteur) suggested that he and Mr. Eiriksson should draft a text which would explain the Commission's decision to use the wording "be sentenced [to . . .]" throughout the draft Code. The appropriate place for the new text would be decided at a later time.

14. Mr. EIRIKSSON said that the secretariat would be preparing for the Sixth Committee a document containing all the commentaries to the articles. That document might include a general commentary to part two of the draft Code, referring to the question of applicable penalties.

Paragraph (7) was approved.

15. Mr. BARSEGOV said he thought it had been generally agreed that paragraph 2 (c) of article 19 could, in some cases, be extended to include deportation. However, he saw no mention of it in the commentary. He therefore proposed that a paragraph should be added to the commentary to the effect that, in the Commission's opinion, paragraph 2 (c) could include deportation, if it was carried out with intent to destroy a group in whole or in part.

16. Mr. THIAM (Special Rapporteur) said it was true Mr. Barsegov had always maintained that deportation should be included among the acts considered as genocide. A reference to deportation should therefore be made in the commentary. However, Mr. Barsegov's view was not held by all the members and he would thus propose the insertion of a sentence reading: "According to one member, deportation, under certain circumstances, is equivalent to genocide."

17. Mr. CALERO RODRIGUES said that he agreed with the comments by Mr. Barsegov and by Mr. Thiam. To make the commentary even more clear, he proposed that the following wording could be used: "The suggestion was made that deportation should be included among the acts qualifying as genocide; however, the Commission decided that deportation already fell within the scope of paragraph 2 (c)."

The commentary to article 19, as thus amended, was approved.

Commentary to article 20 (Apartheid)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

New paragraph (3)

18. Mr. THIAM (Special Rapporteur) proposed that, to make it clear that certain categories of officials were not covered by the draft article, a passage should be added to the commentary as new paragraph (3) to read:

"(3) The Commission has restricted the scope *ratione personae* of the draft article to leaders or organizers—an approach it has also adopted in relation to other crimes, such as aggression and intervention. It has thereby sought to make criminally liable only those who are in a position to use the State apparatus for the planning, organization or perpetration of the crime."

New paragraph (3) was approved and the following paragraph was renumbered accordingly.

Paragraph (4) (formerly para.(3))

Paragraph (4) was approved.

19. Mr. GRAEFRATH, supported by Mr. MAHIOU and Mr. THIAM (Special Rapporteur), said that the wording of the draft article differed from that of the International Convention on the Suppression and Punishment of the Crime of Apartheid in that the Convention used the expression "racial group or groups" whereas the draft article referred to "a racial group". He therefore proposed that it should be made clear in the report that the Commission felt that the expression "a racial group" was sufficient to cover several groups and had therefore deleted the words "or groups".

The commentary to article 20, as amended, was approved.

Commentary to article 21 (Systematic or mass violations of human rights)

20. Mr. RAZAFINDRALAMBO, proposed that, to bring the French version of the title of the article into line with the English, the word *et* should be replaced by *ou*.

It was so agreed.

21. Mr. AL-BAHARNA pointed out that the third human rights violation listed in the article should be amended to read: "Establishing or maintaining over persons a status of slavery, servitude or forced labour".

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

22. Mr. CALERO RODRIGUES pointed out that, in the fifth sentence, the word "not" should be added before "systematic".

Paragraph (3), as amended, was approved.

Paragraph (4)

23. Mr. MAHIOU proposed that the words *nulla poena sine lege* should be replaced by *nullum crimen sine lege*.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

24. Mr. TOMUSCHAT proposed that the first part of the second sentence should be amended to read: "Admittedly, they would, in view of their official position, have far-reaching factual opportunity to commit the crimes covered by the draft article, . . .".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

25. Mr. TOMUSCHAT pointed out that the word "had", following the word "torture", in the third sentence, should be replaced by "has".

Paragraph (7), as amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

26. Mr. TOMUSCHAT said that some of the examples of persecution given in the second sentence could not really be classified as crimes against the peace and security of mankind. He therefore proposed that the references to the compiling of secret files and the systematic destruction of books should be deleted.

27. Mr. CALERO RODRIGUES, agreeing with Mr. Tomuschat, proposed that the reference to the systematic destruction of monuments and buildings should be retained, and the reference to books or other objects deleted.

28. Mr. PAWLAK proposed that the words "political, religious, cultural and other groups" should be added after the words "who represent", also in the second sentence.

29. Mr. EIRIKSSON, agreeing with Mr. Pawlak, proposed that a sentence should be added at the end of the list of examples, reading: "Such acts could come within the scope of this article when committed in a systematic manner or on a mass scale."

30. Mr. PAWLAK said that such a sentence would be repetitious, since the same idea was reflected elsewhere in the paragraph.

31. Mr. CALERO RODRIGUES said that it would none the less be a useful repetition as it would

emphasize that certain kinds of persecution committed in a systematic manner or on a mass scale would amount to a crime under the Code.

32. Following a further exchange of views, in which Mr. CALERO RODRIGUES, Mr. EIRIKSSON, Mr. MAHIOU and Mr. THIAM (Special Rapporteur) took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to amend the second sentence of the paragraph to read:

"Persecution may take many forms, for example, a prohibition on practising certain kinds of religious worship; prolonged and systematic detention of individuals who represent a political, religious or cultural group; a prohibition on the use of a national language even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group. Such acts could come within the scope of this article when committed in a systematic manner or on a mass scale."

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

33. Mr. TOMUSCHAT proposed that the words "a practice of systematic" should be added before "disappearances" and that the words "covered by" should be replaced by "specifically mentioned in".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

34. Mr. BARSEGOV, referring to the third sentence, said that he did not see the difference between expulsion and forcible transfer of population, both of which could occur either within or outside a State's frontiers. In his country, for instance, the Crimean Tartars had been expelled from one republic to another. Was that deportation? And if a State which was not a federal State exiled part of its population to remote regions under bad conditions, was that deportation? In his opinion, it was. The reference to "frontiers" at the end of the sentence could only create confusion and perhaps even be used in justification; unfortunately, the explanation given in the subsequent sentences merely complicated the issue. In the circumstances, it seemed preferable to state simply that: "Deportation, already included in the 1954 draft Code, implies expulsion from the national territory."

35. Mr. MAHIOU said that the word "expulsion" admittedly posed a problem. Traditionally, it referred to a person in one territory who was expelled to another territory or State, though it could have another meaning under other systems of law. Hence there was some ambiguity, depending on the context. The ultimate object, of course, was to condemn deportation or forcible transfers, whether or not they took place within or outside the frontiers of a State. That could perhaps be spelt out, without making certain distinctions. At any rate, expulsion should always be reserved for movements from one State to another State, and forcible transfer should be re-

served for movements of populations within a State. A sufficiently broad form of wording would convey that idea.

36. Mr. CALERO RODRIGUES said that the commentary referred to the 1954 Code which called to mind the classic concept of deportation and thus covered every possible situation. The precise terminology used was not that important, and the paragraph as now drafted should be satisfactory.

37. Mr. PAWLAK suggested that the words “of population in accordance with international agreements or” should be added after “directed at transfers”, in the fifth sentence.

38. Mr. TOMUSCHAT said it was important to specify that the international agreements in question must be agreements between the States concerned. It would be unacceptable for third States to enter into an agreement to transfer populations; moreover, the victim State must agree to the transfer.

39. Mr. PAWLAK said he thought that was implicit in the term “international agreements”. As a compromise, he suggested the wording “in accordance with international agreements between the States concerned”.

40. Mr. BARSEGOV said that the issue was a complex one; it was impossible to cover all the possibilities, nor should the Commission attempt to do so. However, Mr. Pawlak’s proposal, as amended by Mr. Tomuschat, would be a satisfactory solution for the future.

41. Mr. CALERO RODRIGUES said he was concerned that the wording proposed by Mr. Pawlak might be used to justify gross violations of human rights if two States entered into an agreement forcibly to transfer the population of a third.

42. Mr. TOMUSCHAT said he concurred. The rights of peoples and of States should not be placed at odds. The existence of an international treaty would not justify the uprooting of an indigenous population. It was a very delicate problem, and it was hardly possible to legislate for all eventualities. Accordingly, it would be best to leave the text as it stood.

43. Mr. BARSEGOV suggested that the phrase “in accordance with the requirements of international law” should be inserted after “international agreements”. That would resolve the problem raised by Mr. Calero Rodrigues.

44. Mr. PAWLAK said he was willing to withdraw his proposal. However, if the sentence defined what lay outside the scope of the draft article, it must cover every situation, not merely internal transfers of population.

45. Mr. THIAM (Special Rapporteur) said that transfers of population could constitute crimes against humanity whether they took place within the same territory or across frontiers. The key issue was whether they inflicted the kind of suffering contemplated by the draft Code. In view of the discussion, it would be better to delete the third sentence.

46. Mr. MAHIOU queried the use of the word *mieux* in the French text, in the penultimate sentence of paragraph (11). The end of the sentence should be redrafted in the French version.

47. Mr. CALERO RODRIGUES proposed that the entire phrase “for the purposes of better integration with the rest of the nation” should be deleted from the penultimate sentence. There might be various reasons for attempting to uproot a population.

48. The CHAIRMAN said that the penultimate sentence of paragraph (11) would end “. . . their ancestral lands”.

49. Mr. THIAM (Special Rapporteur) said he could also agree to deletion of the fifth sentence. The third sentence, referring to deportation, would be retained.

Paragraph (11), as amended, was approved.

The commentary to article 21, as amended, was approved.

Commentary to article 22 (Exceptionally serious war crimes)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

50. Mr. EIRIKSSON proposed that the words “grave breaches” should be used to replace “serious offences” and “common articles” to replace “joint articles”, in the first sentence.

Paragraph (2), as amended, was approved.

Paragraph (3)

51. Mr. PELLET said that paragraph (3) (c) was confusing. It might convey the impression that commission of any of the acts in question would be enough to constitute a crime against the peace and security of mankind. He suggested that the subparagraph should read: “(c) that the act constituting a crime falls within any one of the six categories in paragraph 2 (a) to (f)”.

52. Mr. THIAM (Special Rapporteur) said he could accept that proposal.

53. Mr. EIRIKSSON proposed that, for the sake of logic, subparagraphs (a) to (c) should be reordered so that, with the inclusion of Mr. Pellet’s proposal, subparagraph (c) would become the first of the subparagraphs.

54. Mr. GRAEFRATH said he agreed, and pointed out that the words “for the draft Code”, in the last sentence of the English text, should be replaced by “of the draft Code”.

55. Mr. ROUCOUNAS proposed that the qualifier “war”, before “crime”, should be deleted. The article dealt with war crimes of a special kind.

56. Mr. MAHIOU said it was clear from the statement at the beginning of paragraph (2) of the commentary, that the article dealt expressly with war crimes.

57. Mr. RAZAFINDRALAMBO pointed out that the title of the article was "Exceptionally serious war crimes". The term "crime", on its own, was too broad.

58. Mr. CALERO RODRIGUES said that in the light of the title to the draft article, the point was unimportant.

Paragraph (3), as amended, was approved.

Paragraph (4)

59. Mr. PELLET proposed deletion from the first sentence of the whole of the text after "Geneva Conventions". He said that it simply reintroduced a controversial question which the Drafting Committee had sought to avoid. If his proposal was not accepted, he wished to state for the record that some members did not agree with the interpretation placed on article 2 (b) of Additional Protocol I.

60. Mr. GRAEFRATH said he did not understand the difficulty in accepting rules stemming from international agreements between parties to an armed conflict. However, the chief problem in paragraph (4) lay in the second sentence. He proposed that the phrase "in other words in the traditional sense of war between two or more States, but also conflicts in which the parties are national liberation movements" should be omitted. The expression "international armed conflicts" should be substituted for "international conflicts" and the words "or internal" should be deleted.

61. Mr. THIAM (Special Rapporteur) said he could accept the proposals of both Mr. Pellet and Mr. Graefrath.

62. Mr. TOMUSCHAT said he thought the disagreement referred to by Mr. Pellet related only to the reference, in the first sentence of paragraph (4), to "international agreements in which the participants are parties to an armed conflict". The mention of customary and treaty law was important, and should be retained.

63. Mr. PELLET said that, in his view, treaty law would be relevant in the context of paragraph (4) only if it was derived from the general principles of international law. Where the rule was of a customary nature, one conventional source would be unimportant. He objected, however, to the mention of treaty law as such.

64. Mr. THIAM (Special Rapporteur) said that a reference to the law of war was unavoidable.

65. The CHAIRMAN suggested that the first sentence of paragraph (4) should end with the words "Geneva Conventions". The second sentence would be amended as proposed by Mr. Graefrath.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

66. Mr. EIRIKSSON proposed that the seventh sentence should be amended to read: "The subparagraph sets out in square brackets a number of examples of acts which unquestionably fall within the general definition in the subparagraph."

67. Mr. THIAM (Special Rapporteur) said he could accept that proposal.

68. Mr. PELLET proposed that the words "and their questionable character" should be added at the end of the last sentence.

It was so agreed.

69. Mr. THIAM (Special Rapporteur) said he thought only one member had expressed that view. The sentence should therefore begin "The view was expressed".

Paragraph (6), as amended, was approved.

Paragraph (7)

70. Mr. EIRIKSSON proposed that the words "in the draft article" should be substituted for "among exceptionally serious war crimes", in the second sentence.

71. Mr. MAHIOU proposed that the word *faire* in the last sentence of the French version, should be deleted.

72. Mr. THIAM (Special Rapporteur) proposed that "odious", in the second sentence, should be replaced by "serious".

Paragraph (7), as thus amended, was approved.

Paragraph (8)

73. Mr. EIRIKSSON suggested that the first sentence should be reformulated so as to begin with the words: "Another category of exceptionally serious war crimes was covered by the draft articles . . .".

74. Mr. GRAEFRATH suggested that, the words "the 1925 Geneva Protocol" in the second sentence, should be followed by "for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction". Furthermore, the reference to methods or means of combat should be deleted. They were out of place in a paragraph of the commentary that dealt with the use of unlawful weapons, not with the means or methods of combat.

It was so agreed.

Paragraph (8), as amended by Mr. Graefrath, was approved.

Paragraph (9)

75. Mr. PELLET said that he had placed on record his strong reservations to subparagraph (d). He suggested that a sentence should be added at the end of the paragraph reading: "One member made a formal reservation on subparagraph (d)."

76. Mr. GRAEFRATH proposed that the words in the first sentence "from article 35, paragraph 3, of Protocol

I . . .” should be amended to read: “from article 35, paragraph 3, and article 55 of Protocol I”.

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

77. Mr. EIRIKSSON proposed that the first sentence should be reworded to read: “Subparagraph (e) covers large-scale destruction of civilian property.”

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

78. Mr. EIRIKSSON proposed that the beginning of the first sentence should be amended to read: “Subparagraph (f) covers . . .”.

79. Mr. THIAM (Special Rapporteur) said that the words “international law applied in armed conflicts . . .”, in the second sentence, should be amended to read “international law applicable in armed conflicts . . .”.

Paragraph (11), as thus amended, was approved.

The commentary to article 22, as amended, was approved.

Commentary to article 26 (Wilful and severe damage to the environment)

Paragraph (1)

Paragraph (1) was approved with a minor drafting change.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraph (5)

Paragraph (5) was approved with a minor drafting change.

Paragraph (6)

80. Mr. THIAM (Special Rapporteur) said that the beginning of the second sentence, “This precludes from the scope of the crime . . .” should be altered to read: “This excludes from the scope of the draft article . . .”.

Paragraph (6), as amended, was approved.

The commentary to article 26, as amended, was approved.

81. Mr. BEESLEY said he had no objection to the commentary, but wished to enter a reservation with regard to article 26 itself, because of the narrowness of the crime it defined.

82. Mr. EIRIKSSON pointed out that the Commission had to discuss the inclusion of a passage as a commen-

tary to part two of the draft Code and suggested a text along the lines of:

“(1) Part two sets out in individual articles the crimes against peace and security of mankind covered by the draft Code.

“(2) The Commission approved a standard format for the articles specifying, in some cases in an introductory paragraph, the categories of persons which can be covered by the crime. Thus, in articles 15 to 18, and article 20, the scope of the crime is confined to leaders or organizers, a distinction adopted in the Nürnberg trials. Articles 23 and 24 apply to agents or representatives of States. Other crimes can, in accordance with the draft Code, be committed by any individual.

“(3) In all cases, the scope of the crimes extends also to cases where the persons concerned do not commit the crime themselves but order other individuals to commit them.

“(4) The articles in part two do not take a position on punishment but include with respect to each crime the clause “be sentenced [to . . .]”. This question will be reviewed on second reading and is without prejudice to whether penalties will be specified for each crime, or whether there will be a single provision for all crimes.

“(5) The scope of the articles with respect to persons is also affected by the provisions of article 3 dealing with the categories of persons other than those who commit the crime who would be responsible therefor.”

83. Mr. THIAM (Special Rapporteur) said that he would prepare, with the help of the secretariat, a passage along those lines for inclusion in Chapter IV of the report.

84. Mr. PAWLAK said that the text proposed by Mr. Eiriksson did not introduce any new element; it simply described the situation. The actual formulation could be left to the Special Rapporteur and the secretariat.

85. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to include a passage of that kind, leaving it to the Special Rapporteur and the secretariat to devise the exact wording.

It was so agreed.

Chapter IV of the draft report, as amended, was adopted on that understanding.

CHAPTER I. *Organization of the session (concluded)*
(A/CN.4/L.461)

F. *General description of the work of the Commission at its forty-third session (concluded)*

86. The CHAIRMAN invited the Commission to resume consideration of chapter I, more particularly section F (General description of the work of the Commis-

sion at its forty-third session). He said that, in accordance with the decision taken at the previous meeting, it was proposed to add at the beginning of the section an additional paragraph to read:

“8 bis. At its forty-third session, the Commission achieved major progress on three topics on its agenda. It concluded the consideration of the topic ‘Jurisdictional immunities of States and their property’ by finally adopting a set of draft articles on the topic. In addition, the Commission provisionally adopted complete sets of draft articles on two other topics on its agenda, namely ‘Draft Code of Crimes against the Peace and Security of Mankind’ and ‘The law of the non-navigational uses of international watercourses’. It is to be recalled that, at its forty-first session, the Commission finally adopted draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft optional protocols thereto. Thus, during the current term of office of its members, the Commission achieved the specific goals which it had set for itself at the beginning of that term of office.”

Paragraph 8 bis was adopted.

Paragraph 9

Paragraph 9 was adopted.

Paragraphs 10 and 11

87. Mr. EIRIKSSON proposed that, in each paragraph, the last sentence, mentioning the Commission’s decision to transmit the draft to Governments for comments and observations, should be moved to become the second sentence.

It was so agreed.

Paragraphs 10 and 11, as amended, were adopted.

Paragraphs 12 to 15

Paragraphs 12 to 15 were adopted.

Chapter I of the draft report, as amended, was adopted.

CHAPTER VIII. Other decisions and conclusions of the Commission (continued) (A/CN.4/L.468 and Corr.1)

88. The CHAIRMAN invited the Commission to resume consideration of chapter VIII. Following the discussion at the previous meeting, it was proposed to insert a new paragraph 18 bis, to read:

“18 bis. The Commission considered the issues raised in paragraph 546 of the report on the work of the forty-second session on the possibility of splitting the session of the Commission into two parts. However, since this proposal had not been considered in detail in the Planning Group, it was agreed that during the next session of the Commission the issue would be discussed and, if necessary, a study would be requested from the secretariat on the administrative and financial implications of the matter.”

Paragraph 18 bis was adopted.

89. The CHAIRMAN said it was gratifying that a formula had been agreed upon on the possibility of splitting the Commission’s session into two parts. He was confident that the lively debate on the subject would in no way impair the spirit of friendship and comradeship which had always prevailed in the Commission.

90. Mr. MAHIU said he hoped that the Chairman would confirm that his critical remarks during that discussion had not been directed against those who had initiated the discussion, including himself.

91. The CHAIRMAN said that any adverse comments he might have made had not been directed at the initiators of the discussion, namely Mr. Mahiou and Mr. Pellet.

Paragraph 18

92. Mr. PELLET said that the somewhat neutral formulation of paragraph 18 did not appear to explain adequately why the Commission wanted the session to last the usual 12 weeks. A passage should be added to state that, notwithstanding a shorter agenda, the Commission still had very important work ahead of it, apart from the need to examine its methods of work in depth.

93. Mr. MAHIU suggested that it should be left to the members of the Sixth Committee to raise such specific issues as those indicated by Mr. Pellet.

94. Mr. CALERO RODRIGUES pointed out there would always be some representatives in the Sixth Committee opposed to a 12-week session for the Commission. The Chairman, who would be representing the Commission at the next session of the General Assembly, would have an opportunity to explain during the debate in the Sixth Committee why the Commission wanted to maintain the 12-week session. Moreover, some members of the Commission would be attending the General Assembly as representatives of their Governments in the Sixth Committee and would be able to contribute to the discussion.

95. Mr. PAWLAK suggested that, in the circumstances, paragraph 18 should be left as it stood. It was best not to depart from the standard formula.

96. Mr. PELLET said he would not press his suggestions.

Paragraph 18 was adopted.

97. Mr. BEESLEY said that he would be unable to attend the next meeting, and therefore wished to place on record his request for deletion of the whole of the explanatory note to the annex.

The meeting rose at 1 p.m.