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Summary record of the 2430th meeting

Topic:
<multiple topics>

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the environment to be considered by the Commission in plenary on 21 May.

12. Mr. PELLET pointed out that, pursuant to the decision taken by the Commission at the previous session, four articles had been referred to the Drafting Committee.[9] It was understood that in its formulations, the Committee might use elements from outside those four articles, but under no circumstances should it take up separately any of the other articles of the draft Code. It should not, for example, create a fifth article, something that would be contrary to what the Commission had clearly decided.

The meeting rose at 10.30 a.m.

[9] See 2427th meeting, footnote 9.

2430th MEETING

Friday, 17 May 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (*continued*)

[Agenda item 1]

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), reporting on the progress of work in the Drafting Committee, said that it was keeping to its schedule. It had practically completed consideration of the outstanding articles in part two of the draft Code of Crimes against the Peace and Security of Mankind, namely, article 21 on crimes against humanity[1] and article 22 on war crimes,[2] and had reconsidered article 15 on the crime of aggression.[3] In that part, it had only to complete the *chapeau* or introductory clause to the articles which should, in so far as possible, be the same for all articles. It still had to consider articles 3, 7 and 14 of chapter II (General principles) of part one, which the Commission had left aside pending a definition of crimes.

2. The Drafting Committee should complete its work on the draft Code the following week and might possibly hold one or two additional meetings to refine the text to be adopted on second reading.

Draft Code of Crimes against the Peace and Security of Mankind[4] (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC (XLVIII)/DC/CRD.3[5])

[Agenda item 3]

3. The CHAIRMAN invited Mr. Tomuschat to introduce the draft proposals, reproduced below, which had been agreed upon by the working group on the issue of wilful and severe damage to the environment[6] on the basis of his document (ILC(XLVIII)/DC/CRD.3):

"*Article 22. War crimes*

"2 (*a*) (iii) (*bis*). Employing methods or means of warfare which are intended or may be expected to cause such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced;

"*Article 21. Crimes against humanity*

"2 (*h*) (*bis*). Wilfully causing such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced;

or

"*Article 26. Wilful and severe damage to the environment*

"An individual who wilfully causes such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced, shall, on conviction thereof, be sentenced to ...."

4. Mr. TOMUSCHAT said that the working group had concluded that crimes against the environment should be incorporated into the draft Code either as a war crime and a crime against humanity or as an autonomous offence, the choice in that regard being left to the Commission.

5. The working group had to a large extent taken as its basis article 55, paragraph 1, of Additional Protocol I to the Geneva Conventions of 12 August 1949. But, having

[1] See 2428th meeting, footnote 4.

[2] Ibid., footnote 2.

[3] Ibid., footnote 3.

[4] For the text of the draft articles provisionally adopted on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94 et seq.

[5] Reproduced in *Yearbook ... 1996*, vol. II (Part One).

[6] See 2427th meeting, footnote 1.

noted that breaches of the rule set forth in that provision were not characterized as grave under the terms of article 85 of the Protocol, it had felt that it could, in the light of recent experiences, go one step further and raise the threshold so as to make damage to the environment a crime comparable to other war crimes and crimes against humanity.

6. For that purpose, damage to the environment must meet two criteria. The first was a two-tiered objective criterion in that the harm had to be, on the one hand, "widespread, long-term and severe"—to borrow the wording of article 35, paragraph 3, and article 55, paragraph 1, of Additional Protocol I—and, on the other, inasmuch as the draft Code was supposed to deal not with crimes against the environment as such, but with the human beings who were its victims, such that the health or survival of an entire population was gravely prejudiced. The second criterion was that of intention, recklessness and negligence being excluded. That characterization, of course, fell outside the context—armed conflict or otherwise—in which the harm was caused.

7. The working group felt that, if the Commission agreed to incorporate crimes against the environment into the draft Code, the text it had prepared should probably be referred to the Drafting Committee for consideration.

8. The CHAIRMAN invited comments on the working group's proposals.

9. Mr. PELLET suggested that the Commission should first take a decision on the actual principle of including wilful and severe damage to the environment in the draft Code and then, if it endorsed that principle, on the working group's draft proposals.

10. The CHAIRMAN, agreeing with Mr. Pellet's suggestion, asked whether the Commission supported the idea of including crimes against the environment in the draft Code.

11. Mr. IDRIS, endorsing Mr. Pellet's suggestion, said he considered that members should be allowed time to study carefully the draft proposal just placed before them. He doubted whether the Commission could reach an agreement on such a difficult and delicate subject at such a late stage in its work on the draft Code.

12. He would like to know whether the working group had considered any specific examples of the use of methods or means of war that might be expected to cause widespread, long-term and severe damage to the natural environment. His own view was that the proposed text was unclear and too broad.

13. Mr. EIRIKSSON expressed his support for the results of the work of the working group. In his view, provisions dealing with crimes against the environment should be included in the draft Code, preferably as separate provisions or, failing that and in the interests of compromise, under the heading of war crimes and crimes against humanity. So far as any delay was concerned, the Commission had already considered the matter and it was never too late to save the environment.

14. Mr. BOWETT said that, while he was not opposed to the working group's draft proposals, he did find the wording unduly restrictive. One of the criteria by which to judge whether harm to the environment was a crime was that the health or survival of a population would be gravely prejudiced. That meant, first, that serious conduct—such as the damage done by Iraq to Kuwaiti oil wells—would not be deemed to be a crime, since, serious though that conduct had been and widespread though the damage had been, there had been no real threat to the health or survival of a population. Secondly, the words "a population" meant "an entire population", according to Mr. Tomuschat. Consequently, when it came to large countries with vast and widely dispersed populations, like China, the United States of America and the Russian Federation, there was very little likelihood that damage to the environment could seriously threaten the health or survival of the entire population. It would therefore never be possible to establish that a crime against the environment had been committed in the case of such countries.

15. Mr. VILLAGRÁN KRAMER said that, while he welcomed the work of the working group and its draft proposals, major legal issues were involved and, like Mr. Idris, he thought that the Commission should be allowed time to ponder the matter.

16. Mr. PELLET said that he was opposed to the adoption of a separate provision on crimes against the environment and to the inclusion of the proposed provisions in the draft Code. In the first place, under the national legislation of States, serious offences against the environment were not treated as a crime or even as a serious offence, even though there was a move in that direction. Secondly, as Mr. Tomuschat had candidly pointed out, Additional Protocol I to the Geneva Conventions of 12 August 1949 did not treat damage to the environment as a serious offence. Thirdly, as Mr. Tomuschat had noted in paragraph 33 of his document (ILC(XLVIII)/DC/CRD.3), international environmental law was itself an uncertain edifice and the bases of the exercise in which the Commission intended to engage were also entirely uncertain. Fourthly, the working group had attempted a quadruple back flip: it adopted the basic assumption that an offence under national law was a crime and concluded from that alleged crime under national law that an offence was established under international law; it assimilated that offence to a crime, without any kind of basis, and without proving that there was any *opinio juris* whatsoever to that effect in the international community; and it transformed an international crime into a crime against the peace and security of mankind.

17. His conclusion was that the time had not come to incorporate crimes against the environment into the draft Code—though he was not opposed to the idea, which was probably defensible politically, but not in law, of making serious and wilful offences against the environment a crime.

18. The document prepared by Mr. Tomuschat should be circulated, perhaps as an annex to the report of the Commission to the General Assembly, in so far as such a legal fiction reflected the intellectual wishes of some members of the Commission. For his own part, he found

no evidence of the existence in that respect of a crime against the peace and security of mankind or even of an international crime. By trying to mix together crimes which had been clearly and soundly established, namely, the four major crimes referred to the Drafting Committee, with such uncertain offences, the Commission would undermine the credibility and interest of the draft Code, as well as the special legal quality of those other crimes which were undoubtedly crimes that were separate from "ordinary" international crimes.

19. Mr. YANKOV said that he had always wanted the Commission to move ahead and be forward looking. He was confirmed in his view by recent world events and by the danger to mankind posed by severe, wilful damage to the environment. He had, moreover, always been in favour of the inclusion in the draft Code of separate provisions on the question of wilful and severe damage to the environment, although the Commission had discussed that matter at great length.

20. He agreed with Mr. Bowett that the population factor was not the only important aspect of the environment to be taken into consideration. The effects of environmental damage on the population were often felt only decades later and they could be serious enough to be regarded as crimes against the peace and security of mankind, particularly when they had global ramifications. He therefore suggested that the working group's restrictive approach should be somewhat modified.

21. The draft proposals by the working group, which were well designed in form and substance, should be forwarded to the Drafting Committee, particularly as it would be the last opportunity to do so before the end of the Commission's mandate in its current form. He hoped that States would make known their views on the inclusion of the issue in the draft Code, which would not be comprehensive if it did not include damage to the environment.

22. Mr. LUKASHUK said that the draft Code would be incomplete if it did not include crimes against the environment. In response to the question by Mr. Idris whether there were any examples of such crimes, he mentioned the means of destruction that were used in time of war and that his own country, which had had to strengthen the protection of nuclear, chemical and other installations, was facing in Chechnya.

23. At first glance, it was clear that crimes against the environment were serious crimes and that, as such, they should be included in the draft Code. The draft proposals by the working group were well founded and could be forwarded to the Drafting Committee for consideration and specific proposals without being discussed in plenary.

24. Mr. CRAWFORD said that he was in favour of referring the draft proposals by the working group to the Drafting Committee for consideration and of including provisions of that type in the draft Code.

25. In reply to comments made by Mr. Pellet, he said that the fact that internal law did not criminalize environmental damage was not definitive: if such crimes were serious, they should be included in the draft Code. Additional Protocol I to the Geneva Conventions of 12 August 1949 covered a wider range of conduct and it would be up to States to decide whether the draft proposals by the working group should be expanded. It was true that international environmental law was still in the process of development, but it was not in such an embryonic state as Mr. Pellet seemed to think and the Commission could easily take the step which had been proposed. With regard to the lack of *opinio juris* and the juridical purity of the category of crimes against the peace and security of mankind, he did not regard those crimes as a juridically pure category as such. The question was to determine what conduct was severe enough to be described as a crime against the peace and security of mankind. If the answer to that question involved the progressive development of international law, that was not a new thing for the Commission.

26. Mr. Bowett's example of the destruction of oil wells in Kuwait deserved consideration, but it might also be the case that the act in question had been an attempt to commit an international crime, which had failed because the consequences had been less serious than had been feared. In addition, he had a few comments to make on the actual text of the draft proposals. Under the heading of war crimes, article 22, paragraph 2, subparagraph (*a*) (iii) (*bis*), dealt with employing methods or means of warfare which were intended or might be expected to cause such widespread, long-term and severe damage to the natural environment that the health or survival of a population would be gravely prejudiced. As a result, the subparagraph focused on the possible effects of such acts, and that was not its intent. A way must be found to make it clear that the reference was, rather, to the use of the environment as a means of warfare against populations. That idea was clear in the second proposal, which dealt with crimes against humanity, since the reference there was to damage to the health or survival of a population as a result of damage to the environment rather than to crimes against the environment as such. He wondered whether the expression "natural environment" was justified since it might be a question of damage to the built environment, for example, dams, which could have the same consequences. He also found the use of the word "wilfully" in article 21, paragraph 2 (*h*) (*bis*), to be rather equivocal and felt that the Drafting Committee should reconsider the wording of those proposals.

27. Mr. SZEKELY said that, after having participated in the work of the working group, he was more than ever convinced that it was essential to include the question of wilful and severe damage to the environment in the draft Code. It was, of course, possible that the threshold of damage had been set too high and that the proposed provisions were too anthropocentric. It was normal for that to be the case, however, since the context was not that of environmental law but of the Code, whose goal was to ensure the protection of mankind. The problem was simply one of drafting, which the Drafting Committee might be able to solve, but the important thing was to stress the link between damage to the environment and the survival of mankind. While it was certain that what had occurred during the Gulf war had been more an attempted crime than a real crime against the environment, it was nevertheless true that it had contributed to an increase in the concentration of atmospheric pollutants, even though

the survival of the population had not been seriously affected.

28. In reply to the argument by certain members of the Commission that environmental crimes were not "ready" to be covered in a code, he noted that the provisions in question were essentially of a preventive and dissuasive nature, as, moreover, were all the provisions of criminal law, including those relating to the environment. Of what use was the Code if not to discourage criminal behaviour, whether it was a question of crimes against the environment or of other crimes? There had even been talk of a "legal fiction", perhaps with the implication that the working group had been unrealistic. But it did not seem any more realistic to believe that it was unnecessary to anticipate crimes against humanity committed through environmental damage in view of the potential for the use of the environment as a weapon against mankind. It had also been said that international environmental law was insufficiently developed, but, in fact, that law had made far more progress than might be thought, as was shown by the intense discussions to which it gave rise at the regional, subregional and bilateral levels. Nevertheless, the important thing was to recognize that the environment had become a means of blackmail and of exerting pressure on mankind at the very time when mankind was becoming increasingly aware of the need to protect that environment, a fact which was, in itself, the source of its vulnerability. He therefore considered that, if the Commission decided to forward the draft proposals to the Drafting Committee, the Committee's main task would be to set a lower threshold of seriousness than that of the current text.

29. Mr. ROSENSTOCK said that he shared the doubts which had been expressed by Mr. Pellet and which were increased by the scarcity of realistic examples of crimes of that kind that were not already covered by existing law. He found it difficult to imagine that acts such as those covered in the draft proposals could be committed without committing crimes against civilian populations, which fell within the ambit of other instruments. He therefore wondered whether it was really necessary to embark on such a project at the risk of impeding the acceptance of the existing provisions on war crimes.

30. Moreover, he found it unlikely that environmental damage should be committed in peacetime by a Government against its own population. He therefore wondered why that issue should be included among the crimes against humanity and concluded that there was no solid basis for the idea. If, however, an article absolutely must be drafted on the matter, it must be clear that the crime in question was one committed intentionally. He was nevertheless convinced that the Commission should not embark on that project.

31. Mr. BENNOUNA said that he did not really know what to make of, and was puzzled by, the draft proposals. Obviously, any method employed to prejudice the survival of a population was a crime—whether a war crime or another kind of crime—and would come within the scope of other instruments. The question was to determine whether the very fact of modifying the environment, namely, the elements that combined to create and perpetuate life, constituted a crime and so to set the threshold above which any such modification actually became a crime. In point of fact, damage was constantly being done to the environment in all countries. The problem was therefore essentially one of threshold and he did not agree with the approach whereby the problem could be avoided by including damage to the environment among war crimes, since it was ambiguous and led nowhere. It would be better to treat a crime against the environment as a separate crime and the subject of a separate article. That crime, however, still had to be defined, and that was particularly difficult if it was not to form part of environmental law or existing substantive law. Yet without a definition, such an article would be too ambiguous. While the proposals submitted would not in his view provide any solution, the Commission might wish to study further the possibility of treating a crime against the environment as an independent crime. He remained sceptical, however, about the outcome of such an exercise.

32. Mr. Sreenivasa RAO said that a decision on the draft proposals, which dealt with an extremely important issue, could not be taken in haste. The fact that at the fiftieth session of the General Assembly the large majority of States had spoken in favour of including a provision on crimes against the environment in the draft Code did not mean that the actual position of States could be gauged. The reservations and objections entered by some of those most concerned should also be examined. The ideas put forward by Mr. Tomuschat were certainly very useful and deserved support, particularly the one regarding the use as a criterion of the wilful nature of the act committed, but his views were somewhat ambivalent. He had said, on the one hand, that the fact that the act committed came within the scope of the internal law of the country where it had been committed did not preclude its incorporation in the Code and, in that connection, had referred to human rights, and had proposed, on the other hand, that the threshold above which damage to the environment became a crime should be raised so as to prevent any act that could result in damage to the environment, of whatever kind and wherever it occurred, from immediately becoming a crime; his aim was therefore to limit the scope of the article to make it acceptable to all those who might have opposed it. All such questions should, in his own view, be studied more carefully.

33. It was also apparent from the discussion that views differed as to the analysis of the examples supplied. Some members of the Commission had emphasized the restrictive nature of the draft proposals. It was obvious too, that modern-day environmental problems could not be ignored. In his view, therefore, the Commission should allow the Drafting Committee to proceed with its work and should then revert to the question when it took up the draft Code in plenary. It would be premature for him to take an immediate decision on those proposals.

34. Mr. HE said that he was not very much in favour of devoting a separate article to serious damage to the environment, since the time was not ripe for drafting a specific environmental law which was still at the developmental stage. On the other hand, serious damage to the environment could, in his view, justifiably be listed under war crimes and crimes against humanity, the latter embracing crimes committed in times of war and in

times of peace. A proposal to that effect should therefore be referred to the Drafting Committee.

35. Mr. THIAM (Special Rapporteur) said that, at a given moment, one always had to choose between what was desirable—in the event, making serious damage to the environment a crime under the Code—and what was feasible. When the draft Code had been examined on first reading, damage to the environment had in fact been treated as a crime under war crimes and under crimes against humanity. After reading the comments and observations received from Governments on the draft Code of Crimes against the Peace and Security of Mankind adopted on first reading by the Commission at its forty-third session,[7] however, he had realized that it was extremely difficult, if not impossible, to draft a provision that was acceptable to everybody and he had proposed to the Commission a certain number of crimes on which there had been general agreement and which it was technically possible to formulate. The Commission, having kept four categories of crimes on second reading,[8] had planned to include other crimes such as apartheid for which it had not wanted to make a separate provision. One member of the Commission had then again taken up the bright idea of referring in the Code to the environment, which, in his own view, was a very sensitive matter, technically speaking.

36. As matters stood, the difficulties of the task and the time available must be taken into account. It would already be a good thing if serious damage to the environment could be included in the category of war crimes, but that it would be a far more difficult exercise in the case of crimes against humanity. He would like to hear the views of the Chairman of the Drafting Committee on that point.

37. The questions raised dealt among other things with the difficulties involved in the degree of seriousness, the determination of the threshold, and the wilful element. He was convinced that to establish wilfulness in strict terms would limit the subject, since negligence would always be invoked. Even in internal law, there was what was known as "serious fault" [*faute lourde*], which constituted an offence and sometimes even a crime.

38. He would urge the Commission, which, as a body of experts, had discussed the question for years without finding a technically acceptable solution, to proceed with the utmost caution.

39. Mr. ELARABY said that he wished at the outset to state his support for the inclusion of severe damage to the environment in the Code and for referral of the issue to the Drafting Committee.

40. With regard to article 55 of Additional Protocol I, he pointed out that the Protocol had been adopted almost 20 years earlier in order to bring up to date the Geneva Conventions of 12 August 1949, which had been adopted a further 20 years earlier. There was therefore no point in arguing that the Protocol did not embrace all the dimensions of the current discussion. Contrary to what some people asserted, the environment did not belong to the realm of science fiction or even of legal fiction. It was a reality of the twenty-first century. Everyone remembered the Gulf war, but it was also possible to envisage the use of nuclear wastes in hostilities between two countries. Serious damage to the environment must therefore be included in the Code so that it would be a forward-looking instrument, but the text must be examined more closely in order to achieve greater legal precision and a balance which reflected the facts of the times.

41. Mr. FOMBA said that, at the internal level, at least in the African countries of the subregion to which his own country belonged, having long disregarded the phenomenon of environmental damage, people were now gradually becoming aware of it and national policies were being introduced. The issue was part of the power relationship between the countries of the North and the countries of the South. The African countries were profoundly concerned about damage to the environment. For example, there were the Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of Their Transboundary Movements within Africa and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa. For the African countries, therefore, it was undoubtedly desirable to have wilful and severe damage to the environment classified as a crime against the peace and security of mankind. The problem was how to translate that "desirable" into law.

42. Some members had commented that *lex lata* was insufficient, and he endorsed Mr. Pellet's analysis of that point. However, the question was whether a step might be taken in the direction of *lex ferenda*. The issue warranted further study, but he also endorsed Mr. Bennouna's idea of separating it from the limited framework of war and seeking in some way, sticking closely, of course, to substantive law, to deal in general terms with wilful and severe damage to the environment as such. He would agree to the Commission's sending the proposed text to the Drafting Committee for it to study that possibility.

43. Mr. MIKULKA said he agreed that extensive, lasting and severe damage to the natural environment could be considered within the framework of war crimes. However, he shared the doubts and endorsed the arguments of Mr. Pellet and Mr. Rosenstock. Such an approach would necessarily cause some duplication of work, since the scope of environmental damage was already covered by other provisions of the article on war crimes. The explanation was simple: the end target of damage to the environment and, therefore, of environmental protection was the civilian population, and damage to the environment—natural or otherwise—constituted only one of the possible means of attack. Even with respect to armed conflicts, therefore, the Commission could only take note that there was no basis for an independent crime of environmental damage.

44. Consideration of the question outside the framework of armed conflicts would be a purely academic and speculative exercise, for the existence of such a crime in

[7] *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/448 and Add.1.

[8] See *Yearbook . . . 1995*, vol. II (Part Two), para. 140.

peace time was quite hypothetical. The Commission could, of course, invent law and give free reign to its imagination, but in that case it might as well include, for example, genetic mutations among the crimes against humanity. Furthermore, if damage to the environment was established as an independent crime, there would be implications for the internal balance of the Code, with respect to the crime of institutionalized racial discrimination, for example, which the Commission had decided not to establish as an independent crime precisely because of its theoretical nature.

45. It would also be impossible to reconcile that approach with the Commission's decision to concentrate on the "crimes of crimes", on the four categories of crime representing more or less what was already contained in positive international law. That decision, as noted in the report of the Commission to the General Assembly on the work of its forty-seventh session,[9] had obtained the support of the Sixth Committee and it provided the basis for the hope that the draft Code would be adopted by consensus. It also allowed people to regard the Code as a statement of customary international law which would be authoritative and therefore applicable by international courts. On the other hand, if the Commission wanted to make environmental damage a crime *de lege lata*, it would necessarily have to produce a text in the form of a convention, since the Code would then consist partly of positive law and partly of the development of the law. The Drafting Committee should be asked to examine means of incorporating environmental damage in the existing article on war crimes.

46. Mr. de SARAM said that, emotionally, everybody was for the environment and against damage to it. The difficulty was to translate emotions into precise legal language, especially in view of the need to produce wording capable of commanding a consensus.

47. First of all, he wondered how the express limitation to the "natural" environment could be justified and, secondly, whether the notion of environmental damage should be restricted to the relatively narrow category of war crimes or crimes against humanity. In theory, the notion would warrant at least a separate article in the Code.

48. In any event, the Commission must acknowledge that the topic was a broad one and involved specific problems in a field where perhaps not all of its members had a perfect grasp of all the scientific or technical aspects. Furthermore, the Commission must ensure that the provisions which it adopted were consistent with the law applicable elsewhere. Referring the matter to the Drafting Committee would therefore be an unfortunate decision at the crucial stage which the Commission had reached, that is to say the end of its second reading of the draft Code, although it still had to review the whole set of draft articles.

49. For those general and practical reasons, he suggested that the Commission should mention in its report to the General Assembly the points on which it had reached a consensus. The other issues, including the environment, might be dealt with in additional protocols which he hoped would subsequently expand the scope of acts regarded as crimes against the peace and security of mankind.

50. Mr. YAMADA said that it was technically correct to argue that, although the acts specified in the text proposed by the working group for inclusion in article 22 (War crimes), a text taken from article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949, had not been defined as a serious violation of the Protocol, the magnitude and severity of the crimes in question justified the text's inclusion in article 22 of the draft Code. It was, of course, also possible to take the view that those crimes were already covered by some provisions of article 22, but the constituent elements of those provisions were somewhat different from those of the text proposed by the working group and that difference was indeed one of the reasons why Additional Protocol I contained a provision—in article 55—separate from the provisions of article 85 of the Protocol.

51. With regard to the classification of crimes against the environment as crimes against humanity, it seemed preferable to include them in article 21 of the draft Code, notwithstanding the importance of the protection of the environment. In view of the need to complete the second reading of the draft Code, the working group's proposals should be sent as quickly as possible to the Drafting Committee and the members of the Commission would then be able to give their final opinions when the Drafting Committee had reported on the matter.

52. The CHAIRMAN, speaking as a member of the Commission, said that the wording of the text proposed by the working group was much more specific than that of the original language of article 26, which was too broad and vague, so that the problem did warrant further thought.

53. Speaking as Chairman, he summed up the range of opinions expressed during the discussion and suggested that the working group's proposals should be sent to the Drafting Committee with the request that it should examine all the arguments put forward and determine whether it was possible to draft provisions for inclusion in the Code. The Commission could then have a substantive discussion and take a decision, by consensus or otherwise.

54. Mr. PELLET said that it was for the Commission to decide in the first place whether the proposed provisions should be included in the draft Code, for the Drafting Committee's task, as its name indicated, was to put the finishing touches to the texts submitted to it. For his part, he would be willing at the very most to agree to referring the text proposed for inclusion in article 22 to the Drafting Committee, provided that the two other proposed texts were abandoned.

55. Mr. ROSENSTOCK and Mr. BENNOUNA said that they were of the same opinion as Mr. Pellet.

56. Mr. THIAM (Special Rapporteur) said that the structure of the draft Code included war crimes, on the one hand, and crimes against humanity, on the other. Accordingly, those two elements could also be separated in the proposals under consideration. The provision to be included under war crimes did not appear to give rise to any major objection, whereas its inclusion among the crimes against humanity was causing such difficulties that even a decision to that effect might be taken by only

[9] Ibid.

a tiny majority and, therefore, have only very limited authority. Accordingly, the most reasonable solution seemed to be to send to the Drafting Committee only the proposal concerning article 22.

57. Mr. EIRIKSSON said that the working group's proposals constituted a whole. However, the independent provision (art. 26) gave rise to very strong objections, but the referral only of the text to be included in article 22 was also encountering some opposition. Nevertheless, there was nothing to prevent both the text for inclusion in article 22 and the one for article 21 being sent to the Drafting Committee.

58. Mr. TOMUSCHAT said that decisions to send texts to the Drafting Committee were traditionally taken by consensus, but there was no obligation to do so. The question of crimes against the environment was not a new one, for such crimes had already been included in the draft Code adopted in 1991.[10] The Commission might in fact give itself an extra week before reaching a decision, but the working group's proposals would then have to be referred to the Drafting Committee.

59. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he concluded from the discussion that the inclusion of crimes against the environment in the category of war crimes was quite acceptable. It would in reality merely make explicit what was already implicit. Assimilation to a war crime would even render superfluous the condition that the health or survival of the population was affected, although the expansion of the scope of that provision proposed by Mr. Bowett was also acceptable. But inclusion in the category of crimes against humanity remained more problematical, and the formula of a separate article (art. 26) seemed to be excluded.

60. The Commission had an irritating tendency to automatically send to the Drafting Committee the texts proposed by special rapporteurs or working groups, at the risk of transferring to the Committee, which was not necessarily representative, discussions which should properly be conducted by the Commission in plenary. Perhaps it would in fact be wiser to take an extra week, which would have the additional advantage of not disturbing the three weeks of intensive work planned for the Drafting Committee.

61. Mr. SZEKELY said that the issues raised by the working group's proposals were very important and that the Commission should not therefore take a decision, come what may, when members still had much to say on the subject.

62. The CHAIRMAN suggested that the Commission should leave aside draft article 26 and take a decision at the following meeting on referral to the Drafting Committee of the text to be included in article 22 and then on referral of the text to be included in article 21, in that order.

The meeting rose at 1.10 p.m.

[10] See 2427th meeting, footnote 8.

2431st MEETING

Tuesday, 21 May 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC (XLVIII)/DC/CRD.3[2])

[Agenda item 3]

1. The CHAIRMAN said that the Commission should take a decision on the question of wilful and severe damage to the environment. On the basis of the proposals of the working group on the issue of wilful and severe damage to the environment,[3] he suggested that the members should consider whether to refer the issue to the Drafting Committee in the context of article 22 (War crimes), or in the context of article 21 (Crimes against humanity). He said that if he heard no objection, he would take it that the Commission agreed to consider each option separately.

It was so agreed.

2. The CHAIRMAN invited members to decide by a vote whether to refer the issue of wilful and severe damage to the environment to the Drafting Committee in the context of article 22.

3. Mr. LUKASHUK said that he had given much thought to the matter and, the more he had thought, the darker his thoughts had become. Indeed, nature itself seemed to have been pouring tears over defenceless Geneva. Protection of the environment had come to the forefront of the tasks facing homo sapiens in recent years, and the Commission was therefore bound to face up to the challenge. It was unlikely that anyone could explain to ordinary mortals why misuse of the Red Cross flag was considered to be a serious crime while damage to the environment was not so high up the list—jurists had their own logic.

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 et seq.

[2] Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

[3] See 2430th meeting, paragraph 3.