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Summary record of the 2446th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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text of article 2 as proposed by the Drafting Committee on the understanding that the commentary to article 2, paragraph 2, would reflect the main elements in the debate and that the application, if necessary, of any of the subparagraphs of paragraph 3, in the case of aggression, was not precluded.

It was so agreed.

Article 2, as amended, was adopted.

67. Mr. ROBINSON said he would like the record to show that he was unhappy with that consensus. A court which had to apply a criminal code needed to be certain about the ingredients of the offence in question. The use of the commentary would only add to the confusion. He had not, however, wished to oppose the consensus.

68. Mr. BARBOZA said that he endorsed the reservations expressed by the Chairman and agreed with Mr. Fomba that the commentary did not really suffice. There should be a more explicit reference in the text of the article itself. The Commission tended to solve matters through the commentaries which were only an auxiliary means of interpreting texts. The Commission should make less use of the commentary and express its consensus more in the texts of the articles themselves.

69. Mr. TOMUSCHAT said that he had joined in the consensus. He fully agreed that article 15, as drafted, contained many of the rules embodied in article 2, paragraph 3.

70. Mr. Sreenivasa RAO said that he had had no difficulty in joining in the consensus, though he would have liked the article itself to have been more explicit.

71. Mr. VILLAGRÁN KRAMER said that he had joined in the consensus but under protest.

The meeting rose at 1 p.m.

2446th MEETING

Friday, 21 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies (*concluded*)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN welcomed the Observer for the Inter-American Juridical Committee and invited him to address the Commission.

2. Mr. ESPECHE GIL (Observer for the Inter-American Juridical Committee) said that the OAS legal advisory body, which had been created in 1906, and the Commission were bound by a tradition of cooperation. The Committee was therefore pleased to inform the Commission about the work it had carried out in 1995 and 1996. That work was very varied, as attested to by the study on dispute settlement procedures in the context of the integration measures being taken in South America, which had been published in Buenos Aires and which was being placed at the Commission's disposal by the Committee.

3. At its session in August 1995, when it had had the pleasure of welcoming Mr. Calero Rodrigues, the Committee had adopted resolutions on a number of subjects: the right to information, stock market regulations in the Americas, the international legal effects of bankruptcy, improvements in the administration of justice and international cooperation in the fight against corruption. The last question had taken up a large part of the session and had been the subject of a report in which the Committee formulated observations on a preliminary draft of a convention that was itself based on a draft submitted by the Permanent Mission of Venezuela, and which was subsequently adopted as the Inter-American Convention against Corruption.

4. The Inter-American Convention against Corruption, the importance of which must be stressed, represented a significant step forward in international collaboration in the punishment of unlawful acts which could be grouped together under the heading of corruption. It duly characterized the acts that were prejudicial to the integrity and civic spirit of the civil service. States were for the first time required to prohibit and punish—to borrow the words of the definition it had laid down—the direct or indirect supplying or granting by their own nations or by natural or legal persons having their usual residence in their territory to agents of other States of any object of pecuniary value or any other advantage or benefit in exchange for the agents' carrying out or not carrying out an act in the performance of their functions in connection with an economic or commercial transaction. That provision, which was entitled "Transnational Bribery" and whose immediate forerunner was the legislation the United States of America had adopted in the matter, opened up new perspectives for the effective punishment of the acts to which it applied. Another new development was the obligation imposed on States parties to

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* Resumed from the 2433rd meeting.

make unjust enrichment a crime under their internal law and to cooperate in the recovery of ill-gotten property.

5. The Convention also dealt with the problem of extradition which was apparently insuperable on a continent where there was a firmly rooted right of asylum. Although that right had not been affected, it could no longer be used to protect any person who tried to evade the law after committing an act of corruption. Also, the requested State could not refuse its assistance by invoking banking secrecy. The requesting State undertook in return not to use information protected by banking secrecy for purposes other than the legal proceedings concerned, unless the requested State so authorized. Lastly, under article 17 of the Convention, the fact that property obtained by corruption was actually or allegedly intended for political purposes was not of itself enough to make the corruption a political offence or an offence under the ordinary law which was linked to a political offence.

6. The Committee had also given much thought to the effective exercise of representative democracy. In the resolution on the matter which it had adopted, it had decided to examine the possibility that acts which distorted or endeavoured to distort electoral results by interfering with free elections and also by tampering with the results of the vote, were unlawful in international law. That question had been included in the Committee's agenda in acknowledgement of the fact that not only classical coups d'état, but also electoral fraud and anything that interfered with free elections were prejudicial to representative democracy. The right of electors to express their will freely and the right to make elections the authentic foundation of the representation of Governments were in keeping with representative democracy's requirement of consistency, ethics and logic that was intrinsic to the inter-American system.

7. The Committee had also taken note of a report on the legal aspects of the foreign debt and had considered a proposal to bring the matter before ICJ, from which the United Nations General Assembly would if necessary seek an advisory opinion. That initiative was based on the work of the European Council for Social Research on Latin America, the Advisory Council of the Latin-American Parliament and the recommendations of the Twelfth European Union/Latin America Inter-Parliamentary Conference. The consideration of the proposal had begun in the framework of the Group of 77 at the fiftieth session of the United Nations General Assembly.

8. Referring to the usual international law course at Rio de Janeiro, Brazil, which the Committee organized in collaboration with the OAS legal secretariat, he said that the twenty-second course had been attended by 38 students and had had the privilege of welcoming 2 members from the Commission. Various topics had been taken up, such as the settlement of disputes in American regional integration procedures, international human rights protection, the legal aspects of foreign debt, democracy in the inter-American system, the legal system of the European Union, the development of international law in OAS, humanitarian intervention, privileges and immunities of international agencies, the application of international law in internal law, the law of the sea, cooperation in the fight against terrorism, international responsibility of States, and WTO, and the students had studied the two topics of dispute settlement and the inter-American system for the protection of human rights in a working group. In future, the course would focus on a central theme to prevent an excessive number of subjects from detracting from the depth of the analyses. The topic selected for the twenty-third course was therefore "Justice and international law".

9. The session the Committee held in January and February 1996 had had the following agenda: preparation and approval of inter-American legal instruments within the framework of OAS; legal dimension of the integration of international trade; administration of justice in America; environmental law; peaceful settlement of disputes; and inter-American cooperation to combat terrorism. The Committee would also consider other subjects such as national jurisdiction and the legal personality of legal persons, the composition of ICJ, and the obligations provided for in the United Nations Convention on the Law of the Sea, as well as the request by the OAS General Assembly that it should examine as a matter of priority the validity, in international law, of the Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act), signed into law by the United States of America.

10. The serious question of terrorism had been on the Committee's agenda since 1994. A number of reports had been prepared on inter-American cooperation to combat the scourge. More recently, in April 1996, the Inter-American Specialized Conference on Terrorism had been held in Peru at which the strategies set forth in the Declaration of Lima to Prevent, Combat and Eliminate Terrorism had been formulated. The Declaration stipulated that international law, human rights and fundamental freedoms, the sovereignty of States and the principle of non-intervention provided the framework for action to combat terrorism. Terrorist acts must be treated as particularly serious offences under ordinary law. The Committee would consider the need and advisability of having an inter-American convention on the question in the light of existing international instruments.

11. The Committee had also started to hold meetings with the legal advisors of the ministries for foreign affairs of the OAS member States. Thus, in Brazil, in August 1995, the two parties had had a fruitful exchange of information and experience. It should be noted that, at the invitation of the Brazilian Government, the Committee was shortly to have its headquarters in Brazil.

12. The Committee was to embark on consideration of a document from the OAS General Secretariat entitled "The law in a new inter-American order". It was auspicious that the United Nations had proclaimed the Decade of International Law[1] at the very time when there had been renewed interest in legal matters in America, as was apparent from the significant number of candidatures submitted by States members to fill the vacancies on the Committee.

[1] See 2433rd meeting, footnote 2.

13. The Committee welcomed the fruitful relations established between the Commission and itself and the presence of the Commission's representatives from time to time at its sessions in Rio de Janeiro, Brazil. The importance of those relations had been underlined by the OAS General Assembly in the Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law, which it had just adopted and paragraph 11 of which invited it to strengthen OAS coordination and cooperation with the other international institutions that dealt with the codification and development of international law and, in particular, with the United Nations.

14. Mr. BARBOZA said he was surprised that there were so many topics on the agenda of the Committee. The most interesting from the Commission's point of view were integration and free trade in a continent whose countries were in the process of regrouping (MERCOSUR came to mind in that connection), the drafting of the Inter-American Convention against Corruption and work on the standardization and codification of inter-American law relating to terrorism, the new inter-American order and the new role of the Committee itself. The relevance of all those topics testified to the importance of the contribution which the Committee was making to the codification and development of international law.

15. Mr. VARGAS CARREÑO welcomed the fact that Mr. Espeche Gil had informed the Commission of the Committee's work, thereby enabling both bodies to avoid any duplication. Of the many topics on the Committee's agenda, two in particular stood out. The first was the drafting of the Inter-American Convention against Corruption. In 1994, the Heads of Government of the member States of OAS, meeting in Miami, had decided to prepare an instrument of that kind. The Committee had done a great deal of work in that connection and had made a most valuable contribution to the drafting of the text. After countless meetings and more than a year of work, the text of the Convention had been adopted in Caracas at the end of March 1996. The Convention was the first of its kind.

16. The second topic was one which the OAS General Assembly, held in Panama, had entrusted to the Committee, namely, the Helms-Burton Act, which involved the freedom of the Cuban people. Many American States took the view that the Act was contrary to international law. They had therefore sought the opinion of the Committee, whose value would be only consultative, but which the Governments awaited with interest because of the prestige and authority the Committee enjoyed.

17. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his statement and noted that regional bodies were in some ways ahead of international bodies, such as the Commission, which had to take a universal view. The Committee therefore opened up perspectives for the Commission, if only through the topics on its agenda.

Draft Code of Crimes against the Peace and Security of Mankind[2] (*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[3])

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[4] (*continued*)

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

ARTICLE 18 (War crimes)

18. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the text of article 18 before the Commission was substantially different from the text of article 22 (Exceptionally serious war crimes), adopted on first reading both in terms of approach and in terms of structure. A revision of the article had been found necessary in view of comments and observations received from Governments[5] and of the debate in the Commission at its forty-seventh session.

19. As to the approach, it would be recalled that the article, as adopted on first reading, had established two processes through which war crimes came under the Code. First, in paragraph 1 of the article, it had set out the criterion of "exceptionally serious war crimes". It had then defined that criterion in paragraph 2. Secondly, it had listed in paragraph 2 a selected number of war crimes that, once committed in a manner which could be characterized as exceptionally serious, would come under the Code. It would be recalled that some Governments had criticized the whole approach because of the absence of a clear dividing line between "grave breaches" and "exceptionally serious war crimes".

20. The Special Rapporteur had in turn proposed a revised text, in his thirteenth report,[6] based on articles 2 and 3 of the statute of the International Tribunal for the Former Yugoslavia.[7] The Drafting Committee had agreed with the new approach which had been proposed by the Special Rapporteur and which abandoned the "exceptionally serious war crimes" model and, with some modifications, followed the model of the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda.[8]

21. The opening clause of the article made it clear that not all war crimes, abhorrent as they might be, were crimes against the peace and security of mankind. In order to be characterized as a crime against the peace and

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

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

[4] For the text of draft articles 1 to 18 as adopted by the Drafting Committee on second reading, see 2437th meeting, para. 7.

[5] See 2437th meeting, footnote 7.

[6] See 2441st meeting, footnote 9.

[7] See 2437th meeting, footnote 6.

[8] Ibid., foonote 7.

security of mankind, a war crime had to be committed either "in a systematic manner" or "on a large scale".

22. In terms of structure, the article comprised seven subparagraphs. Subparagraph (*a*) dealt with grave breaches under the Geneva Conventions of 12 August 1949; subparagraphs (*b*) and (*c*) with breaches under article 85 of Additional Protocol I to the Geneva Conventions of 12 August 1949; subparagraph (*d*) with breaches under common article 3, paragraph (1) (*c*), of the Geneva Conventions of 12 August 1949 and article 4, paragraph (2) (*e*), of Additional Protocol II to the Geneva Conventions of 12 August 1949; subparagraph (*e*) with violations of laws and customs of war, known as the "Hague law"; subparagraph (*f*) with breaches of international humanitarian law applicable in armed conflict not of an international character, namely, breaches under article 3 common to the Geneva Conventions of 12 August 1949 and article 4 of Additional Protocol II; and subparagraph (*g*) with damage to the environment. The reason for dealing with those various war crimes in seven separate subparagraphs was that each set of crimes had a different origin and each subparagraph had been drawn from different legal instruments.

23. The Drafting Committee had decided not to refer to the instruments from which each subparagraph was taken, for two reasons. First, in the view of some members of the Drafting Committee, most of the acts listed were at the present time war crimes, not only because of the existence of the treaties making them crimes, but also under customary international humanitarian law. Thus, a specific reference to a particular legal instrument might, in some ways, actually reduce the current status of the law on the crimes in question. Secondly, since States, by virtue of becoming parties to the Code, would be bound by its provisions, it would be unnecessary to refer to other treaties to which those States might not be parties. That could create the presumption that, by becoming parties to the Code, States would become parties to those instruments as well, and that might damp down their willingness to accede to the Code. It had been agreed, however, that the commentary to the article would refer to the legislative history of the crimes covered by it and identify the origin of each subparagraph.

24. He drew attention to the opening clause of the first six subparagraphs, which indicated that the act had been committed in violation of international humanitarian law. The only exception was subparagraph (*g*), which he would introduce separately later.

25. Turning more specifically to subparagraph (*a*), he said that the eight grave breaches of the Geneva Conventions of 12 August 1949 listed therein were also listed in article 2 of the statute of the International Tribunal for the Former Yugoslavia.

26. The CHAIRMAN suggested that, in the interests of orderly debate, article 18 should be considered paragraph by paragraph. He invited the members of the Commission to comment on subparagraph (*a*).

Subparagraph (*a*)

27. Mr. IDRIS said that, before making any comments on substance, he would prefer to take time to reflect on the introduction of the article just given by the Chairman of the Drafting Committee. Could the text of the introduction perhaps be distributed? It seemed to him that the introduction, with its references to the various international instruments which the Drafting Committee had drawn on in drafting the article under consideration, was very important as it touched on a complex area of treaty law. The Commission should take time to consider the paragraphs one by one so as to analyse all their implications and to make sure that they were as clear and precise—and also as reasonable—as possible. Only after such methodical consideration of each of the proposed provisions could the Commission, in his view, go on to consider the title of the article itself.

28. Mr. PAMBOU-TCHIVOUNDA said that he fully endorsed the comments by Mr. Idris; he, too, reserved his comments on the substance. For the time being, he would simply draw attention to a drafting problem in the *chapeau* of the article. Would it not be better to say: "Any of the war crimes covered by one of the following categories"? After all, it was categories of crimes that were under consideration.

29. Mr. Sreenivasa RAO noted that, in his introduction, the Chairman of the Drafting Committee had explained that the Drafting Committee had not deemed it useful to refer to the provisions of the various international conventions which it had used because their content had become part of customary international law. If that was truly the case with the Geneva Conventions of 12 August 1949, given the number of States parties to them, he would be curious to know how many States had ratified Protocols I and II thereto and with what reservations. That might serve as a useful indication for the members of the Commission. Could the Chairman of the Drafting Committee or the secretariat provide information on that subject?

30. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, unfortunately, he could not give Mr. Sreenivasa Rao an answer for the moment, but stressed that the Drafting Committee had not used in the text any provision taken from Protocols I and II that was not regarded as generally accepted.

31. Mr. ROSENSTOCK said that he fully agreed with the comments by Mr. Sreenivasa Rao. In his introduction, the Chairman of the Drafting Committee had rightly pointed out that, in the view of many members of the Drafting Committee, the provisions on which the Drafting Committee had based itself were part of customary international law; that showed that everyone had not shared that point of view.

32. Mr. LUKASHUK said that the discussion might well take a turn which was as strange as the structure of the article itself; that seemed rather illogical to him, whereas logic was supposed to be the basis of law. As the Chairman of the Drafting Committee had explained, the disjointed structure was the result of the fact that the Drafting Committee had relied on various instruments relating to humanitarian law. He did not object to the use of the Convention respecting the Laws and Customs of War on Land (The Hague Convention (IV) of 1907) or the Geneva Conventions of 12 August 1949, but, as to the Protocols which, as the term indicated, were only

"additional", that would inevitably give rise to problems.

33. In his view, the entire structure of the article should be reviewed. As a basis for discussion, he proposed designing three new articles on the following questions: (*a*) criminal violations of the laws and customs of war; (*b*) crimes against protected persons and property; and (*c*) criminal violations of international humanitarian law applicable in armed conflict not of an international character. That would make the text much clearer.

34. Mr. FOMBA said that he wanted to make a number of general comments before considering the substance of subparagraph (*a*). First of all, concerning the title of the article (War crimes), he was pleased that the Commission had abandoned the old legal interpretation of that concept, which classically had applied only to serious offences committed in the context of international armed conflicts. He welcomed that effort to modernize the text and bring it into line with recent instruments.

35. The Drafting Committee had had the choice between an analytic and a synthetic approach to the problem. He would have preferred a synthetic approach and would have drafted the article to read:

> "Any war crime constitutes a crime against the peace and security of mankind when it is committed in a systematic manner or on a large scale;
>
> "War crime means any act qualified as a serious violation of international humanitarian law applicable to:
>
> "(*a*) International armed conflicts;
>
> "(*b*) Non-international armed conflicts."

That wording might not be irreproachable from the point of view of drafting logic in criminal matters or the harmonization of the entire text, but it seemed to him to be more concise and clearer.

36. Concerning subparagraph (*a*), the Chairman of the Drafting Committee had said that the proposed draft had in substance repeated the material scope of the Geneva Conventions of 12 August 1949, which distinguished between two categories of offence: "grave breaches" and "other offences". The criteria followed in the Conventions for characterizing "grave breaches" were acts which, first, "were not justified by military necessity" and, secondly, were "carried out unlawfully and wantonly". Those criteria corresponded in the draft Code of Crimes against the Peace and Security of Mankind to the systematic or massive nature of the acts committed and the criminal intent itself, even if it was not expressly mentioned in the provisions of all the articles.

37. Bearing in mind those criteria, he wondered whether the crimes listed in subparagraph (*a*) should not remain open to take account not only of positive international humanitarian law, but also of the prospects for change in that regard, which should be of concern to the Commission. But in that case, why not also repeat in the introductory phrase that violations of international humanitarian law were involved, since it was precisely one of the criteria which the Commission wished to emphasize?

38. He would have preferred to have article 18 start with a clearer introductory phrase more in tune with the articles already adopted and setting forth the subject in a more methodical way. The introductory phrase might, for example, read:

> "War crime means any of the following acts committed in a systematic manner or on a large scale in violation of international humanitarian law."

A list of the crimes would then follow. Of course, such wording would entail the deletion of subparagraph (*a*).

39. The CHAIRMAN noted Mr. Fomba's suggestion with interest. But making the expression "international humanitarian law" in the introductory phrase applicable throughout might pose drafting problems later on, if only with regard to subparagraph (*e*), which covered acts committed "in violation of the laws or customs of war".

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that it had not in fact, been easy to structure article 18, but the result was not as illogical as it appeared. The reason why there was an introductory phrase for each of those paragraphs was that they had different sources and meanings and each category of crimes listed therein had its intrinsic characteristics. For example, the crimes under subparagraph (*b*) were different from those under subparagraph (*a*) in that they led to death or caused serious injury to physical integrity or health, whereas those under subparagraph (*c*) were collective crimes and those under subparagraph (*d*) were violations of human dignity. Subparagraphs (*e*), (*f*) and (*g*) dealt specifically with acts committed in time of armed conflict.

41. In fact, it seemed to him that the way the crimes were listed had little practical importance. What was essential was that they appeared in the article and that judges could cite them and impose punishment for them. Everything else was an academic exercise.

42. Mr. ROBINSON said he wondered whether it had really been necessary to state at the beginning of article 18 that the crimes referred to had to have been committed in a systematic manner or on a large scale. He understood the Drafting Committee's concern not to identify as "war crimes" isolated acts or acts of limited scope. But it should not go to the opposite extreme and set too high a threshold. The systematic or mass nature of the crimes listed in the article would probably be very difficult to prove in practice. Had consideration been given to the problem of the burden of proof?

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that Mr. Robinson's questions were pertinent and legitimate. The Drafting Committee had decided to specify that the war crimes included in the draft Code had to have been committed in a systematic manner or on a large scale because only on that condition could they constitute crimes against the peace and security of mankind. While some of those crimes, such as the transfer of population or delay in repatriation of prisoners, already included that element, in other cases it

would have been necessary to specify that condition after each act enumerated. It had thus been deemed preferable to insert that criterion at the very beginning of the article.

44. The CHAIRMAN said that that question had been debated very extensively during the consideration of the provision on first reading. The idea was that, if the crimes referred to were not committed in a systematic manner or on a large scale, they remained war crimes and punishable as such, but did not fall within the purview of the Code. The justification for that approach was the desire not to make any and every crime a crime against the peace and security of mankind and to ensure that only the most serious war crimes would be covered by the Code.

45. Mr. BARBOZA said that he personally found the structure of the article acceptable in the form submitted and that, in any case, the present meeting was neither the time nor the place to reconsider it.

46. The crimes covered by the Code must, of course, be extremely serious. War crimes were not crimes against peace, since, in a state of war, peace had already been shattered. So they could not be crimes against humanity unless they were genuinely crimes of sufficient seriousness to justify their inclusion in the Code.

47. Although the general comments that had been made, including those on custom, were not without interest, he hoped that the Commission could consider each point on the merits and decide in each case whether or not international custom was involved.

48. Mr. FOMBA said that he nevertheless wished to make one last general comment. In order to tackle the question of war crimes, the Commission had apparently adopted as a criterion for classification the diversity and disparity of the legal sources and of the instruments in force, with the result that the text was long, often disjointed and somewhat confused, at least at first glance. That manner of proceeding implied that there was a hierarchy in the sources of international law, whereas it was the principle of equality that must prevail. That was established, *inter alia*, by Article 38, paragraph 1, of the Statute of the International Court of Justice. The Secretary-General had also confirmed the dialectical link between the conventional source and the customary source of international humanitarian law in connection with the jurisdiction *ratione materiae* of the International Tribunal for the Former Yugoslavia.

49. In his view, the only rational criterion for classification should be a distinction, not between the legal sources, but between international and non-international armed conflicts.

50. Mr. TOMUSCHAT said that one could add to the substantive response already given to Mr. Robinson's legitimate question another explanation, taken from procedural law. Articles 7 and 8 of the draft Code, dealing with jurisdiction and the obligation to extradite or prosecute, imposed very heavy obligations on States that could be justified only by acts of a mass character that genuinely jeopardized international peace and security. That was why a restrictive criterion was warranted.

51. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt subparagraph (*a*). Replying to comments by Messrs. PAMBOU-TCHIVOUNDA, LUKASHUK, ROBINSON and ROSENSTOCK, he said that the adoption of subparagraph (*a*) did not imply the concomitant adoption of the *chapeau* to article 18, which the Commission would reconsider when it had adopted all the subparagraphs of that article, in order to ensure the coherence of the article as a whole.

Article 18, subparagraph (a), *was adopted.*

Subparagraph (*b*)

52. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that subparagraph (*b*) listed certain breaches enumerated in article 85, paragraph 3 of Protocol I, which had been subjected to some modifications necessitated by their insertion in the draft Code. For example, all the cross-references to the Geneva Conventions of 12 August 1949 and other provisions of Protocol I had been deleted. Furthermore, some crimes listed in the Protocol had been omitted: for example, article 18, subparagraph (*b*) (i) of the draft Code did not include article 85, paragraph 3, subparagraphs (*d*) and (*e*), of the Protocol, but the actions they referred to were nevertheless not excluded from the draft Code. Article 85, paragraph 3 (*d*), of Protocol I was covered by article 18, subparagraph (*e*) (iii).

53. The violations listed in article 18, subparagraph (*b*), of the draft Code were qualified, as they were in article 85, paragraph 3 of Protocol I, by the requirement that they should be committed wilfully and cause death or serious injury to body or health.

54. Mr. VILLAGRÁN KRAMER thought that the expression "civilian objects" used in subparagraph (*b*) (ii) was too vague and general.

55. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that that expression was taken from article 85 of Protocol I, which the Drafting Committee had not deemed it necessary to revise.

56. Mr. PAMBOU-TCHIVOUNDA said that, while not wishing to question the Commission's practice of reproducing the text of instruments that were in force, the wording of subparagraph (*b*) (v) on the perfidious use of the distinctive emblem of the red cross and other signs lacked precision, particularly in the context of the *chapeau* to subparagraph (*b*). No one supposed that the perfidious use of the emblem of the red cross could have any connection whatever with the disappearance of groups of population. It should therefore be specified that such use involved the disappearance of persons.

57. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Drafting Committee had not reproduced the provisions of existing instruments automatically; there had been a discussion in each case. In the event, the Drafting Committee had asked itself whether the perfidious use of the distinctive red cross emblem or other emblems was of sufficient gravity to appear in the Code. Although that had not been the decisive consideration, ICRC would certainly have been

unhappy had the provision been omitted. But the Drafting Committee had above all taken the view that such an act would be of sufficient gravity if two requirements were met, namely, the use of the emblem must have resulted in death or serious injury to body or health, and that must have occurred in a systematic manner or on a large scale.

58. The CHAIRMAN said that, in order for the acts listed in subparagraphs (i) to (v)—which already figured in existing conventions—to be regarded as crimes against the peace and security of mankind, they must have an additional degree of gravity, in other words, they must meet the twin requirements set forth in the opening clause of subparagraph (*b*) and, in addition, the requirement which appeared in the introductory provision to the article.

59. Mr. ROSENSTOCK said that, if the red cross emblem was perfidiously misused, the troops who were injured as a result would not respect it in future. Use of the emblem therefore had an extrinsic consequence that might undermine the entire regime. That was why it was extremely important to include such a provision.

60. Mr. TOMUSCHAT, agreeing with that viewpoint, said there was a danger that soldiers, posing as ICRC workers, might open fire on troops who were not expecting it. That was the link between abuse of the red cross emblem and human losses.

61. Mr. ROBINSON said the only subparagraph of article 85, paragraph 3, of Protocol I not included in article 18, subparagraph (*b*), was subparagraph (*d*) concerning attack on non-defended localities and demilitarized zones. He wondered whether the inclusion in subparagraph (*b*) of cases in which such acts were committed in a manner that met the three criteria referred to by the Chairman would not be justified.

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the provision had not been restated in subparagraph (*b*) as it was covered by subparagraph (*e*) (iii).

63. Mr. KABATSI, noting that the best was the enemy of the good, said that article 18, given its size, would always be open to improvement, but to find fault with a text which had been drawn up at the end of a long discussion in the Drafting Committee, far from solving the problems, might create new ones.

64. Mr. ROBINSON pointed out that subparagraph (*e*) (iii), unlike article 85, paragraph 3 (*d*) of Protocol I, did not refer to demilitarized zones. He wondered whether the intention was to exclude such zones or whether they were supposed to be covered by the term "undefended buildings".

65. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that that difference would be explained in the commentary. In point of fact, in drafting subparagraph (*e*) (iii), the Drafting Committee had used another source. But the "Hague law" necessarily applied to demilitarized zones.

66. Mr. MIKULKA said that, while he recognized the relevance of Mr. Robinson's remark, he would point out that subparagraph (*e*) referred to zones, whereas subparagraph (*b*) dealt with persons, death and health. The difference which had been noted should therefore be explained in the commentary to subparagraph (*e*).

67. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (*b*).

Article 18, subparagraph (b)*, was adopted.*

Subparagraph (*c*)

68. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that subparagraph (*c*) listed two of the five violations enumerated in article 85, paragraph 4, of Protocol I. Subparagraphs (*c*) (i) and (*c*) (ii) corresponded to paragraphs (*a*) and (*b*) of that paragraph. Paragraph 4 (*d*), which referred to making historic monuments, places of worship, and so on, the object of an attack, was covered by subparagraph (*e*) (iv), which dealt with violations of the laws and customs of war. Paragraph 4 (*e*), which made depriving a protected person of the right to a fair trial punishable, was also not covered in subparagraph (*c*) because it was already covered in subparagraph (*a*) (vi).

69. Subparagraph (*c*) (ii) included only the first half of paragraph 4 (*a*) of article 85 of Protocol I because the second half was already covered by subparagraph (*a*) (vii). Furthermore, paragraph 4 (*c*), which related to the practices of apartheid and other inhuman and degrading practices involving outrages on personal dignity, based on racial discrimination, had also not been included there because it came under the broader category of "outrages upon personal dignity", which was covered by subparagraph (*d*). Lastly, the acts listed in subparagraph (*c*) must have been committed wilfully.

70. The CHAIRMAN, speaking as a member of the Commission, said that the only conditions governing unjustifiable delay in the repatriation of prisoners of war or civilians, as referred to in subparagraph (*c*) (ii), were those set forth in the opening clause of article 18. He would therefore like to know whether holding thousands of prisoners for a period of 10 days, for example, would amount to a crime against the peace and security of mankind.

71. Mr. THIAM (Special Rapporteur) said that that was a question of fact which it would be for the court hearing the case to decide in each particular case. It was, of course, impossible to set a deadline. Not all delays in the repatriation of prisoners of war or civilians would amount to a crime under the Code; they might be just incidents.

72. Mr. ROBINSON said he found it difficult to see how an act which was a crime under international humanitarian law and was committed in a systematic manner and on a large scale could not constitute a crime against the peace and security of mankind. More generally, he would like the Chairman of the Drafting Committee to explain why a particular provision of international humanitarian law had been omitted by the Drafting Committee.

73. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he could not possibly go through all the provisions of international humanitarian law not included in the draft Code and explain in each case why some had not been included. Any member who considered that a provision had been wrongly omitted could propose that it should be included.

Subparagraph (*d*)

74. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that subparagraph (*d*) was taken from article 4, paragraph 2 (*e*), of Protocol II and the Drafting Committee had incorporated it into article 18 for a number of reasons. The list in article 18, subparagraph (*f*), which dealt with war crimes committed during armed conflict not of an international character, was taken from article 4 of the statute of the International Tribunal for Rwanda. The crimes listed in article 4 were in turn taken from article 3 common to the Geneva Conventions of 12 August 1949 and article 4 of Protocol II. One of the crimes in article 4 of the statute of the International Tribunal for Rwanda consisted of outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. Since it was recognized that such outrages upon personal dignity were crimes under international humanitarian law applicable to armed conflict not of an international character, they must surely be a crime if committed during an armed conflict of an international character. An *a contrario* interpretation would lead to the absurd conclusion that such acts were crimes if committed during internal armed conflict, but not during an international armed conflict. Hence the inclusion of subparagraph (*d*).

75. Subparagraph (*d*) had the added advantage that the broad language of the first part—"outrages upon personal dignity, in particular humiliating and degrading treatment"—was very close to the wording of article 85, paragraph 4 (*c*), of Protocol I, which related to apartheid and racial discrimination and thus included that kind of practice, which amounted to a crime in the circumstances covered by article 18.

76. Mr. FOMBA said that the Commission of Experts established pursuant to Security Council resolution 935 (1994), on Rwanda, having had information that women had been abducted and raped, had decided, after considering the matter, that rape was both an offence under international humanitarian law and a crime against humanity.[9] In the case of the former Yugoslavia, the Special Rapporteur of the Commission on Human Rights appointed to consider the situation of human rights in the territory of the former Yugoslavia had brought out clearly, in his fifth periodic report,[10] in 1993, the relations that existed between rape as a tool for controlling society and ethnic cleansing. He had established that there had been obvious cases when rape, which undeniably severely damaged physical or mental integrity, had been committed on the orders of the responsible authority as a systematic policy or which was additional to part of a wider policy aimed deliberately at destroying all or part of a national, ethnic, racial or religious group as such. For that reason, he therefore welcomed the inclusion of subparagraph (*d*) in article 18.

77. Mr. ROBINSON said he regretted that the terms of article 85, paragraph 4 (*c*), of Protocol I, on apartheid and other inhuman and degrading practices, involving outrages upon personal dignity, based on racial discrimination, were not reflected in subparagraph (*d*). True, in introducing subparagraph (*c*), the Chairman of the Drafting Committee had stated that the practices in question were implicitly covered by the notion of an outrage upon personal dignity, but, in his own view, that was not enough. He therefore proposed that, in subparagraph (*d*), express reference should be made if not to apartheid, then to "institutionalized discrimination".

78. Mr. de SARAM recalled that Protocol I concerning international armed conflict had been adopted in 1977, when the objective had been to make the provisions applicable to armed conflicts in which peoples fought "against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" (Protocol I, article 1, paragraph 4). That explained the express reference to apartheid and racial discrimination in article 85, paragraph 4 (*c*) of the Protocol. Since 1977, however, the notion of crime against humanity had been developed and accepted and was now applied not only in the case of armed conflict of an international character, but also in the case of internal armed conflict and even in times of peace. The provisions of article 85 concerning racial discrimination and apartheid had therefore been used, in an amplified and broadened form, in article 17, subparagraph (*f*) of the draft Code. It would, therefore, not be inconsistent to refer to "institutionalized discrimination" in article 18, subparagraph (*d*).

79. Mr. ROSENSTOCK, supported by Mr. TOMUSCHAT, said that he was opposed to Mr. Robinson's proposal because its adoption would limit the scope of subparagraph (*d*).

80. Mr. THIAM (Special Rapporteur), supported by Mr. GÜNEY and Mr. Sreenivasa RAO, said that he did not see how a reference to institutionalized discrimination in subparagraph (*d*) would limit the scope of that paragraph. It would be but one example among others of an outrage upon personal dignity.

81. The CHAIRMAN suggested that Mr. Robinson should submit a written proposal to the secretariat for the Commission's consideration at the next meeting.

The meeting rose at 1.10 p.m.

[9] See S/1994/1405, annex.

[10] E/CN.4/1994/47.