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Summary record of the 2447th meeting

Topic:
**Draft code of crimes against the peace and security of mankind (Part II)- including the
draft statute for an international criminal court**

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2447th MEETING

Tuesday, 25 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (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.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING³ (continued)

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

ARTICLE 18 (War crimes) (continued)

Subparagraph (c) (concluded)

1. The CHAIRMAN drew attention to a new subparagraph (c) (iii) for article 18 submitted by Mr. Robinson, which read:

“(iii) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population.”

He invited Mr. Robinson to introduce that proposal.

2. Mr. ROBINSON said that he had previously raised the question (2446th meeting) of including in article 18 the provision set forth in article 85, paragraph 4 (c), of Additional Protocol I to the Geneva Conventions of 12 August 1949, which referred to practices of apartheid and degrading practices involving outrages upon personal dignity, based on racial discrimination. It had been

suggested at the time that the same idea was to some extent reflected in article 18, subparagraph (d), but it had ultimately been decided that the reference to “outrages” in that subparagraph was too wide and did not capture the concept set forth in paragraph 4 (c) of article 85 of Protocol I. It had further been decided to refer to institutionalized discrimination rather than to practices of apartheid. That was acceptable to him and he therefore believed it would be very useful to include as a new subparagraph (c) (iii) the same wording as had been adopted for article 17, subparagraph (f).

3. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that crimes against humanity could be committed either in peacetime or in wartime. The proposed new subparagraph was therefore quite unnecessary.

4. Mr. FOMBA said that he tended to share the position of the Chairman of the Drafting Committee. It was unnecessary to recall the need, in the context of crimes against the peace and security of mankind, to stipulate firmly for a proscription of institutionalized discrimination. Yet, the question had to be weighed up in the light of the relevant international humanitarian law, and in particular of article 85, paragraph 4 (c), of Protocol I, and of the global scope of the draft Code of Crimes against the Peace and Security of Mankind. The scope of article 85, paragraph 4 (c), was more restricted in that it was limited to racial motives. *A contrario*, therefore, religious and/or ethnic motives were excluded, subject, of course, to including ethnic criteria. The *chapeau* to paragraph 4 of article 85 of Protocol I regarded practices of apartheid, when committed wilfully, as “grave breaches”. Accordingly, various questions arose. What was the actual scope of institutionalized discrimination in times of war? Would the answer be the same in the case both of an international war and of a non-international war? What was the likelihood of the emergence of such a situation, according to whether the war lasted for a day, for weeks or for years? And did not the interpretation of the concept of institutionalization pose a problem?

5. As to the matter of its place in the draft Code, institutionalized discrimination was already dealt with in article 17, subparagraph (f). There was also an obvious link between a crime against humanity and a war crime as a result of their scope *ratione temporis*, for the special characteristic of crimes against humanity, which included institutionalized discrimination, was that they could be committed in times of peace and of war. Hence there was no pressing need to refer to institutionalized discrimination in a new subparagraph (c) (iii). In the circumstances, he considered that subparagraph (c) of article 18 should remain unchanged, though he would not oppose a consensus to the contrary should one emerge.

6. Mr. CRAWFORD said that, for the reasons stated by the Chairman of the Drafting Committee, he considered that the proposed addition was unnecessary. The principle of a crime against humanity was equally applicable whether in time of war or in time of peace. Indeed, ICJ had even implied that it might be more applicable in time of war than in time of peace.

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

7. Mr. YAMADA said that he too agreed with the Chairman of the Drafting Committee. He saw no need to have precisely the same provision in article 18 as in article 17 when the latter applied both in wartime and in peacetime. There was also a difference of threshold as defined in the two *chapeaux* to articles 17 and 18 and that could create confusion.

8. Mr. KABATSI said the proposed provision already appeared in article 17, subparagraph (f), and he agreed that crimes against humanity could be committed in both peacetime and wartime. For lawyers, that might be enough. Mr. Robinson's proposal, however, was addressed not so much to lawyers and judges as to those actually responsible for waging war, who should know in advance that institutionalized discrimination on racial, ethnic or religious grounds was specifically prohibited as a war crime. Further, Mr. Yamada had referred to a difference in the threshold levels in the *chapeaux* to articles 17 and 18. Actually, that difference was another reason for adopting the proposal. Admittedly, it would involve repetition, but it would not be the first instance of repetition in the draft Code—article 18, subparagraph (a) (viii), and subparagraph (f) (iii), "taking of hostages", being a case in point.

9. Mr. LUKASHUK said that, while he understood and was not opposed to the idea behind Mr. Robinson's proposal, he considered that any systematic comparison of the proposal with article 17 could have adverse results since it could be interpreted as limiting other crimes against humanity to times of peace.

10. Mr. GÜNEY said that he, too, experienced some difficulty with the proposed provision. First, it would be redundant in that the same provision already figured in article 17, subparagraph (f), but also because the *chapeaux* to articles 17 and 18, as well as the crimes covered in those articles, were different.

11. Mr. THIAM (Special Rapporteur) said that he was in favour of the proposal, since a particular act could be characterized in two ways. For instance, an act committed in peacetime would be characterized as a crime against humanity whereas, if it was committed in wartime, it would constitute a war crime. That twofold characterization, which was universally recognized, existed even in internal law and was supported by a long line of jurisprudence. Also, since there could be two aspects to the same act, there was absolutely no reason for arguing that, because the provision already figured in article 17, it could not be included in article 18 as a war crime. It would be a great pity if Mr. Robinson's proposal was not adopted, as the question would inevitably arise why apartheid, of all the breaches listed as constituting a war crime in article 85 of Protocol I, had been left out of the Code. For once he had to disagree completely with the Chairman of the Drafting Committee: he supported Mr. Robinson's proposal even if he was in a minority.

12. Mr. PAMBOU-TCHIVOUNDA, endorsing the Special Rapporteur's comments, said that the Commission must be consistent and logical in its approach. The proposed provision, which had his support, should be placed after subparagraph (c) (i) of article 18 rather than after subparagraph (c) (ii). It should also be couched in

more concise terms and he therefore suggested that it should be redrafted to read

"Institutionalized discrimination on racial, ethnic or religious grounds that could seriously disadvantage a part of the population;"

13. Mr. PELLET said that he agreed with the substance of the idea underlying Mr. Robinson's proposal, namely, that apartheid should be punished even if it was committed in wartime, but he thought that adoption of the proposal would be highly counterproductive. Incorporation of Mr. Robinson's provision in article 18 would mean, *a contrario*, that if a crime against humanity was committed in wartime, it was not punishable if it was not enumerated. It was an extremely dangerous course and a step backwards to Nürnberg, where crimes against humanity and war crimes had been linked together. It was particularly important for it to be understood that crimes against humanity were punishable whether they were committed in times of war or times of peace. In the circumstances, he was strongly opposed to implementing Mr. Robinson's proposal.

14. Mr. VILLAGRÁN KRAMER said that the Drafting Committee's provision on war crimes enlarged somewhat on the understanding of those crimes since the time of the Charter of the Nürnberg Tribunal.⁴ Having regard to that enlargement, he believed that Mr. Pellet was right and consequently he was not sure that he could support Mr. Robinson's proposal.

15. Mr. ROBINSON said he was not sure it was correct to say that, *a contrario*, other crimes against humanity listed in article 17 would not be punishable if committed in time of war because they were not expressly listed in article 18. It was true that they would not be punishable as war crimes; but they would certainly be punishable as crimes against humanity, if committed during an armed conflict. The essence of his proposal was that institutionalized discrimination should be designated as a war crime *eo nomine*, irrespective of whether it was a crime against humanity, and would for that reason also be punishable as such if committed in time of war. Such an assertion had an entirely different legal character from an assertion that an act which was a crime against humanity was punishable equally in wartime and in peacetime. Did the Commission believe that institutionalized discrimination, *eo nomine*, warranted designation as a war crime? If that was the case, then the mere fact that it was already included in article 17 as a crime against humanity did not suffice to achieve that purpose, and he very much doubted that a reference in the commentary would solve the problem.

16. Mr. CRAWFORD said that the difficulty with incorporating the elements of article 17 in article 18 was that the preconditions for the commission of a crime against humanity differed from those for a war crime. The opening words of subparagraph (c) of article 18 were words not of description but of qualification. They therefore implied that, if all or any part of article 17 was incorporated therein, international humanitarian law might possibly exculpate in the context of an armed

⁴ See 2439th meeting, footnote 5.

conflict—which in respect of crimes against humanity was simply not the case. So, for the reasons given by Mr. Pellet and which he himself had expressed in a rather different form, he believed that Mr. Robinson's intention could be adequately spelt out in the commentary to article 17, and also usefully referred to in the commentary to article 18. However, to try textually to incorporate parts of article 17 in article 18, which had a different *chapeau* containing words of qualification, was a dangerous undertaking.

17. Mr. TOMUSCHAT said that, in spite of Mr. Robinson's lengthy explanation, he could still see no difference in essence between crimes against humanity and war crimes. They were all crimes against the peace and security of mankind and thus fell within the purview of the Code. Furthermore, if the proposal was inserted as subparagraph (c) (iii), the subject-matter would apply only to international conflicts, with the misleading implication that it did not apply to internal conflicts. The proposal was thus wrongly placed.

18. Mr. de SARAM said that Mr. Robinson had made it clear (2446th meeting) that his proposal was made on the basis of article 85 of Protocol I, which contained a provision concerning apartheid. Protocol II contained no such provision. For that reason, any suggestion that Mr. Robinson's provision should also be included in the section of article 18 dealing with internal armed conflicts would be ill-considered, since its inclusion therein would certainly not be possible in terms of existing law.

19. Mr. THIAM (Special Rapporteur) noted that many members who were opposed to the proposed provision wished him to state in the commentary that the provision was applicable in time of war. In that case, that statement might as well be placed in the main body of the article. It seemed to him that, whenever members were unable to agree on a provision, they asked the Special Rapporteur to deal with the matter in the commentary. That was very much easier said than done.

20. Mr. ROBINSON said that, notwithstanding the Special Rapporteur's reservations, he agreed with Mr. Crawford that a carefully worded comment on the question in the commentary to article 17 and also to article 18 would be a satisfactory solution.

21. Mr. Sreenivasa RAO said that, like Mr. Robinson, he believed that if provisions from certain sources were being incorporated, they should be incorporated as fully as possible and that, where matter was deleted from those sources, the deletion must be explained. In the present case the explanations given appeared to be slightly contradictory. However, if a consensus could be built around them he would not oppose it.

22. Mr. PAMBOU-TCHIVOUNDA apologized for reverting to a provision that had already been adopted by the Commission. However, the idea that crimes against humanity could be committed in peacetime as well as in time of war was of such crucial importance that it should appear in the *chapeau* to article 17, rather than merely being consigned to the commentary to that article.

23. Mr. PELLET said he agreed with the substance of Mr. Pambou-Tchivounda's remarks. The Special Rap-

porteur, on the other hand, was guilty of putting words into some members' mouths. He was not asking the Special Rapporteur to take on the task of expressing Mr. Robinson's concerns in the commentary; indeed he continued to be opposed to recourse to the commentary as a means of resolving genuine problems. What he had actually envisaged was that the commentary, or the *chapeau* to article 17, should explain, first, that crimes against humanity were crimes against the peace and security of mankind whether committed in peacetime or in time of war; secondly, that if the Commission had not taken up in article 18, the equivalent of article 85 of Protocol I, the reason that it was drafting, not a Protocol to the Geneva Conventions of 12 August 1949, but a code of crimes against the peace and security of mankind, and since the crime was already covered in article 17, there was no need to repeat it in article 18. If the matter was tackled in that way it would be possible to eliminate the very serious risk that acts not listed in article 18 might go unpunished in time of war. Apartheid, like all crimes against humanity, should be punishable in peacetime and in wartime. War crimes, as distinct from crimes against humanity, were *lex specialis*.

24. Mr. YANKOV said he was becoming convinced that Mr. Robinson's proposed amendment would only lead to greater difficulties in interpretation and application of the provisions of article 18.

25. Mr. VILLAGRÁN KRAMER said that, in the first place, the task of the Commission was not to expand on the Additional Protocols to the Geneva Conventions of 12 August 1949 or on the International Convention on the Suppression and Punishment of the Crime of Apartheid but to regulate specific crimes against the peace and security of mankind. Secondly, he still doubted whether all the acts characterized as crimes against humanity could be reputed war crimes in time of war. If only some of those acts could be regarded as war crimes, that was a different matter, but to claim that all such acts could be so regarded was perhaps to extrapolate. Thirdly, the Commission must tread warily with regard to the question of ethnic and religious groups in wartime. It was doubtful whether Mr. Robinson's proposal was a positive contribution in the context of war crimes, nor should the commentary clarify an issue on which the Commission itself was far from clear. The Special Rapporteur should not be asked to interpret a consensus that did not exist.

26. Mr. THIAM (Special Rapporteur) agreed with Mr. Villagrán Kramer's comments. He reiterated that one and the same act could have two different characterizations in international as well as internal law. If it was possible to consider that one and the same act constituted both a war crime and a crime in peacetime, it should be covered by both articles 17 and 18. That was the case in the present instance. If Mr. Robinson withdrew his proposal, he would try to reflect it in his commentary. In any case, he was convinced that it was wrong to say that one and the same act could not be covered in the framework of crimes against humanity and in the framework of war crimes when that act had a twofold characterization.

27. Mr. ROSENSTOCK said he agreed with Mr. Pellet's comment. The absolutely essential point to be made was that crimes against humanity applied both in peacetime and in time of war. Nobody had ever doubted that they applied in time of war, so the present discussion was somewhat astonishing. The question was: did they apply in peacetime? Since 1945 it had been clearly established that they did indeed apply in peacetime as well as in wartime, which meant that the perpetrators could be punished for the crime. The designation to be given to the crime did not go to the essence of the matter and to worry about it would lead only to muddle. The Commission should make things clear in the commentary.

28. Mr. LUKASHUK said that two questions were not clear. First, he had a purely legal difficulty with Mr. Robinson's proposal, for subparagraph (c) covered crimes that represented violations of international humanitarian law. He did not think, however, that apartheid was a part of international humanitarian law. Secondly, if the Commission wished to include apartheid among war crimes, logically, it would also have to include genocide among war crimes. He would be grateful if the Special Rapporteur would clarify that issue.

29. The CHAIRMAN asked whether Mr. Robinson was prepared to agree that his proposal should be reflected in the commentary to article 17, along the lines proposed by Mr. Pellet. Mr. Pambou-Tchivounda had also proposed amending the *chapeau* of article 17, but that, perhaps, was too far-reaching a proposal.

30. Mr. ROBINSON said he would be content with an appropriately worded commentary.

31. Mr. PAMBOU-TCHIVOUNDA said he wished formally to propose that, in order to confer on the issue the importance it deserved, the words “, in time of peace or in time of war” should be added to the *chapeau* to article 17, after the word “group”. It was not his intention, however, to bulldoze the Commission into accepting his proposal.

32. The CHAIRMAN noted that Mr. Pambou-Tchivounda did not insist on his proposal, and that the alternative proposal, namely that the matter should be dealt with in the commentary, was acceptable to Mr. Robinson.

33. Mr. HE said that the concept of crimes against humanity stemmed from the Charter of the Nürnberg Tribunal. Originally, it had applied to offences committed in peacetime. The scope of such crimes had now been extended to cover offences committed in time of war. The Commission should exercise caution on that point, and he would therefore prefer the explanation to appear in the commentary, rather than in the actual article itself.

34. Mr. YANKOV said that, if the additional wording proposed by Mr. Pambou-Tchivounda was inserted in the *chapeau* of article 17, on crimes against humanity, similar action would have to be taken in respect of article 16, on genocide. To embark on such changes at the current advanced stage of the proceedings was extremely risky, and he appealed to Mr. Pambou-Tchivounda to exercise wisdom and restraint.

35. Mr. PAMBOU-TCHIVOUNDA said that shortage of time ought not to prevent the Commission from considering important issues. Points that were shelved at the present stage were bound to come up elsewhere in the form of criticisms levelled at the Commission by Governments. He himself, when he came to act as his Government's representative rather than as a member of the Commission, would not hesitate to draw attention to any shortcomings he might find in the Commission's draft.

36. Mr. THIAM (Special Rapporteur) said that he would have no objection to accepting Mr. Pambou-Tchivounda's proposal, but if the majority view was that an explanation in the commentary would suffice he would, of course, comply.

37. Mr. KABATSI wondered whether to explain that crimes against humanity could occur in time of peace as well as in time of war would not be to state the obvious. Besides, if such an explanation was included in the commentary to article 17, a similar one should also be added to the commentary to article 16. However, he would not oppose the wish of the majority of members.

38. The CHAIRMAN, supported by Mr. Sreenivasa RAO, said that the general sentiment appeared to be to incorporate a clarification in the commentary to article 17, to the effect that the definition of crimes against humanity applied both in peacetime and in wartime. He said that, if he heard no objection, he would take it that the Commission so agreed.

It was so decided.

39. Mr. VILLAGRÁN KRAMER said that, if the Special Rapporteur concurred, it might also be useful for the commentary to article 17 to make it clear that crimes against humanity committed in war time did not necessarily have to be judged as war crimes. The point could be of importance to countries where it was the rule to impose the lesser penalty applicable.

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

Article 18, subparagraph (c), was adopted.

Subparagraph (d) (concluded)

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

Article 18, subparagraph (d), was adopted.

Subparagraph (e)

42. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the text of subparagraph (e) was modelled on article 3 of the statute of the International Tribunal for the Former Yugoslavia⁵ in that it covered five breaches of The Hague Convention (IV) of 1907 and the Regulation annexed thereto and the Charter of the International Military Tribunal.

⁵ See 2437th meeting, footnote 6.

43. The list of violations of the laws or customs of war in article 3 of the statute of the International Tribunal for the Former Yugoslavia was not exclusive. The opening clause of that article provided that: "Such violations shall include, but not be limited to". The Drafting Committee, however, had felt that the degree of certitude necessary for the Code made it imperative to avoid, to the extent possible, an open-ended list of crimes. For that reason, such a proviso was not included in the opening clause of subparagraph (e).

44. Mr. IDRIS asked for clarification of the words "unnecessary suffering" in subparagraph (e) (i). Was there such a thing as necessary suffering, and should not acts calculated to cause suffering be avoided in any case?

45. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the concept was a familiar one in humanitarian law and the law of war. War was a series of acts designed to put the enemy *hors de combat*, and the suffering that resulted was considered to be necessary if it formed an essential part of the act of war. In the case of certain weapons, such as bullets which did not simply kill but in addition caused prolonged agony, the suffering was considered to be unnecessary. The Drafting Committee had certainly not coined the phrase, which was to be found in many documents pertaining to humanitarian law. He personally did not think that an explanation was called for, but the Special Rapporteur could no doubt be asked to provide one in the commentary if members of the Commission so desired.

46. Mr. ROBINSON said that, in the consideration of subparagraph (b) (2446th meeting), he had drawn attention to the omission of the reference to demilitarized zones to be found in paragraph 3 of article 85 of Protocol I, which had served as the basis for subparagraph (b). He proposed that the words "demilitarized zones or" should be inserted before the word "undefended" in subparagraph (e) (iii).

47. Mr. CRAWFORD asked if the Chairman of the Drafting Committee would explain why the reference to demilitarized zones did not appear in the subparagraph under consideration.

48. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 85 of Protocol I, in which that reference was to be found, was not the source of the text under consideration and had never been contemplated in connection with the drafting.

49. Mr. ROBINSON said that, when he had raised the point previously in connection with subparagraph (b), there had seemed to be general agreement that a reference to demilitarized zones should be included at an appropriate place. Without venturing to say whether subparagraph (e) (iii) was or was not that place, he strongly held to the view that the provision on demilitarized zones appearing in Protocol I should be reflected somewhere in the article on war crimes of the draft Code.

50. Mr. ROSENSTOCK said that he would see no objection to explaining in the commentary that the form of language used in subparagraph (e) (iii) encompassed demilitarized zones. If, as Mr. Robinson was proposing, a

reference to demilitarized zones was included in the article itself, the commentary would have to make it very clear that the departure from the text of article 3 of the statute of the International Tribunal for the Former Yugoslavia in no way implied that the statute failed to cover demilitarized zones.

51. Mr. THIAM (Special Rapporteur) said that he would prefer the latter of the two possible courses outlined by Mr. Rosenstock.

52. Mr. de SARAM said the issue had a technical aspect to which the Commission could not afford to be insensitive. The matters dealt with in subparagraph (e) pertained to battlefield conditions. Members of the Commission, who were not experts in the laws of war and were unacquainted with the reasons why the reference to demilitarized zones had not been included in the text of the statute of the International Tribunal for the Former Yugoslavia, should hesitate before making any change from the statute, which was the most recent provision on the subject. A reference in the commentary would therefore be preferable to the addition proposed by Mr. Robinson.

53. Mr. IDRIS, referring to subparagraph (e) (iv), proposed that the words "works of art" should be replaced by "literary and artistic works", thus bringing the text more closely into line with the Berne Convention for the Protection of Literary and Artistic Works.

54. Mr. FOMBA, referring to subparagraph (e) (iii), commented that the concept of demilitarized zones seemed to him to be covered by the words "undefended towns, villages, dwellings or buildings". He therefore failed to see the need for the proposed addition, but would be prepared to go along with the majority view.

55. Mr. KABATSI said that he was inclined to agree with the arguments advanced by Mr. de Saram. With regard to Mr. Fomba's point, a demilitarized zone that was really completely demilitarized would indeed be covered by the provision as it stood, but in practice it was never possible to tell whether such a zone had not been infiltrated by combatants.

56. Mr. GÜNEY and Mr. TOMUSCHAT said that they expressed support for Mr. Robinson's proposal.

57. Mr. PAMBOU-TCHIVOUNDA said he too supported Mr. Robinson's proposed insertion, but was against using the commentary as a hold-all.

58. Mr. KABATSI said that it would be preferable to insert the words at the end of subparagraph (e) (iii). The first category of protected areas, namely, undefended towns, villages, dwellings or buildings, should take precedence.

59. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he agreed with Mr. Kabatsi. Subparagraph (e) (iii) would read:

"(iii) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or demilitarized zones."

60. Mr. BARBOZA said that he endorsed the comments by Mr. Kabatsi. A demilitarized zone was legally defined as such, but it could be defended and could have troops in it, in which case it could not be considered as a sanctuary.
61. Mr. de SARAM said that, as he understood the insertion, it meant that it would be an undefended demilitarized zone.
62. Mr. ROSENSTOCK said that it would be preferable for the end of the subparagraph to read: "dwellings or buildings or of demilitarized zones", the "of" serving to set off demilitarized zones from "undefended", bearing in mind a situation in which, for example, peacekeeping forces might be involved. Presumably, everyone would agree on the need to make it clear in the commentary that the addition was in no way indispensable for the concept to be encompassed by the existing formulation.
63. Mr. GÜNEY said that he did not object to the insertion, but did not agree with Mr. Rosenstock's proposal for an explanation in the commentary.
64. Mr. BARBOZA asked whether that meant that a zone which had been declared demilitarized but in fact was defended by military forces fell within the purview of subparagraph (e) (iii). If so, it was unacceptable. It must be understood that the demilitarized zone was actually demilitarized. He might be wrong, but he did not think that the presence of peacekeeping forces could be considered a violation of the demilitarization of the zone. The idea of "undefended" was very important, because a demilitarized zone was not a sanctuary to be used by military forces in order to defend it.
65. Mr. ROSENSTOCK said that he would only be able to accept the insertion of "demilitarized zones" if the commentary made it clear that the Commission did not regard the text as not including them in the absence of that express form of language. Otherwise, it would lead to an *a contrario* implication for the International Tribunal for the Former Yugoslavia, which was the last thing the Commission ought to be doing.
66. Mr. TOMUSCHAT said that one of the preconditions of article 60 of Protocol I was that all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated. Only then could a zone be called demilitarized. Therefore, a zone with troops could not be so termed. The presence of United Nations peacekeeping contingents was a different matter altogether, and he did not think that they constituted an obstacle, because they were not combatants and therefore did not change the nature of the demilitarized zone.
67. Mr. IDRIS said that he fully supported Mr. Tomuschat's remark. It was important not to confuse the context of the provision under consideration with the legal status of peacekeeping. The terms of reference of peacekeeping were totally different and had no bearing on the subject under discussion.
68. Mr. BARBOZA said that he was grateful to Mr. Tomuschat for his explanation, but then it must be clearly stated that a demilitarized zone must be declared as such, because otherwise any empty piece of land would be a "demilitarized zone". There must be some way of saying that its status as a demilitarized zone had not been violated. A zone which had been declared demilitarized did not cease to be a demilitarized zone just because it had been occupied. It had been occupied in violation of its status of demilitarized zone.
69. The CHAIRMAN said that, as the notion of demilitarized zone was already defined in article 60 of Protocol I, he wondered whether there was any need to produce a new definition.
70. Mr. CRAWFORD said that, on the contrary, the commentary must refer to demilitarized zones as interpreted in article 60 of Protocol I. That would of course be picked up in the *chapeau* of the subparagraph on violations of the laws and customs of war, and to the extent that article 60 now reflected laws and customs of war, it would be incorporated by reference. It was not a question of making any changes to the substance of the article, but of making it clear. Although he had no objection to inserting "demilitarized zones" as defined in article 60 of Protocol I, the Commission must be very careful about any change suggesting either that such zones, as defined, were not already covered or that the Commission was somehow qualifying article 60.
71. Mr. Sreenivasa RAO said that the more it was discussed, the more blurred the concept of a demilitarized zone became. There was no need to redefine existing texts or what was generally acceptable. Mr. Barboza had made a good point, but it was clear that violation of a demilitarized zone would come under the laws of war themselves. The matter need not be addressed in the present context. As Mr. Idris had pointed out, peacekeeping had its own parameters. It was preferable simply to set out the article and leave the commentary to the Special Rapporteur.
72. Mr. YAMADA said he did not object to Mr. Robinson's proposal, but there was an additional element. The purpose of subparagraph (e) (iii) was to protect the victims of war. In speaking about undefended localities, one assumed that there were protected persons inside them, that is to say civilians. If the Commission added "demilitarized zones", presumably it was clear that there were also protected persons within the demilitarized zones. However, in the case of the demilitarized zone on the Korean peninsula between the north and the south, it was a no-man's-land, and he did not think an attack on that zone would constitute a war crime. In his opinion, the concept of demilitarized zone should be defined in the commentary.
73. Mr. BARBOZA said that he was willing to accept the inclusion of demilitarized zones in subparagraph (e) (iii) together with clarification of the concept in the commentary, but it should take the form suggested by Mr. Crawford, namely with a specific reference to article 60 of Protocol I.
74. Mr. IDRIS said that there appeared to be agreement on Mr. Robinson's proposal as amended by Mr. Rosenstock. Mr. Crawford had been stating the obvious: that in the commentary, the Commission should reiterate what article 60 of Protocol I stated. In his opin-

ion, the two proposals, namely regarding the article itself and the commentary, could be adopted.

75. Mr. KABATSI said that he had misgivings about the concept of a demilitarized zone. Mr. Yamada's point was well taken: the purpose of subparagraph (e) (iii) was to protect non-combatants and their property. Demilitarized zones often had no buildings or civilians but, for example, a strip of desert. For that reason, he was not sure that an attack on a demilitarized zone would constitute a crime against the peace and security of mankind.

76. Mr. GÜNEY said that, as he understood it, Mr. Rosenstock had suggested not an amendment to Mr. Robinson's proposed insertion, but the inclusion of certain points in the commentary. If the Commission agreed to the insertion, then there was no need for the commentary to be altered.

77. Mr. HE said that, unless a clear and unambiguous definition of the term "demilitarized zones" could be found, the Commission should be cautious about inserting it in the subparagraph, because it might give rise to abuse in an armed conflict or a war.

78. Mr. CRAWFORD said that the point made by Mr. He and other members showed why it was so important for the commentary to refer to Protocol I, article 60, paragraph 7, which stated that "If one of the Parties to the conflict commits a material breach of the provisions of paragraph 3 or 6, the other Party shall be released from its obligations" and that "In such an eventuality, the zone loses its status" as a demilitarized zone. Such status could, of course, be reaffirmed subsequently, but it disappeared in the event of a material breach. Therefore, the concerns voiced had in fact been incorporated in the carefully drafted provision of article 60.

79. Mr. VILLAGRÁN KRAMER said he was afraid that the addition of certain acts as crimes would create an obstacle to approval of the draft Code. He was putting himself in the place of countries that might think the Charter of the United Nations prohibited the use of force, only to authorize it in certain circumstances. Thus, war was banned. Except in specific cases, it was a crime. The proposed insertion led the Commission to forget the nature of the weapons currently used by armed forces. He had in mind what everyone had seen on television in connection with Iraq, where in the Gulf war there had been no demilitarized zones or areas in which weapons had been prohibited.

80. Again, ICJ had not yet resolved the question whether the use of atomic weapons was illegal or not. In his view, the Commission should be realistic and should not add too many elements, but should leave it to the working group that would be appointed by the Sixth Committee or the General Assembly to elucidate those highly technical and military questions.

81. Mr. THIAM (Special Rapporteur) said that, in his view, the draft article had been considered long enough. The discussion should be closed, since a reference would be made in the commentary, as pointed out by Mr. Crawford, to Protocol I, article 60.

82. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he agreed. However, the commentary should address not only Mr. Crawford's point, but also the very concept of a demilitarized zone. The commentary to article 60 stated that the expression was not in itself very accurate and went on to refer to islands such as those ceded by Italy to Greece and those situated between Sweden and Finland, as well as to the demilitarized zones in Korea and in the Middle East between Israel and its neighbours. In that regard the commentary said:

It is quite clear that the drafters of Article 60 did not have such zones in mind, even though they provided that demilitarized zones could be created already in time of peace. In fact, such different types of demilitarized zones, created by treaty, as mentioned above, are not created for wartime but for peacetime, or at least for an armistice.⁶

Then came what should be placed in the Commission's commentary:

In fact, this is the essential character of the zones created in Article 60: they have a humanitarian and not a political aim; they are specially intended to protect the population living there against attacks.⁷

83. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (e) (iii) with the proposed addition, and explanation in the commentary.

It was so agreed.

84. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt article 18, subparagraph (e), as amended.

Article 18, subparagraph (e), as amended, was adopted.

85. Mr. KABATSI said he hoped that the proposal by Mr. Idris concerning the protection of literary works, and which basically had the protection of libraries in mind, had also been included in the text as adopted.

86. Mr. CRAWFORD said it was his understanding that the sole addition had been the one proposed by Mr. Robinson.

87. Mr. IDRIS said that the commentary should emphasize the need to protect literary works, but his suggestion had not been meant as an amendment to the article itself.

88. Mr. ROSENSTOCK said it was clear to him that the reference in subparagraph (e) (iv) to "works of art and science" also included literary works.

The meeting rose at 1.05 p.m.

⁶ C. Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949: Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Geneva, ICRC, Martinus Nijhoff, 1987), p. 709.

⁷ Ibid.