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Summary record of the 2448th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1996, vol. I

2448th MEETING

Wednesday, 26 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

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

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]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[3] (*continued*)

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

ARTICLE 18 (War crimes) (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of draft article 18.

Subparagraph (*f*)

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that subparagraph (*f*), which dealt with war crimes committed during armed conflict not of an international character, followed the model of article 4 of the statute of the International Tribunal for Rwanda.[4] The wording of that article was closer to that of article 4, paragraph 2, of Additional Protocol II to the Geneva Conventions of 12 August 1949 than to the wording of article 3 common to those Conventions. The Drafting Committee had decided to follow the provision of the statute of the International Tribunal for Rwanda because, in its view, that was the most recent statement of the relevant law. It was a step, moreover, that took account of the reality of contemporary armed conflict and that had already been endorsed by the Security Council. Not to follow the model of the statute of the International Tribunal for Rwanda might have been considered regressive.

3. Subparagraph (*f*) (i) corresponded to article 3, paragraph 1 (*a*), common to the Geneva Conventions of 12 August 1949 and to article 4, paragraph 2 (*a*), of Protocol II. Subparagraph (*f*) (ii) corresponded to article 4, subparagraph (*b*), of the statute of the International Tribunal for Rwanda and to article 4, paragraph 2 (*b*), of Protocol II. Subparagraph (*f*) (iii) corresponded to article 4, subparagraph (*c*), of the statute of the International Tribunal for Rwanda, to paragraph 1 (*b*) of article 3, common to the Geneva Conventions, and to article 4, paragraph 2 (*c*), of Protocol II. Subparagraph (*f*) (iv) corresponded to article 4, paragraph 2 (*d*), of Protocol II. Subparagraph (*f*) (v) was taken from article 4, subparagraph (*e*), of the statute of the International Tribunal for Rwanda, which, in turn, was taken verbatim from article 4, paragraph 2 (*e*) of Protocol II. It also corresponded to article 3, paragraph 1 (*c*), common to the Geneva Conventions. The difference between subparagraph (*f*) (v) and paragraph 1 (*c*) of common article 3 was that the latter did not give examples of such outrages upon personal dignity, whereas article 4, paragraph 2 (*e*), of Protocol II, and article 4, subparagraph (*e*), of the statute of the International Tribunal for Rwanda did give examples of such practices. Subparagraph (*f*) (v) was also the same as article 18 (*d*). Subparagraph (*f*) (vi) corresponded to article 4, subparagraph (*f*), of the statute of the International Tribunal for Rwanda and to article 4, paragraph 2 (*g*), of Protocol II. Subparagraph (*f*) (vii) corresponded to article 4, subparagraph (*g*), of the statute of the International Tribunal for Rwanda, which was taken verbatim from article 3 (*d*) common to the Geneva Conventions. Subparagraph (*f*) thus codified provisions of existing law.

4. Mr. FOMBA noted that, as the Chairman of the Drafting Committee had stated, article 18, subparagraph (*f*), modelled on article 4 of the statute of the International Tribunal for Rwanda, with the slight difference that the latter provision gave the International Tribunal for Rwanda the possibility of dealing with other offences by specifying that "These violations shall include, but shall not be limited to" the offences listed therein. The difference deserved an explanation. In drafting the provision, the authors of the statute of the International Tribunal for Rwanda had followed in the footsteps of the Commission of Experts established pursuant to Security Council resolution 935 (1994), on Rwanda, which had in order to determine the legal foundations for the Tribunal's jurisdiction, considered several provisions for the purposes of the legal qualification of alleged acts whose commission it had proved possible to establish. The Commission of Experts had concluded that systematic, massive and flagrant violations had been committed of article 3 common to the Geneva Conventions of 12 August 1949 and of several provisions of Protocol II. It had therefore a broader concept of grave breaches committed in armed conflict not of an international character. It would of course be for the International Tribunal for Rwanda to confirm or to invalidate that conclusion by the Commission of Experts.

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[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.

[4] See 2437th meeting, footnote 7.

5. Mr. LUKASHUK said that he accepted the text of subparagraph (*f*), but would like the word "protected" to be added before the word "persons" in the second line of subparagraph (*f*) (i) for the sake of clarity.

6. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), explaining that the Drafting Committee had not considered that point and that he was therefore speaking as a member of the Commission, said that Mr. Lukashuk's proposal was, at first sight, a judicious one, even if the reference to protected persons was implicit in the *chapeau* of the subparagraph, which referred to "international humanitarian law applicable in armed conflict not of an international character". Article 3, paragraph 1, common to the Geneva Conventions of 12 August 1949 contained the following definition of protected persons:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The article went on to state that the acts which it listed "are and shall remain prohibited... with respect to the above-mentioned persons". The addition of the word "protected" would make explicit what was already implicitly contained in the text; it could be indicated in the commentary that, in that particular case, the words "protected persons" referred to persons covered by article 3, paragraph 1, common to the Geneva Conventions of 12 August 1949.

7. Mr. THIAM (Special Rapporteur) associated himself with the comments of Mr. Calero Rodrigues. By referring to international humanitarian law applicable in armed conflict not of an international character, the *chapeau* of subparagraph (*f*) indicated that protected persons were the only persons referred to.

8. Mr. PAMBOU-TCHIVOUNDA said he wondered whether it was appropriate to single out protected persons in such a way. He was not sure whether any "unprotected" persons existed and what the effect of thus singling out the "protected" ones would be. He proposed that the word *par* should be inserted after the word *particulier* in the French text of subparagraph (*f*) (i) and that the word "well-being" should be replaced by the word "integrity" to bring the text into line with article 17, subparagraph (*j*).[5]

9. Mr. TOMUSCHAT, supported by Mr. FOMBA, said that he had serious doubts about the advisability of adding the word "protected" before the word "persons". As previous speakers had said, the concept was implicit in the text and he feared that such singling out might pave the way for interpretations *a contrario* and could oblige the Commission to review other provisions of subparagraph (*f*), in particular subparagraph (*f*) (v).

10. Mr. de SARAM associated himself with the comments made by the Chairman of the Drafting Committee and said that it was preferable to leave subparagraph (*f*) (i) as it stood, the explanations given on the subject of article 3 common to the Geneva Conventions of 12 August 1949 and article 4 of Protocol II being reproduced in the commentary.

11. Mr. ROSENSTOCK said that he, too, thought that it would be better to reproduce in the commentary the terms used in article 3 common to the Geneva Conventions of 12 August 1949 rather than to refer to "protected persons" in subparagraph (*f*) (i).

12. Mr. LUKASHUK said that he was not convinced by Mr. Tomuschat's arguments, if only because the application of international humanitarian law in armed conflict not of an international character represented a special case and a relative novelty. Furthermore, subparagraph (i) was different from the other subparagraphs of subparagraph (*f*) because the acts covered by those other subparagraphs were prohibited in respect of all persons, including those that were not protected. They were crimes of a general nature. However, he would not oppose the consensus provided that the explanations given by Mr. Calero Rodrigues were reproduced in the commentary.

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

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

Subparagraph (*g*)

14. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that the Commission had referred to the Drafting Committee (2431st meeting) a text dealing with the issue of damage to the environment in the context of armed conflict, to be placed in the article on war crimes. The result of the Drafting Committee's work on that text appeared as subparagraph (*g*). Having failed to reach consensus, the Committee was proposing two alternatives. There had been general agreement in the Drafting Committee that the Commission, in proposing such a provision, was engaged in progressively developing the law. For that reason, the opening clause of the subparagraph, contrary to the subparagraphs preceding it, did not speak of violations of international humanitarian law. The wording used, "in the case of armed conflict", indicated that the provision was *lex ferenda*. The expression "armed conflict" appeared with no further qualification because the Commission had agreed that the provision should apply to armed conflict of an international as well as a non-international character.

15. With regard to the text of the provision, both versions were inspired by paragraph 1 of article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949. Both texts referred to "using methods or means of warfare not justified by military necessity". It should, however, be mentioned that some members of the Drafting Committee, while consenting to the retention of the words "not justified by military necessity", would have preferred their deletion.

16. The most significant difference between the two texts was related to *mens rea*, or criminal intent. In alter-

[5] For the text of article 17, subparagraphs (*i*) and (*j*), see 2444th meeting, para. 1.

native A, the use of methods and means of warfare was specified as being with the intention to cause widespread, long-term and severe damage to the natural environment, while, in alternative B, it would suffice to use such methods and means of warfare in the knowledge that they would cause widespread, long-term and severe damage to the natural environment.

17. In both alternatives, the damage to the environment had to gravely prejudice the health or survival of people. Moreover, in order for the act to come under the Code, it had to possess some degree of gravity. In alternative A, the requirement of intent also extended to causing grave prejudice to human health. In alternative B, however, the requirement of knowledge did not extend to the fact that such damage would occur. Both alternatives required that damage to the environment and prejudice to human health should have occurred in order for a particular use of methods and means of warfare to come under subparagraph (*g*).

18. There was one other difference between the two alternatives. In alternative A, the object of prejudice to health or survival was "the" population. The definite article implied that the population was that of the place where damage to the environment had occurred. That was the formula adopted in article 55 of Protocol I. Alternative B, however, spoke of "a" population, with the intention of including not only the population of the place where the environmental damage occurred, but also the population outside the immediately affected zone.

19. As previously explained, the Drafting Committee had been divided on the issue and had felt that a decision of such importance should be made by the Commission, in the hope that the Commission would be able to agree on a single text.

20. Mr. THIAM (Special Rapporteur) said that the Commission obviously could not submit two alternatives to the General Assembly. His own preference was for alternative A because it took account of intent. A provision of criminal law was involved and criminal intent was a constituent element of a crime; there would be no crime in the event of environmental damage caused by negligence or lack of due care.

21. Mr. HE said that, in his view, crimes against the environment should be included in the draft Code of Crimes against the Peace and Security of Mankind. Both alternatives A and B were modelled on article 55 of Protocol I and two comments were called for in that regard.

22. The first point was whether the word "environment" covered man-made environmental installations such as dykes and dams. Damage caused to such installations could have serious consequences for the health and survival of the civilian population. The commentaries to article 55 of Protocol I[6] stated that changes to the "environment" could form part of means of warfare. In that context, not only objects protected under article 54 of Protocol I, entitled "Protection of objects indispensable to the survival of the civilian population" but also those protected under article 56, entitled "Protection of works and installations containing dangerous forces", could be regarded as "environmental installations". Yet, in the wording of alternatives A and B as proposed by the Drafting Committee, the term "natural environment" appeared. Were man-made environmental installations, such as dams and dykes, therefore covered by the notion of "natural environment". At the very least, an explanation should be given in the commentary to clarify the precise meaning and scope of the notion of "environment" and "natural environment".

23. Secondly, for severe damage to the environment to constitute a war crime, two conditions had to be met: means of warfare "not justified by military necessity" must have been used, and they must have been used "with the intent" to cause damage. Those two elements should be included in the provision adopted. Another important factor should also be taken into consideration, namely, that environmental damage could be caused by a State in the exercise of its right of self-defence or for the purpose of maintaining its territorial integrity and independence. In such a case, a derogation from the prohibition set forth in the provision under consideration would be necessary. In that connection, the commentaries to articles 54, 55 and 56 of Protocol I cited examples of severe damage to the environment, such as, the scorched earth policy followed by China during the Sino-Japanese war (1937-1945) and other examples that justified the use of such means of warfare to slow down the invasion of the aggressor. In such cases, the party to the conflict defending its territory had to take such extreme measures due to an imperative military necessity, but it had no intent to cause damage to the life and survival of its own people.

24. In view of the foregoing, the Commission should adopt alternative A and it should be explained in the commentary that the acts punishable under subparagraph (*g*) would be justified if they were committed by a State in the exercise of its right of self-defence or to maintain its territorial integrity and national independence.

25. Mr. CRAWFORD said that, in his view, the expression "not justified by military necessity", which appeared in both alternatives, suggested that the acts covered in the provision could sometimes be lawful. Unless that wrong impression were corrected in the commentary, subparagraph (*g*) would be unacceptable. A related concern raised by Mr. He was that self-defence was not the only situation involving military necessity: the aggressor also had his own military necessity. But, aggression of course constituted a crime in itself and came within the ambit of another provision in the draft Code. He could therefore accept alternative A provided that the commentary reflected his concerns.

26. Mr. ROSENSTOCK said that he wished to record his agreement with the comment made by Mr. Pellet (2430th meeting) that crimes against the environment were lacking in any legal basis either in internal law or in international law. But, as already noted, the events that had taken place in the Gulf war had had a considerable influence on the views with respect to that crime that had led to General Assembly resolution 47/37,

[6] See Pilloud and others, op. cit. (2447th meeting, footnote 6).

which stated that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law". A number of conferences, meetings and symposia had subsequently been held following which the Secretary-General had decided that the international community was not prepared to create a new body of international rules and that it wished to abide by the existing law.

27. In his view, therefore, extreme caution was required when characterizing crimes against the environment: punitive provisions should be confined to the most heinous acts, those that were truly unacceptable. It was important not to try to make subparagraph (*g*) say too much.

28. Although he was not altogether convinced by alternative A and had reservations about the subparagraph itself, he was prepared to join in any consensus reached on its wording provided, as Mr. Crawford had said, that the necessary explanations were given in the commentary.

29. Mr. LUKASHUK said he considered that the draft Code should include a provision like that in subparagraph (*g*). The bases for that provision lay in positive law, such as the Convention on the Prohibition of Military or Any Other Hostile use of Environmental Modification Techniques or even Protocol I. The Commission was therefore bound to cover environmental damage in the draft Code. Furthermore, at the fiftieth session of the General Assembly, the majority of Member States had come out in favour of characterizing "ecocide" as a crime, and only three States, France, Brazil and the Czech Republic were against it.

30. Mr. TOMUSCHAT pointed out that breaches of the terms of articles 35 (Basic rules) relating to methods and means of warfare and 55 (Protection of the natural environment) of Protocol I were not covered by article 85 (Repression of breaches of this Protocol), as they did not constitute "grave breaches" within the meaning of that article. There had, however, been many developments since the adoption of Protocol I. Subparagraph (*g*) had its bases in the general principles of law. No country could agree to see its environment destroyed and the survival of its people placed in jeopardy. It also had bases in positive law, as already noted.

31. The two proposed alternatives provided for an element of intent and rightly so, since intent was the basis of a crime. The difference between the two alternatives derived from the fact that the first provided for two levels of intent: the intent "to cause widespread ... damage" and the intent to "gravely prejudice the health ...". That twofold requirement seemed to set a very high threshold, whose elements would in any event be almost impossible to prove.

32. Even if the Commission did not opt for alternative B, it had already agreed, in articles 18, subparagraph (*a*) (iv), to make "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" a crime. For example, setting fire to forests as part of a scorched earth strategy would fall within the scope of that subparagraph. Ecological crime was already therefore partly covered.

33. As Mr. Crawford had pointed out, the expression "not justified by military necessity" was somewhat awkward, as it suggested that it was sometimes lawful to place the survival of a population in jeopardy. If absolutely necessary, that expression could be retained in alternative B, but, if alternative A was adopted, it would have to be omitted unless the necessary explanations were given in the commentary.

34. Mr. He had rightly wanted to introduce a distinction between the aggressor and the victim of aggression in an armed conflict. International humanitarian law, however, knew no such distinction. Nonetheless, the victim state should at least have the right, in the case of self-defence, to harm its own environment. His preference was for alternative B.

35. Mr. KABATSI said that subparagraph (*g*) commanded his full support, as it was inconceivable to think of protecting international peace and security without also protecting the environment. The choice between alternatives A and B actually depended on how bold the Commission would want to be. Alternative A underlined the twofold intent the perpetrator of the crime should have: to cause damage and gravely to prejudice the survival of the population. That, however, as Mr. Tomuschat had pointed out, was a very high level of intent and would in any event be difficult to prove in practice.

36. Consequently, although alterative A placed the emphasis on specific intent and alternative B provided for responsibility by deduction in actual fact the difference between the two was not so great: in both instances, the facts of the particular case would have to be weighed to determine whether there had been "intent" or "knowledge". However, even in the case of self-defence, a State could not, when at war, use a means, such as poisoning waters, which no "military necessity" could justify.

37. He would prefer alternative B, but would like the words "a population" to be replaced by the words "the population". If the Commission chose alternative A, he would go along with the consensus, but it should be noted that that alternative clearly raised the problem of the exception of "military necessity". Was it possible to have the intent to do something and at the same time be obliged to do it by necessity?

38. It did not seem advisable to refer expressly in the Code to the case of installations containing dangerous forces, which Mr. He had raised, because anyone who damaged installations of that kind necessarily caused environmental damage.

39. Mr. FOMBA said that the category of crimes in question was certainly no myth and very much a reality. It was therefore amenable to a provision in the Code. Such a provision, however, raised the problem of its basis in law and of its degree of positivity: was it, in that particular case, a matter of *lex lata* or *lex ferenda*? For his own part, he was prepared to go along with the argument that the field to be codified actually fell in between the two, in that the legal basis for making the acts in question a crime had not really been consolidated. Yet it existed, in Protocol I (in particular, articles 35 and 55), in Protocol II (in particular, articles 13 and 14) and also

in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. It had just been said that the crimes in question did not fall within the ambit of article 85 of Protocol I, but the opening clause of paragraph 3 of that article did indeed refer to "acts ... causing death or serious injury to body or health"; that wording should be compared with the wording of alternatives A and B, which laid down the same criteria, namely, intent and the consequence.

40. The two alternatives proposed were not in fact very different. It was difficult to have the intent to cause damage without knowing that one would in fact cause it and, conversely, it was difficult to commit an act without intent when one knew the consequences in advance. But, since the concept of intent was hallowed in legal writings, in his view, alternative A should be chosen.

41. There remained the problem of "military necessity" as an exception to the obligation to protect the environment. It was a difficult concept to interpret in a general way. Moreover, it raised the problem of evidence: how could the court be persuaded of the existence of "military necessity"? If, therefore, the Commission retained that exception—although it would be better to drop it—it could perhaps limit its scope by referring to "imperative military necessity" to raise further the threshold of applicability. That qualification was in fact used in article 54, paragraph 5, of Protocol I.

42. Even though there was no very solid basis in positive law, moral and legal reasons dictated the need to include subparagraph (*g*) in the draft Code and, for his part, he would prefer alternative A.

43. Mr. YAMADA said that his preference was for alternative B. He could see a difference between the two proposed alternatives, which the Special Rapporteur had brought out clearly: it was easier to prove that the perpetrator of an act had had the intent to commit that act than to establish that he knew the consequences in advance. But the difference was blurred when it came to substance, since, if a person knew the consequences of his act and committed it none the less, he certainly had the intent to commit it. The Commission had in any event already recognized the element of "knowledge" in the definition of crimes by providing for individual responsibility in article 2, paragraph 3 (*d*), of the draft Code.

44. In his view, subparagraph (*g*) was a very important provision of the Code. As to the choice of alternative, despite his inclination, he would join in the general consensus of opinion if alternative A commanded a consensus.

45. Mr. GÜNEY said that, while he was very much alive to the arguments in support of alternative B, he had a distinct preference for alternative A, quite simply because the element of intent was, as a general rule, a constituent part of a crime and that was stated unambiguously in alternative A. He would, however, accept that alternative only if the Commission agreed to Mr. Crawford's proposal on the explanation to be given in the commentary with regard to the interpretation of "military necessity".

46. Mr. Sreenivasa RAO said that the Commission could clearly not overlook widespread and long-term damage which might be caused to the natural environment, although the military context in which it had been decided to place such acts was very particular. He was nevertheless not entirely satisfied with either of the proposed alternatives. The question of the threshold of gravity was not stated correctly in either one. In addition, the relationship between the acts committed and the resulting consequences and the point at which such consequences should be considered to come within the scope of the Code were not specified clearly enough. He recalled that the purpose of the Code was to be an instrument of dissuasion by preventing the future commission of acts which could be prosecuted under the Code, as well as a basic reference to make the international community aware of the problem, provide it with guidelines in that area and encourage it to be vigilant in preventing that type of crime. The Code was meant to be applied in actual situations and, in those circumstances, it was very unfortunate that the proposed provisions were not more precisely targeted.

47. It was probably too late to draft new proposals and, if a choice had to be made between alternative A and alternative B, he would choose the latter for the same reasons as Mr. Tomuschat. Alternative B had the advantage of eliminating the idea of "intent", which, because of its subjective nature, gave rise to problems of both interpretation and proof.

48. Mr. VARGAS CARREÑO said that he fully supported the inclusion in the draft Code of the crimes mentioned in article 18, subparagraph (*g*). At the same time, both of the proposed alternatives contained a subjective element which was essential to the characterization of the crimes in question. In alternative A, it was intent and, in alternative B, it was knowledge. While it was often necessary in criminal matters to base the definition of crimes on subjective elements, it was better in drafting an international instrument to place as much emphasis as possible on an objective description of the acts in question in order to avoid problems of application, interpretation and proof.

49. There was, as Mr. Sreenivasa Rao had noted, probably not enough time to revise the text substantially, but the Commission might wish to consider the following wording, which would help eliminate those subjective elements:

> "using methods or means of warfare not justified by military necessity and which cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population, and such damage occurs."

50. Nevertheless, if the Commission adopted one of the two proposed alternatives, he would be more in favour of alternative B, with the idea, once again, of attenuating the subjective element. In the event of war, the belligerents' objectives were, by definition, always military objectives and the perpetrator of the harmful acts could argue that he had never "intended" to cause damage.

51. Mr. VILLAGRÁN KRAMER said he welcomed the fact that the Commission had decided to include environmental damage in the Code. He regretted, however, that the question had been raised only in the context of armed conflict. Jurists from developed countries probably had concerns that were different from those of jurists in the third world, who were dismayed at the fact that it was possible, in time of peace, to cause damage to the environment that was comparable to a genuine crime against humanity.

52. The members of the Commission who, like himself, had participated in the debates in the Sixth Committee at the fiftieth session of the General Assembly could not have failed to notice how much importance delegations attached to that problem. He none the less respected the Commission's decision to take account only of crimes against the environment in time of war and, like Mr. Fomba, therefore had some doubts about the applicable law in that regard in the context of armed conflict. He was not a specialist in military law, but he had not found provisions in the texts on the laws of war that he had been able to consult which applied expressly to the environment. That might be the result of the fact that, until recently, the environment had not been regarded as an asset to be protected by legal provisions. He had, moreover, been struck by the fact that, during the Second World War, the belligerents, which had, moreover, carried out horrible massacres, had never thought to burn down forests.

53. If there were no applicable rules of positive law, the Commission might establish such rules with a view to *lex ferenda*. To that end, it should, in his view, take account of several criteria. Were the natural resources which were damaged renewable or non-renewable? Was the damage caused to those resources permanent or reversible? In that connection, it might be useful to use wording similar to that of article 18, subparagraph (*e*) (i), and refer to the employment of poisonous weapons for the purpose of damaging the environment. The international community had been moved by the excessive exploitation of the Amazonian forest, but what about the destruction by napalm of the forests of Viet Nam? The industrialized countries, which had a formidable array of technical resources for preventing environmental damage caused by natural catastrophes, as well as for inflicting enormous damage on the environment of neighbouring countries, needed to propose a more convincing wording for that subparagraph. He had listened with interest to the arguments put forward by the previous speakers in favour of each alternative; he personally had no preference.

54. Mr. MIKULKA said he was glad that the Commission had decided against its original idea of treating intentionally caused damage to the environment as a separate crime. In so doing, it would have strayed much too far from its mandate, which was basically to codify the law in force. The two alternatives proposed seemed to him to represent a step forward from that point of view. While preferring alternative B, he would agree to go along with alternative A if that would help the Commission reach a consensus, which was always desirable from the standpoint of the progressive development of the law.

55. Mr. CALERO RODRIGUES, speaking as a member of the Commission, said that he also preferred alternative B, but was willing to accept alternative A. In both texts, the central element was damage caused to the environment, which had to be widespread, long-term and severe. The term "crime" always involved an element of intent, but did it have to be a requirement that the person who had done the damage had to have "intended" to cause it? It would be both sufficient and more logical to specify that the person must have been aware of what he was doing. He took note of the comment by Mr. Crawford on the expression "not justified by military necessity", which might imply *a contrario* the obligation to obtain an authorization, for example, to use certain substances as means of warfare.

56. Mr. LUKASHUK, reaffirming the view he had expressed in his earlier statement, said that he tended to prefer alternative A, which appeared to be more in keeping with positive law. The proposal made by Mr. Vargas Carreño would define as a crime under international law any act which resulted in widespread, long-term and severe damage to the environment, even where such damage had not been caused either intentionally or even consciously. He pointed out that the subjective element was very important in criminal law.

57. On another matter, he fully understood Mr. Villagrán Kramer's concerns and sincerely hoped that the Commission would be able to respond to them. That would, however, mean starting all over and he was afraid that the Commission would not have enough time to do so.

58. Mr. de SARAM said that the provisions of article 18, subparagraph (*g*), had not been drafted to protect the environment or in an attempt to codify in an international instrument the decisions of the United Nations Conference on the Human Environment[7] and the United Nations Conference on Environment and Development.[8] That was the work of UNEP. The Commission was concerned in the current case with a much more limited issue—that of damage caused to the environment in time of armed conflict. It was not, of course, easy to know what was justifiable in wartime. The two alternatives under consideration were based mainly on article 55 of Protocol I, but articles 54 and 56 would also be relevant. Moreover, as Mr. He had rightly pointed out, the question of self-defence could not be avoided in the case of an international armed conflict.

59. In fact, alternatives A and B both seemed to him to leave too much room for interpretation. As they stood, they could end up defining as criminal behaviour acts which might not be on the level of gravity implied by the idea of a "crime against the peace and security of mankind". In short, the two proposed texts were too imprecise, had too broad a scope to be applicable in practice and did not reflect existing law. Thus, while he under-

[7] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum).

[8] See *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda).

stood the Commission's concern to take account of environmental issues, he preferred to abstain and would not choose either one alternative or the other.

60. Mr. YANKOV said that he had already made his views known as a member of the Drafting Committee. He was personally convinced that, under the pressure of international public opinion, widespread, long-term and severe damage to the environment would, one day or another, be regarded as a crime against humanity. It was, moreover, of little importance whether such a crime was committed in wartime or in peacetime.

61. He nevertheless understood that the Commission had to bow to practical considerations and draft texts not for its own satisfaction, but to serve as instruments in relations between States. He was accordingly prepared to support either alternative A or alternative B, with a slight preference for the latter, for the various reasons given by those who had spoken before him.

62. Mr. KUSUMA-ATMADJA said that he had already had an opportunity to point out, both in the working group on the issue of wilful and severe damage to the environment (art. 26)[9] and in the Drafting Committee, that, by "criminalizing" acts such as those referred to in subparagraph (*g*), the Commission was, in his view, going too far given the current state of international law. In such circumstances, it was understandable that he should be tempted to abstain and not choose either of the alternatives. He had never, however, been opposed to the idea of including preliminary provisions in the draft Code which could later be improved on as the situation changed. If the proposed texts were thus seen as working tools, he was willing to support them in order to facilitate consensus, taking account, however, of the comments by Mr. Crawford and Mr. He. In that case, he had a slight preference for alternative B.

63. Mr. THIAM (Special Rapporteur), referring to the circumstances which had led the Commission to include a text on the environment, said that, on first reading, he had proposed a text applicable to the environment in general and not exclusively to damage to the environment in the case of war crimes. Since most Governments had held the view that it was too early for a text on the environment, he had, with regret, put aside his draft. One member had then requested that the Commission should reconsider the question of damage to the environment; the debate had been reopened in a plenary meeting and the question had been referred to the Drafting Committee. The Commission had before it the results of the Drafting Committee's work and he noted that the members were divided. In his view, if the Commission wished to propose a text to the General Assembly, that text must not, if it was not to be weakened, reflect too much disagreement. The problem was actually more one of expression than of a real difference of opinions, since no one was excluding intent. Everyone acknowledged that guilty intent was an absolute prerequisite for a crime. Some members wanted intent to be referred to expressly, while others wanted to deduce it from the words "in the knowledge that". The disagreement was therefore not one of substance and it was up to the Chairman to find wording that would enable the Commission to reach a consensus.

64. The CHAIRMAN, speaking as a member of the Commission, said that he tended to be in favour of alternative B, for the reasons expressed by Mr. Tomuschat and Mr. Yankov. Like them, however, he was open to consensus solutions.

65. Speaking in his capacity as Chairman, he said that he did not think that there was a real substantive disagreement within the Commission. On so new and sensitive a topic, it was normal that there should be differences in approach to crimes against the environment in the framework of the draft Code. Thus, some members would have preferred that such crimes should be referred to in both wartime and peacetime; however, it was necessary to take account of the views of States and to propose to them a draft which would be acceptable.

66. It was clear from the statements by the members of the Commission that there was a preference for alternative B, but that those in favour of it were willing to accept alternative A in order to arrive at a consensus. The Commission was in fact dealing with an area that involved both the codification and progressive development of international law and it would be reasonable to refer a consensus text to the General Assembly. As part of that consensus, the point made by Mr. Crawford must be taken into account. The expression "not justified by military necessity" gave rise to a serious problem because it could be concluded that the Commission might be saying that the acts in question were lawful in other circumstances. It might be suggested that Mr. Crawford should include an explanation in the commentary which would clearly show that that was not the Commission's intention, because that was an important point. On that basis and taking account of the reservations and preferences of each member, he suggested that the Commission should adopt by consensus a provision which could carry weight with States when they received the draft Code. He therefore requested the members of the Commission to support alternative A for the purpose of consensus.

67. Mr. CRAWFORD said he agreed with the idea that it was more important to arrive at a consensus on alternative A, with or without amendment, than to perpetuate a dispute over two alternatives which, for the reasons given by Mr. Fomba and others, were not as far apart as some speakers had said. He wondered whether, as part of a consensus, it might not be possible to dispel the doubts he and others had about the reference to military necessity by taking up Mr. Fomba's idea of adding the word "imperative" used in Protocol I and he expressly invited the members of the Commission to adopt that proposal.

68. Mr. TOMUSCHAT said that, if a person intended to cause widespread, long-term and severe damage to the natural environment and thereby gravely to prejudice the health or survival of the population, the acts committed by such a person could never be justified by military necessity. In a spirit of consensus, he was therefore prepared to go along with alternative A in preference to alternative B. In the same spirit of consensus, however, he believed the advocates of alternative A should agree to

[9] See 2427th meeting, footnote 1.

the deletion of the words "not justified by military necessity".

69. Mr. ROSENSTOCK said the fact that all texts in related areas of the law, and most importantly, those of ICRC, referred to military necessity justified the retention of that phrase in subparagraph (*g*). If the Commission were to begin amending that subparagraph in an attempt to describe the military necessity involved in each specific case, that would raise more problems than it would solve. On the other hand, the Commission could certainly indicate in the commentary that the degree of military necessity must be very high indeed.

70. Mr. IDRIS said that he supported alternative A as it stood. The Commission might specify in the commentary the degree of military necessity that would justify the results referred to in subparagraph (*g*), but, if it started discussing whether the phrase in question should be deleted or the word "imperative" should be added, it would be calling the content of the entire text into question.

71. Mr. AL-BAHARNA congratulated the Drafting Committee on having succeeded in including in the draft Code of Crimes subparagraph (*g*) in the form of two alternatives. It was entirely understandable and justified that it should have decided, for the purposes of the draft Code, to limit the effect of that subparagraph to armed conflict. When he had read the two alternatives, namely, alternative A dealing specifically with intent (*mens rea*) and alternative B relating to knowledge, he had initially thought that he supported alternative A, but, hearing the viewpoints expressed by other members, he was convinced that it was advisable and appropriate to adopt alternative B, which apparently had more supporters than alternative A. Mr. Crawford had made a very useful comment on the words "not justified by military necessity". He shared Mr. Crawford's concerns and agreed with the Chairman's suggestion that they should be referred to in the commentary.

72. In view of the two proposals on alternative A, made by Mr. Crawford and by Mr. Tomuschat, he had the impression that the deletion of the words "not justified by military necessity" might enable members who were in favour of alternative B, including Mr. Tomuschat, to support alternative A. That would be a very good way of achieving consensus and the text would read well without the qualification relating to military necessity. He was therefore prepared to support that solution.

73. He also had two other comments to make. First, in view of the explanations by the Chairman of the Drafting Committee on the difference between the definite article before the word "population" in alternative A and the indefinite article before that word in alternative B, he proposed that, at least in the English text of alternative A, the Commission should delete the word "the" before the word "population". The subparagraph would then refer to any population, whether in or outside the area under consideration. Secondly, in the English text, the words "and such damage occurs" were not very clear and should be replaced by the words: "provided such damage occurs".

74. Mr. THIAM (Special Rapporteur) said that the Commission had now looked at the question from every angle. He suggested that it should agree to the very wise suggestion by the Chairman for the adoption of the text and the inclusion in the commentary of all the comments and reservations made, particularly with regard to the idea of adding the word "imperative". The words "military necessity" were found in all the conventions, but had been criticized in many works on international law.

75. Mr. CRAWFORD said that he was willing to draft the commentary, incorporating the comment by Mr. Rosenstock that, in the context of the type of damage covered by subparagraph (*g*), the degree of military necessity must be very high: the reservation would thus already be implicitly contained in the text. On that basis and on that basis alone, he was prepared to withdraw his proposal.

76. The CHAIRMAN said the debate showed that the Commission wanted to adopt alternative A, on the understanding that explanations would be included in the commentary to reflect the views expressed and the proposals made.

Alternative A of subparagraph (g) *was adopted, on that understanding.*

77. Mr. TOMUSCHAT pointed out that, before adopting subparagraph (*g*), the Commission had not defined the meaning of the word "long-term". At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, some representatives had maintained that the term should be understood to mean about 10 years.[10] The Commission had simply used that term in its text without specifying what it actually meant and it would now be up to judicial bodies to define it. Since the Commission had not discussed the matter, it could not be said to have endorsed the interpretation given by certain representatives at that Conference.

78. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), noting that the Commission had adopted all the subparagraphs of article 18, proposed that the article as a whole should be adopted. He recalled that the title had been amended and now read: "War crimes". Since any reference to exceptional gravity had been deleted from the text, the Drafting Committee had removed it from the title as well.

79. Mr. de SARAM said that, in his view, the title "War crimes" did not adequately reflect the basic distinction made in existing law between international armed conflict and armed conflict not of an international character. Subparagraph (*f*) which the Commission had just adopted dealt with armed conflict not of an international character and the text was based on article 3 common to the Geneva Conventions of 12 August 1949 and the relevant provisions of Protocol II, particularly article 4 on fundamental guarantees. Subparagraphs (*a*) to (*e*) relating to international armed conflict were taken mainly from The Hague Convention (IV) of 1907 and its

[10] The fourth session was held in Geneva from 17 March to 10 June 1977.

annex (Regulation concerning the Laws and Customs of War on Land), as well as from the provisions on grave breaches contained both in the Geneva Conventions of 12 August 1949 and in Additional Protocol I thereto.

80. The distinction in existing law between international armed conflict and armed conflict not of an international character was relevant in terms of jurisdiction. In the case of armed conflict not of an international character, international law provided that crimes came under the national jurisdiction of the State in which the violation of the applicable international humanitarian law had occurred. In the case of international armed conflict, however, violations of existing law came under both national jurisdiction and obligatory universal criminal jurisdiction. That was the important distinction. In that connection, he was not referring to the International Tribunal for the Former Yugoslavia[11] or to the International Tribunal for Rwanda, both of which were governed by and derived their authority from their statutes.

81. The expression "war crimes" applied under existing law exclusively to violations of The Hague Convention (IV) of 1907 and its Regulation and to the provisions on grave breaches in the Geneva Conventions of 12 August 1949 and Protocol I. Applying that expression to non-international armed conflicts or, in other words, to internal conflicts would not be in line with its meaning under existing law. It would have been infinitely preferable to use the wording "Crimes in armed conflict" for the title, which would have covered both situations. He stressed that he had no argument with any substantive provision in article 18, subparagraph (*f*), and he endorsed the idea that, when the acts it referred to were committed as indicated in the *chapeau* of the article, they were international crimes. The point he wanted to make was that, if the Commission made no distinction between international armed conflict and armed conflict not of an international character, that would certainly create confusion, in the public mind at least, about how the wording of article 18 accorded with existing law. Readers might wonder whether the Commission had not been unduly innovative in using the phrase "War crimes" to describe violations committed as part of internal armed conflicts.

82. If the title of article 18 had been amended along the lines he had suggested, the same amendment would have had to have been made in the *chapeau* of the article. In conclusion, he noted that the statute of the International Tribunal for Rwanda, which dealt with an internal armed conflict, referred only to genocide and crimes against humanity and used the provisions of article 3 common to the Geneva Conventions of 12 August 1949, which, under existing law, applied to internal armed conflict.

83. Mr. ARANGIO RUIZ endorsed the point of view expressed by Mr. de Saram and said that it would have been preferable to amend the title of article 18 and the wording of the *chapeau* as well.

84. Mr. THIAM (Special Rapporteur) said the question raised by Mr. de Saram had been extensively debated several years earlier and he himself had questioned in his seventh report[12] whether the word "war" should be retained or whether it should be replaced by the words "armed conflict". At that time, the Commission had felt that, while war was regarded as unlawful, the expression "war crimes" had become so commonplace that it should be retained in the title. It was, however, only a title and the commentary could explain what was meant. In any event, the Commission had already decided the matter.

85. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt the title of article 18 as proposed by the Drafting Committee.

It was so decided.

86. The CHAIRMAN invited the Commission to adopt the *chapeau* of article 18.

87. Mr. IDRIS said the statement in the *chapeau* that each of the war crimes covered by the article "constitutes a crime against the peace and security of mankind" was illogical, since it gave the article an entirely different treatment from the other substantive articles in the draft Code, such as article 16 (Genocide) or article 17 (Crimes against humanity). Furthermore, since the phrase "crimes against the peace and security of mankind" appeared in the title of the draft Code, it seemed useless to repeat it in a rather arbitrary way in only one article. That was not a legal problem, but merely one of drafting.

88. He also wanted to make it clear that he would have wished article 18, like articles 16 and 17, to contain a clear-cut definition, which might read: "War crime means any of the following acts, when committed in a systematic manner or on a large scale".

89. The CHAIRMAN said that it was difficult to draft that provision along the lines of articles 16 and 17 because war crimes were not all of such gravity as to make them crimes against the peace and security of mankind under the Code. There were some war crimes, as defined in humanitarian law conventions, which were not covered by the Code. The same was not true of genocide and crimes against humanity, for which there was only one definition. It was thus a drafting matter that accounted for the difference in the wording of the *chapeau* of article 18.

90. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt the *chapeau* of article 18.

It was so decided.

Article 18, as a whole, was adopted.

91. The CHAIRMAN recalled that the Commission still had to take up Mr. Rosenstock's proposal on crimes

[11] See 2437th meeting, footnote 6.

[12] See *Yearbook... 1989*, vol. II (Part One), p. 82, document A/CN.4/419 and Add.1.

against United Nations and associated personnel (ILC (XLVIII)/CRD.2 and Corr.1).

The meeting rose at 12.50 p.m.

2449th MEETING

Thursday, 27 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, 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 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]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[3] (*continued*)

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

ARTICLE 19 (Crimes against United Nations and associated personnel)

1. The CHAIRMAN said that, following the adoption of the articles of the draft Code of Crimes against the Peace and Security of Mankind proposed by the Drafting Committee, the Commission at the current time, would begin its consideration of a proposal for a new article on crimes against United Nations and associated personnel contained in a memorandum (ILC(XLVIII)/CRD.2 and Corr.1). The revised text of the proposal, submitted by Mr. Rosenstock at the suggestion of the Drafting Committee, read:

"*Crimes against United Nations and associated personnel*

"1. A crime against United Nations and associated personnel means the intentional commission of:

"(*a*) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;

"(*b*) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty.

"2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

The Commission also had before it a memorandum by Mr. Pellet on the same subject (ILC(XLVIII)/CRD.5).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he wished to draw the Commission's attention to an issue discussed in the Drafting Committee, namely the inclusion of an additional crime in the draft Code. One member of the Drafting Committee, Mr. Rosenstock, had proposed that crimes committed against United Nations and associated personnel should be included as a fifth crime under the draft Code and had referred to General Assembly resolution 49/59, which had adopted the Convention on the Safety of United Nations and Associated Personnel. The Drafting Committee had considered that it was not entitled to discuss the proposed article because it had only had a clear mandate concerning a number of specific articles. The proposal for the inclusion of attacks on United Nations and associated personnel had received support from some members of the Drafting Committee. It had been noted that such attacks and the threat they posed to international peace and security were of concern to the Security Council, the General Assembly and the Secretary-General. The possibility of including crimes against United Nations personnel had also been discussed in the Preparatory Committee for the Establishment of an International Criminal Court. However, the Drafting Committee had not found it appropriate to take a decision on the issue of including that crime in the draft Code, because it had not been discussed in plenary.

3. Mr. ROSENSTOCK, briefly summarizing his memorandum, pointed out that nothing could be said to be more clearly an attack against the peace and security of mankind than an attack on the personnel of an organization whose first purpose was to maintain international peace and security. By and large, as the Secretary-General had pointed out in a note on the matter,[4] that in the past the fact of working under the banner

[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.

[4] A/AC.242/1.