Document:-

A/CN.4/SR.2443

Summary record of the 2443rd 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

instance, against men—but it was hardly a crime against humanity.

66. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), referring to Mr. Bowett's comment in connection with the expression "in a systematic manner", recalled that, in paragraph (3) of the commentary to article 21 relating to systematic or mass violations of human rights adopted on first reading, it was stated:

> The systematic element relates to a constant practice or to a methodical plan to carry out such violations. The mass-scale element relates to the number of people affected by such violations or the entity that has been affected.[10]

67. Mr. ROBINSON explained that he had not proposed that the criterion of acquiescence should be included in the *chapeau* of the article, but, rather, that the words "and instigated or directed by a Government or by any organization or group" should be deleted from it and that all three ideas should be explained in the commentary.

68. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Drafting Committee had incorporated the criterion whose deletion Mr. Robinson was proposing in order to prevent serial murders committed by an individual, such as those which had recently occurred in the United Kingdom of Great Britain and Northern Ireland and Australia and which were acts committed on a large scale, from being considered crimes against humanity.

The meeting rose at 1.05 p.m.

[10] *Yearbook . . . 1991*, vol. II (Part Two), p. 103.

2443rd MEETING

Tuesday, 18 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

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

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

[Agenda item 3]

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

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

ARTICLE 17 (Crimes against humanity) (*continued*)

Subparagraph (*f*)

1. The CHAIRMAN, inviting the Commission to continue the consideration of draft article 17, recalled that at the previous meeting, subparagraph (*f*) had been criticized for being so broadly worded as to cover acts which could not be qualified as crimes against humanity or, indeed, as crimes at all. The feeling in the Commission had appeared to be that a more detailed identification was needed of acts of institutionalized discrimination on racial, religious or ethnic grounds which constituted a crime against humanity. As an informal suggestion, he wondered whether it might not be appropriate to revert to a modified version of the definition of apartheid to be found in article 20 (Apartheid) as adopted on first reading.[4] Subparagraph (*f*) of article 17 might then read:

> "(*f*) Institutionalized discrimination on racial, religious or ethnic grounds which consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial, religious or ethnic group over any other racial, religious or ethnic group and systematically oppressing it:
>
> "(i) Denial to a member or members of any of the above-mentioned groups of the right to life and liberty of person;
>
> "(ii) Deliberate imposition on any of the above-mentioned groups of living conditions calculated to cause its physical destruction in whole or in part;
>
> "(iii) Any legislative measures and other measures calculated to prevent any of the above-mentioned groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

[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 footnote 1 above.

"(iv) Any measures, including legislative measures, designed to divide the population along racial, religious or ethnic lines, in particular by the creation of separate reserves and ghettos for the members of any of the above-mentioned groups, the prohibition of marriages among members of different groups or the expropriation of land and property belonging to such groups or to members thereof;

"(v) Exploitation of the labour of the members of any of the above-mentioned groups, in particular by submitting them to forced labour;

"(vi) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose institutionalized discrimination on racial, religious or ethnic grounds."

2. All other subparagraphs of article 17 were, of course, still open for discussion. Emphasizing that the suggestion was purely tentative, he invited members to consider whether the text might serve as a basis for further discussion of subparagraph (*f*) and whether they wished to refer the matter back to the Drafting Committee or a working group.

3. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, said that the text suggested by the Chairman appeared to have some merits. It should be noted, however, that subparagraph (*f*) (vi) of the suggested text related to persecution, which formed the subject of subparagraph (*e*). A working group or the Drafting Committee might perhaps consider the possibility of combining (*f*) with (*e*), which, in his view, was in its present form a little too vague for inclusion in the Code of Crimes against the Peace and Security of Mankind.

4. The CHAIRMAN, replying to a query by Mr. TOMUSCHAT, said that the text he was suggesting for the Commission's consideration was an adaptation of article 20 adopted on first reading.

5. Mr. SZEKELY said that the text of article 20 adopted on first reading had itself been adapted from article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid. The text suggested by the Chairman was a definite improvement over article 17, subparagraph (*f*), as it stood, and deserved to be referred to a small working group for closer study. He did not, however, think it advisable to merge (*f*) and (*e*), a possibility the Drafting Committee had discussed at length and had ultimately rejected.

6. Mr. IDRIS, pointing out that members had not yet had time to familiarize themselves with the text suggested by the Chairman, proposed that the Commission should leave article 17 in abeyance and embark on the consideration of article 18. He was not opposed to the Chairman's text, but to discuss it immediately would be premature. The Commission could revert to the subject matter of subparagraph (*f*) at a later meeting, and, having duly considered the matter, it could refer the subparagraph back to the Drafting Committee or to a working group.

7. Mr. ROSENSTOCK said that he had sympathy with the plea for more time to consider the Chairman's text, which had come as something of a surprise. The suggested text was very lengthy when compared with the remarkably succinct subparagraphs (*a*) to (*d*), which obviously depended on the commentary for an explanation. The best course would be for the Drafting Committee to look into the whole matter, perhaps combining subparagraphs (*e*) and (*f*), but the Commission could complete its examination of the rest of the article.

8. Mr. THIAM (Special Rapporteur) said that the text suggested by the Chairman contained some interesting points, but the Commission should at least engage in a brief exchange of views before referring it to the Drafting Committee or a working group, which needed instructions on what direction their work on article 17, subparagraph (*f*), should take.

9. Mr. LUKASHUK said that he had nothing against the main idea embodied in the Chairman's suggestion but did not think the full text should be incorporated in article 17. The balance of the article would be completely destroyed. There were two possible ways around that problem. One way would be to replace (*f*) as proposed by the Drafting Committee by the *chapeau* of the text suggested by the Chairman and to put subparagraphs (i) to (vi) in the commentary. The other would be to place the full text in a new separate article 16 *bis*. He agreed that a preliminary discussion in plenary was needed before deciding to refer the matter to the Drafting Committee or a working group.

10. Mr. KABATSI said that he concurred with members who had argued in favour of deferring substantive consideration of the Chairman's suggestion until a later meeting. He also agreed that to include a text of such considerable length in an article in which the other subparagraphs were very succinct could well distort the article as a whole. The idea of merging (*e*) and (*f*) into a separate article on persecution and institutionalized discrimination was, at first glance, attractive.

11. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, when introducing article 17 (2442nd meeting), he had reported that a lengthy discussion had taken place in the Drafting Committee with respect to the crime listed in subparagraph (*f*). Some members had proposed the inclusion of the crime of "institutionalized racial discrimination", with the intention of covering the crime of apartheid under a more general name, and others had expressed doubts and had felt that, if institutionalized discrimination were to be included, it should not be limited to discrimination on racial grounds. Views as to which grounds should be mentioned in the text had been divided, and the Committee presented the text of subparagraph (*f*) with very strong reservations on the part of some of its members. Accordingly, the Commission ought first to ascertain whether the prevailing feeling was that the crime of "institutionalized discrimination" should include discrimination on religious and ethnic as well as on racial grounds. If that proved to be the case, the Commission might go on to consider the text suggested by the Chairman. A majority of members might feel that only racial discrimination

should be referred to in subparagraph (*f*), the other aspects being covered by subparagraph (*e*).

12. Mr. BENNOUNA said he agreed with the point made by Mr. Lukashuk about the place to be given to the Chairman's suggestion, the full text of which would seriously affect the balance of the article as a whole. He was inclined to favour a separate provision on institutionalized discrimination. If a decision was taken on that issue, the matter could then be referred to the Drafting Committee.

13. Mr. VILLAGRÁN KRAMER said that the Commission did not want to use the term apartheid, yet it was difficult to speak of a crime which corresponded to the crime of apartheid without actually using the term. The Chairman's suggestion was certainly an interesting one, and he was in favour of referring it to the Drafting Committee or a working group, possibly with a view to including the substance as a separate article.

14. Mr. de SARAM said that the phrase "which consists of any of the following acts", in the *chapeau* of the text suggested by the Chairman, introduced a limitation that was inconsistent with the Drafting Committee's wording for article 17. The difficulty could be overcome by including subparagraphs (i) to (v) in the commentary. Subparagraph (vi) of the text suggested by the Chairman contained the words "because they oppose" which, again, imposed a substantial limitation compared with the broader formulation in the Drafting Committee's article 17, subparagraph (*e*). As to the possibility of merging subparagraphs (*e*) and (*f*), he was inclined to think that the two crimes in question should be kept separate, as persecution could exist in addition to institutionalized discrimination.

15. Mr. FOMBA said that, without prejudice to other solutions that might be reached in the Drafting Committee or in the Commission, he tended to the belief that the present wording of the *chapeau* of article 17 was satisfactory and self-sufficient. If the Commission decided that a more detailed definition of institutionalized discrimination was called for, he would accept that view. Like others, however, he deemed it more judicious not to expand subparagraph (*f*). Rather, it should be replaced by a separate, more explicitly worded, provision.

16. Mr. ROSENSTOCK said that it made excellent sense to consider whether subparagraphs (*e*) and (*f*) should be combined or left separate and also to explore in greater depth what was covered by subparagraph (*f*) that was not already covered by subparagraph (*e*). Given the events in Bosnia and the Great Lakes region of Africa, it was difficult to distinguish between racial, religious or ethnic discrimination. The world was plagued by those three types of discrimination, and probably others as well.

17. Mr. GÜNEY said that, in attempting to merge subparagraphs (*e*) and (*f*), the Chairman's suggestion was an improvement. However, notwithstanding the proposal made by Mr. Lukashuk and supported by Mr. Bennouna, he thought that a decision at the current time on how to incorporate the suggestion in the article would be premature.

18. Mr. HE said that, although he sympathized with the Chairman's suggestion, he agreed with Mr. Lukashuk that it would be impossible to include all the elements in subparagraph (*f*). The main ones should be singled out and the others left for inclusion in the commentary. It was unnecessary to refer the text back to the Drafting Committee, where it had already been discussed at length. As only two meetings remained to finish consideration of the draft Code of Crimes against the Peace and Security of Mankind, it would be wiser for several members to get together informally and produce a final text, which could be presented at the next meeting.

19. The CHAIRMAN said that, as the second reading of the draft Code was a matter of the highest priority, the Commission could, if necessary, allocate an additional meeting to the subject.

20. Mr. YANKOV said that the Chairman's initiative was a positive one, because subparagraph (*f*) was very vague as it stood. In the past two years, when the question of apartheid had been discussed, the Commission had broadly agreed on the need to find another solution, while retaining the definition used for apartheid. He concurred that racial discrimination should not be considered alone: institutionalized ethnic and religious discrimination were no less dangerous for international peace and security.

21. He was therefore in favour of condensing the wording, making it more general and leaving the details to the commentary. It would be difficult at the present time to merge persecution and institutionalized discrimination, for example, institutionalized forms of ethnic cleansing and remnants of various types of treatment akin to the traditional notion of apartheid.

22. Mr. MIKULKA said that the Chairman's suggestion deserved close study: there was general agreement that subparagraph (*f*) was too laconic and not as precise as the other elements in article 17. However, the text should be referred to the Drafting Committee, which should try and remove all elements that overlapped with other parts of the text, for example in the *chapeau* of article 17 and in the Chairman's suggestion on subparagraph (*f*) and in subparagraph (*e*), on persecution, and in the wording of article 16, subparagraph (*c*).

23. The Commission should not expatiate on racial, ethnic and religious discrimination, but should see where those elements were already covered elsewhere. Only then could it decide whether it needed to draft a separate provision or whether all elements could remain in article 17. He was against a separate provision and thought that the problem could be solved by restructuring article 17.

24. Mr. TOMUSCHAT welcomed the Chairman's thought-provoking suggestion, but agreed with Mr. Mikulka about the many overlapping elements, in particular the fact that subparagraph (*f*) (ii) was virtually identical with article 16, subparagraph (*c*). As he saw it, the text must be shortened. His preference was for setting forth in the commentary the various elements mentioned in the Chairman's suggestion.

25. He had considerable sympathy with the phrase "institutionalized discrimination" proposed by the Drafting Committee. It was not too vague. On the contrary, it was a comprehensive notion with clear contours. If the Commission sought to introduce too much detail, it ran the risk of not taking into account other cases which likewise deserved to be covered. Article 17 was concise. It would be noted that there was no definition, either, of "torture", "enslavement", "persecution" or "arbitrary". Further development of subparagraph (*f*) would entail major changes and much additional work for the Drafting Committee. However, if so wished by a majority of members, the text could be returned to the Drafting Committee for the purpose of producing a wording that commanded a consensus.

26. Mr. EIRIKSSON commended the Chairman for his initiative, but wondered whether the original version might not be more appropriate. He agreed with Mr. Tomuschat that the present definition was not too vague. He feared, moreover, that the impact of the text suggested by the Chairman might be to limit the scope of the article unnecessarily, failing to cover some of the extreme forms of discrimination to which Mr. Rosenstock had referred.

27. Although subparagraphs (i) to (vi) in the Chairman's suggestion would fall within the definition, the *chapeau* had the effect of producing a rather exclusive list. Moreover, the English translation of the text contained an error: in the *chapeau* the word "racial" before "segregation", should be deleted. Even leaving the *chapeau* as it stood, the Commission would be limiting the scope of the article more than it had intended. On the other hand, he did not object to those elements being taken up in the commentary.

28. Mr. Sreenivasa RAO said that the Chairman's suggestion reflected the basic difficulty that most members felt in dealing with article 17. The question of crimes against humanity was a broad one. Taken individually, the contents of the article appeared to be even broader than the concept itself. The Chairman had shown that the aspect of discrimination alone could easily be expanded into a further six or seven subparagraphs. Given the opportunity, the Commission could do the same for each of the other categories. There lay the real difficulty. He wondered whether the Commission should really include such wide-ranging and divergent concepts, some of them rooted in culture, history and practices unrelated to racial discrimination. If the text was expanded and made more specific, the widespread practice of religious and social discrimination around the world, even without institutionalized approval through legislation, would place many countries on trial.

29. It was necessary to introduce a high threshold that went beyond normal concepts of the promotion and implementation of human rights. The criterion had to be international repercussions of such dimensions that they could legitimately be regarded as a threat to the peace and security of mankind. If the Commission looked at discrimination, as opposed to segregation, or considered the prohibition of interracial marriages, then it was dealing with a fundamental reordering of society. Although some of the elements in the text deserved to be promoted, he was not certain that the Code was the right place to do so. Were not the efforts made in various human rights forums adequate? Could the Commission simply bypass difficulties by calling them crimes and placing them in the Code? He was not sure that that was the answer to social ills. The longer and more detailed the Code was, the less acceptable it became.

30. Mr. BARBOZA said that, as there appeared to be a large majority in favour of reconsidering whether to retain the wording from article 20 adopted on first reading, the text must be sent to the Drafting Committee. The Commission itself was not the most suitable place for a careful comparison of the Chairman's suggestion and article 17, subparagraphs (*e*) and (*f*). In the version now under discussion, institutionalized discrimination was restrictive, because it was condemned only where used for the purpose of establishing or maintaining the domination of a particular racial, religious or other group. But there were also other reasons for discrimination, such as plain hatred. The examples given should be included in the commentary. Otherwise, the balance of the text might be distorted.

31. Mr. IDRIS said that institutional discrimination occurred every day in many societies, without being based on government policy. He was therefore strongly opposed to the wording, in the beginning of the Chairman's suggestion, which read: "Institutionalized discrimination ... based on policies". Again, he had misgivings about subparagraph (*f*) (v). Subjecting persons to forced labour was not so much an exploitation of their labour as a violation of their basic human rights.

32. Mr. YAMADA said that the Chairman's suggestion had clarified the notion of institutionalized discrimination, yet he had the impression that the *chapeau* raised the threshold. Also, an exhaustive list might have the effect of limiting the application of subparagraph (*f*). As Mr. Tomuschat and Mr. Mikulka had already pointed out, parts of the Chairman's suggestion overlapped with other subparagraphs of article 17, as well as article 16. Furthermore, if the Commission agreed to the suggestion for clarifying subparagraph (*f*), what was one to do with terms used in other subparagraphs, such as "torture", "enslavement" and "persecution".

33. The Chairman's suggestion should be referred to the Drafting Committee and the entire structure of article 17 should be reviewed.

34. Mr. ROBINSON said that the text suggested by the Chairman gave a broader picture of the acts that would constitute a crime against humanity, but he did not altogether agree with the exhaustive enumeration of those acts. In particular, the last part of the *chapeau*, referring to the domination by one racial, religious or ethnic group over any other group, was restrictive, though he appreciated that it was consistent with article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid. It would be better to have a form of wording that provided wider coverage. He therefore proposed that the *chapeau* should be reworded to read:

> "(*f*) Institutionalized discrimination on racial, religious or ethnic grounds consisting of acts based on

policies or practices of racial segregation and discrimination."

35. Mr. BOWETT said that he had spoken against the original wording of article 17, subparagraph (*f*), simply because he thought it was too broad. In his view, no institutionalized discrimination amounted to a crime against humanity. His concern could, however, be met by adding the words "involving denial of fundamental human rights" at the end of the subparagraph.

36. Mr. KUSUMA-ATMADJA said that the *chapeau* of the text suggested by the Chairman tended to weaken the provision. Subparagraph (vi) was nonetheless very useful and, if the text were redrafted, should be retained.

37. Mr. THIAM (Special Rapporteur) said the fact that a procedural debate had turned into a substantive one would facilitate the Drafting Committee's work, since it would preclude any later need for a fresh substantive debate in plenary.

38. He did not favour the idea of a separate provision, as that would only lead to further endless discussion. The wisest course would be to retain the *chapeau*, and deal with the remaining items in the commentary. It was particularly important to shorten the provision and, he therefore proposed that the words "Institutionalized discrimination on racial, religious or ethnic grounds" should be replaced by "Institutionalized discrimination on racial grounds". That would also take account of the concern felt in some quarters that the words "on religious grounds" could cause problems for those of the Muslim faith. With those considerations in mind, he recommended that the matter should be referred to the Drafting Committee, which should take account of the views expressed during the discussion.

39. The CHAIRMAN said it seemed that a consensus was emerging in favour of referring the provision to the Drafting Committee. The fact that the discussion had developed into a substantive debate was not a bad thing, since the Drafting Committee would have certain indications that should give it food for thought and perhaps enable it to propose a form of wording acceptable to the Commission. He therefore suggested that the provision should be referred to the Drafting Committee.

40. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) asked whether the Drafting Committee would be precluded from considering the Special Rapporteur's suggestion, namely, to replace the opening words of the *chapeau* by the words "Institutionalized discrimination on racial grounds".

41. The CHAIRMAN said that, in his view, the Drafting Committee should be allowed the necessary leeway. It should start its work on the basis that the reference to racial, religious and ethnic discrimination would be retained but, if it were unable to agree on such wording, it should then fall back on the Special Rapporteur's proposal. On that understanding, he suggested that subparagraph (*f*) should be referred to the Drafting Committee.

It was so agreed.

42. Mr. TOMUSCHAT said that, as explained by the Chairman of the Drafting Committee, the word "arbitrary" had been added to subparagraph (*g*), the intention being to take account of the fact that, in some limited circumstances and particularly for health reasons, it might be necessary to evacuate the population of a particular area. That could apply, for instance, in the case of the construction of a dam. The Commission certainly did not condone ethnic cleansing or massive expulsion of a population from its ancestral lands. The point should be clarified in the commentary.

43. The CHAIRMAN said it would indeed be useful to mention in the commentary cases such as serious flooding or industrial accidents, where transfer of the population would be permissible.

44. Mr. Sreenivasa RAO said that "arbitrary deportation or forcible transfer of population" denoted a massive movement of population whereas deportation usually applied to only one or two persons. It was generally used for instance, in cases of illegal entry, or where someone was an undesirable person, did not have the proper papers in his possession, or engaged in activities contrary to the law of the State. That point would presumably be properly dealt with in the commentary to avoid any confusion.

45. Mr. ROSENSTOCK said that, while he agreed in large measure with Mr. Sreenivasa Rao, the words "of population" in subparagraph (*g*) qualified the preceding words, which should take care of the matter. Also he agreed with the examples cited by Mr. Tomuschat, but regarded them as illustrative rather than exhaustive.

46. Mr. ROBINSON proposed that, for the reasons he had already given, a separate subparagraph reading "rape and other forms of sexual abuse" should be added to article 17 and that, as a consequential amendment, the words "and sexual abuse" should be deleted from subparagraph (*i*). A separate provision was fully justified, given the importance of the whole question of protecting women's rights. The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda provided a precedent in that connection.

47. Mr. KABATSI said he supported the proposal but noted that, when Mr. Robinson had last raised the issue, he had also referred to the question of gender. He (Mr. Kabatsi) wished to make it clear that, should the matter of gender be discussed in the Drafting Committee, he would experience difficulty in including any provision on the matter in article 17. A reference to gender could cause problems for those who held certain religious beliefs or had certain social arrangements based on gender. Such beliefs and arrangements gave rise to certain duties and rights which, though perfectly acceptable to those concerned, were not acceptable to the rest of the world. The Drafting Committee should bear that in mind when considering the question of gender.

48. Mr. SZEKELY said that he strongly supported Mr. Robinson's proposal and would have liked him to have raised the gender issue as well. The wording proposed by Mr. Robinson was, however, very clear and there should be no need to refer it to the Drafting Committee. The Commission could insert it in the article without further ado.

49. Mr. GÜNEY also supporting Mr. Robinson's proposal, said that the international community's recent bitter experience in the matter fully justified the inclusion of such a subparagraph.

50. Mr. TOMUSCHAT said he too agreed with the proposal. In his view, however, article 17 should refer not only to rape but also, in express terms, to enforced prostitution even though it was in fact already mentioned in article 18, subparagraph (*f*) (v). He therefore proposed a new subparagraph for article 17 preceding subparagraph (*i*), reading "rape, enforced prostitution and other forms of sexual abuse". The existing subparagraph (*i*) would become subparagraph (*j*).

51. Mr. Sreenivasa RAO said he was not opposed to the proposals. However, some of the acts enumerated would be covered by "torture" in article 17, subparagraph (*c*). Again, were others, such as enforced prostitution, sufficiently widespread or frequent enough to warrant inclusion in the article under discussion?

52. Mr. YANKOV said he supported the proposal made by Mr. Robinson as amended by Mr. Tomuschat. However, the words "such as mutilation, severe bodily harm" would add nothing to the preceding general formulation once the reference to "sexual abuse" was placed in a separate subparagraph. Those words should thus be consigned to the commentary, and subparagraph (*j*) should end with the words "human dignity".

53. Mr. BENNOUNA said that proposed new subparagraph (*i*) was justified by the problems that had lately arisen in the international arena. However, a problem still remained with regard to subparagraph (*j*). He personally was opposed to broad catch-all categories such as "other inhumane acts which severely damage physical or mental integrity, health or human dignity", particularly where the object of the exercise was to define a crime against the peace and security of mankind. In any case, that category overlapped with torture to a considerable extent. It seemed to him that to severely damage physical or mental integrity was to torture someone. The formulation should be added to the category "torture", or else be consigned to the commentary to subparagraph (*c*).

54. Mr. IDRIS said Mr. Yankov was right: if the Commission insisted on maintaining subparagraph (*j*), there would be no need to enumerate the "other inhumane acts". After listening to Mr. Bennouna's comments he would even go further. The reference to "other inhumane acts" could be deleted, and any listing could be dealt with in the commentary. On the new subparagraph (*i*), he fully supported the proposal by Mr. Robinson.

55. Mr. SZEKELY, referring to Mr. Sreenivasa Rao's assertion that Mr. Robinson's proposal referred to crimes that would be covered by the category of "torture", said that that assertion would be true only if an entirely new definition of torture were adopted. Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained a very precise definition of torture which was in no way compatible with the types of act included in the new subparagraph (*i*).

56. Mr. de SARAM noted that the Commission was now drafting in plenary, which was perhaps unavoidable. He agreed with those members who had difficulty in accepting a truncated version of subparagraph (*j*). If the examples following the word "dignity" were to be eliminated, the question would arise whether the Code would, for instance, encompass forms of punishment such as solitary confinement for long periods of time, which if practised systematically, were covered by the *chapeau* to the article. Such practices were abhorrent, but he was not sure that the Commission should seek to remedy them in article 17.

57. Mr. THIAM (Special Rapporteur) cautioned against deletion of the words "other inhumane acts". To begin with, the most recent statutes, those establishing the International Tribunal for the Former Yugoslavia[5] and the International Tribunal for Rwanda,[6] had set a precedent by using the expression, thereby allowing those bodies some latitude in determining what constituted an inhumane act. Secondly, if the expression were deleted, the Commission would then be faced with the impossible task of ascertaining that no inhumane act had been omitted from the enumeration in the remainder of the article.

58. The CHAIRMAN said Mr. Robinson's proposal was clearly warranted, given the prominence that the phenomenon had recently assumed in international life. But to eliminate the examples of inhumane acts would weaken subparagraph (*j*) and might also broaden its scope unduly. Such acts might indeed constitute crimes, but not necessarily crimes against the peace and security of mankind within the meaning of the Code. As a compromise, would Mr. Robinson be prepared to accept a reference to "rape, enforced prostitution and other forms of sexual abuse" in the original subparagraph (*i*)? The importance the Commission attached to that phenomenon could then be highlighted in the commentary.

59. Mr. ROBINSON said he commended the Chairman for his proactive chairmanship. However, he had as yet heard no objection to the proposal to make the issue of rape, enforced prostitution and other forms of sexual abuse the subject of a separate subparagraph, an approach he preferred before deciding, when the Commission subsequently came to consider proposed new subparagraph (*j*), whether the latter required some amendment. In that regard, he favoured retention of subparagraph (*j*), since he did not believe that the enumeration in subparagraphs (*a*) to (*h*) covered all inhumane acts.

60. As to the point raised by Mr. de Saram, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained a saving clause in article 1 stating that the term "torture" did not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. The commentary should make that point absolutely clear.

61. The CHAIRMAN said that in effect the Commission was already considering subparagraph (*j*), since

[5] See 2437th meeting, footnote 6.

[6] Ibid., footnote 7.

there had been no objection to Mr. Robinson's proposal. However, adoption of that proposal as a separate subparagraph had a knock-on-effect, since it created problems with regard to the wording of subparagraph (*j*).

62. Mr. KABATSI said that Mr. Robinson's proposal should stand alone as a separate subparagraph (*i*). In his view, proposed new subparagraph (*j*), would not be weakened in consequence, since the *chapeau* to article 17 made it clear that the reference was to other inhumane acts "committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group". Whether the provisions in subparagraph (*j*) would all be covered by the category of "torture" was debatable. There might be other inhuman acts that severely damaged physical or mental integrity, health or human dignity—especially if perpetrated in a systematic manner or on a large scale. He agreed with Mr. Yankov that the words "such as mutilation, severe bodily harm" were superfluous and should be deleted.

63. Mr. BENNOUNA said that, whatever solution was adopted, the form in which the article was cast posed a problem. To provide an explicit enumeration of the acts that constituted crimes against humanity and to end that enumeration with the catch-all category of "other inhumane acts" was self-defeating. A restrictive definition of "other inhumane acts" was called for, and to leave the issue wide open was to fail seriously to address the task of codification.

64. Mr. Sreenivasa RAO thanked Mr. Szekely for drawing his attention to the definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It certainly did not cover the acts referred to in proposed new subparagraph (*i*), since it focused on acts of a public official, presumably perpetrated for purposes of State. The definition contained in the *chapeau* to article 17 referred not only to acts "committed in a systematic manner or on a large scale and instigated or directed by a Government", but also to acts of "any organization or group"—the intention having been to include acts of autonomous power cliques functioning within the system in spite of the best efforts of the Government, in situations where law and order had broken down. However, the question then arose: what forms of implementation and prosecution could there be with respect to those groups? Would some world government or peace-enforcement operation bring the culprits to book? Such an idealistic scenario seemed far removed from practical considerations, and only served to highlight his concern that, in seeking to define crimes against humanity, the Commission might be seeking to address social ills that could not in fact be solved by means of criminalization procedures.

65. Mr. SZEKELY said he felt it would be a great pity simply to incorporate Mr. Robinson's proposal in the existing subparagraph (*i*). An important feature of the proposal was to confer special importance on that category of crimes by making it the subject of a separate subparagraph. Mr. Robinson's proposal should thus form the subject of a new subparagraph (*i*). As for subparagraph (*j*), it should be kept in its entirety—minus, of course, the reference to sexual abuse.

66. The CHAIRMAN suggested that the Commission should continue its consideration of proposed new subparagraphs (*i*) and (*j*) at the next meeting.

It was so agreed.

The meeting rose at 1 p.m.

2444th MEETING

Wednesday, 19 June 1996, at 10.15 a.m.

Chairman: Mr. Ahmed MAHIOU

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

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

[Agenda item 3]

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

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

ARTICLE 17 (Crimes against humanity) (*continued*)

Subparagraphs (*i*) and (*j*)

1. The CHAIRMAN recalled that, at the initiative of Mr. Robinson (2443rd meeting), it had been proposed that a separate subparagraph on rape and sexual abuse

[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.