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Summary record of the 2444th meeting

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

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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 inhuman acts” was self-defeating. A restrictive definition of “other inhuman 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.


[Agenda item 3]

Consideration of the draft articles on second reading3 (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

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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.
3 For the text of draft articles 1 to 18 as adopted by the Drafting Committee on second reading, see 2437th meeting, para. 7.
should be added to the crimes against humanity listed in article 17. Accordingly, the Commission had before it a draft text in which the original text of subparagraph (i) had been broken up into two separate subparagraphs reading:

"(i) Rape, enforced prostitution and other forms of sexual abuse;

"(j) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm."

He emphasized, however, that the proposed new wording might give rise to drafting problems and wondered whether it would not be better to maintain a single subparagraph adding rape to the list of other inhumane acts. The main thing was surely that the Code of Crimes against the Peace and Security of Mankind should specifically refer to that crime so that judges might be able to punish it. Notwithstanding the special treatment given to rape and sexual abuse in certain legal reference texts, what mattered most was the practical usefulness of the Code.

2. It was his understanding that Mr. Robinson, Mr. Szekely and the other members who had supported the proposal under consideration would be prepared to accept such a solution in a spirit of compromise.

3. Mr. SZEKELY confirmed that he would not oppose the adoption of the solution proposed by the Chairman if that was the wish of the majority. Before they took a decision, however, the members of the Commission should bear in mind that the proposal before them had been submitted in the light of the importance of following the international practice of States, which was moving more and more in that direction. In the statute of the International Tribunal for Rwanda, for example, the crime of rape was mentioned separately in article 3 (g). Rape was also one of the crimes against humanity listed separately in article 5 of the statute of the International Tribunal for the Former Yugoslavia.

4. The General Assembly itself, which was the Commission's parent body, at its fiftieth session, had adopted resolution 50/192 reaffirming that, under certain circumstances, rape was a crime against humanity.

5. The international community might therefore find it surprising if the Commission proposed a draft Code of Crimes against the Peace and Security of Mankind in which rape and sexual abuse did not form the subject of a separate provision.

6. Mr. ROSENSTOCK said that, while he entirely sympathized with the arguments put forward by Mr. Szekely, he saw no need to complicate matters by adding a new subparagraph to article 17 that was likely to cause drafting problems. There was no reason why the crime of rape should not be mentioned among the inhumane acts listed in the original text of subparagraph (i), whose text he found satisfactory except for the fact that he could not see the difference between an act which severely damaged physical or mental integrity and one which severely damaged health. Be that as it might, he would go along with the majority view.

7. Mr. PAMBOU-TCHIVOUNDA said that he fully shared Mr. Rosenstock's view that there was no need to complicate matters by adding a new subparagraph. He therefore supported the solution suggested by the Chairman, but proposed a more sober wording for subparagraph (i), in which the reference to "physical or mental integrity" would be deleted. The subparagraph would then begin with the words "Other inhumane acts which severely damage physical or mental health or human dignity" and continue with the enumeration as it stood, with the addition of rape and enforced prostitution, which were, moreover, essentially infringements of human dignity.

8. Mr. KABATSI said that he agreed with the arguments put forward by Mr. Szekely. If there were separate subparagraphs for murder or extermination, should not the very serious crimes of rape or sexual abuse also be placed in a separate category? The typographical separation would draw attention to the horror of such acts, which were perpetrated on a large scale against defenceless women. However, he would not stand in the way of a decision to revert to the solution of a single subparagraph. He did nevertheless have some reservations about the use of the term "human dignity", which was a little too vague.

9. Mr. ROBINSON said that he, too, would go along with the general view. However, he failed to see why the proposed new wording would give rise to particular drafting problems. There were in fact a number of legal and political reasons in favour of the adoption of the new presentation. By highlighting the crimes of rape and other forms of sexual abuse in a separate paragraph, the Commission would be discharging one of the duties that should be particularly close to its heart, that of promoting the development of rules relating to the protection of women.

10. If the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda had deemed it useful—admittedly, in situations of armed conflict—to regard rape as a separate category of crimes, why could not the Commission do the same? Everyone was aware that rape committed for political ends did not take place only in situations of armed conflict.

11. Setting aside a separate subparagraph for the problem of rape was a way of drawing the attention of the international community to the problem. He also wondered whether a consensus was really forming within the Commission in favour of the solution suggested by the Chairman, namely, the maintenance of a single subparagraph.

12. The CHAIRMAN said that there finally seemed to be agreement on the advisability of having a separate subparagraph on rape and sexual abuse. He said that if he heard no objections, he would take it that the members of the Commission wished to adopt the proposed new subparagraph (i).

New subparagraph (i) was adopted.

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6 See 2437th meeting, footnote 7.
7 Ibid., footnote 6.
13. Mr. MIKULKA said that it should be clearly understood that the decision just taken would have no effect on the wording of draft article 18, where the same problem arose. That article was based on Additional Protocols I and II to the Geneva Conventions of 12 August 1949, whose wording could not be amended lightly. He would appreciate an assurance on that point from the other members.

14. The CHAIRMAN said that the problem of article 18 would be considered in due course.

15. Mr. THIAM (Special Rapporteur) noted that the reason for the Commission's decision to have two separate subparagraphs would have to be explained in the commentary.

16. Mr. VILLAGRÁN KRAMER said that, if the statute of the International Tribunal for the Former Yugoslavia qualified rape as a crime against humanity and not as a war crime, it was important that the point should also be made clear in the draft Code.

17. The CHAIRMAN referred Mr. Villagrán Kramer to the heading of article 17 (Crimes against humanity).

18. Mr. TOMUSCHAT questioned whether there was really any difference between physical integrity and health. Would it not be possible to drop the reference to one of the two from subparagraph (j)?

19. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) explained that the Drafting Committee had worked on the basis of the texts of instruments in force.

20. Mr. LUKASHUK said that he supported the text of subparagraph (j), but suggested that the reference to human rights, proposed by Mr. Bowett (2443rd meeting), might be added to it.

21. Mr. FOMBA said that he had no objection to subparagraph (j) as proposed. The terms "physical integrity" and "health" did seem to him to duplicate one another, but if the wording was taken from the text of the Additional Protocols to the Geneva Conventions of 12 August 1949, he was not opposed to maintaining it.

22. While not fundamentally against Mr. Bowett's suggestion for the inclusion of a reference to human rights in the subparagraph, he wondered whether it was justified; the human rights dimension seemed to be implicitly contained in the word "inhumane".

23. Mr. GÜNEY said that, in the light of the explanation given by the Chairman of the Drafting Committee, he was prepared to accept subparagraph (j) in its current form.

24. Mr. YAMADA said that he wished to formulate the same reservations as Mr. Mikulka. While having no fundamental objection to making rape and other sexual abuse the subject of a separate subparagraph, he would point out that the solution was not without consequences for the remainder of the text. In drafting the original text of subparagraph (i), the Drafting Committee had based itself on the principle that there was a link between acts damaging to human dignity and rape or other sexual abuse. That link was to be found in subparagraphs (d) and (f) of article 18, where rape was listed among "outrages upon personal dignity". That wording was directly inspired by the Additional Protocols to the Geneva Conventions of 12 August 1949.

25. Now that the reference to sexual abuse had been deleted from subparagraph (j), it would be logical also to delete the reference to "human dignity". However, he warned the members of the Commission against the temptation of doing drafting work in plenary, as that was always liable to have repercussions on other articles.

26. Mr. PAMBOU-TCHIVOUNDA said that it would have been better to replace the words "other forms" in subparagraph (i) by the words "all forms". Referring to subparagraph (j), he said, first, that the adjective "severe" before the words "bodily harm" could be dispensed with because the acts in question were already qualified as acts "which severely damage physical or mental integrity". Secondly, he proposed that the concepts of mental integrity and health should be dropped, so that the text would read: "which severely damage integrity or human dignity, such as".

27. The CHAIRMAN recalled that the text was taken from the Additional Protocols to the Geneva Conventions of 12 August 1949 and only a major reason could justify changing it.

28. Mr. PAMBOU-TCHIVOUNDA said that the Additional Protocols to the Geneva Conventions of 12 August 1949 related to the law of war and that the context was therefore different.

29. Mr. THIAM (Special Rapporteur) said that, in practice, as demonstrated by case law, a war crime could also be a crime against humanity. The Commission should avoid drawing distinctions that were too subtle.

30. Mr. ROSENSTOCK pointed out that the wording of subparagraph (j) was not to be found in either of the Protocols and was, in particular, substantially different from that of paragraphs 1 and 4 of article 11 of Protocol I. He therefore proposed that the Commission should adopt wording closer to those provisions of Protocol I or of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, if the other members of the Commission thought that the expression "physical or mental integrity" had some meaning, he would not insist on having subparagraph (j) amended.

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he saw no great difference between the wording of subparagraph (j)—which seemed sufficiently clear—and the words "the physical or mental health and integrity of persons" which appeared in article 11 of Protocol I. In his view, revising the text would be justified only if there were a real problem.

32. Mr. ROBINSON said that he had three comments to make. First, he would be in favour of dropping the words "such as mutilation and severe bodily harm". Secondly, he was not in favour of adding a reference to fundamental human rights. Lastly, he would prefer it if
in subparagraph (j) the Commission reproduced literally the wording of article 11 of Protocol I as quoted by the Chairman of the Drafting Committee and, possibly, omitted the reference to “human dignity”.

33. With regard to the first of his comments, he explained that the deletion of the reference ejusdem generis to mutilation and severe bodily harm was justified because such acts were exclusively physical in nature, whereas the text also covered acts of a different nature in that it referred to damage to mental integrity and health. In order to get round that illogicality, the Commission therefore either to delete the last part of the sentence or add to it some examples of acts not exclusively physical in nature.

34. Mr. HE wished to place on record that he supported the insertion of a subparagraph relating specifically to rape, in conformity with the statutes of the International Tribunal for the Former Yugoslavia and of the International Tribunal for Rwanda, as well as with the development of the law on the protection of women. With regard to subparagraph (j), he thought that the wording was clear and that there was no need to add an express reference to the violation of fundamental human rights, the idea being already contained in the text.

35. Mr. KABATSI said that, while he was prepared to accept the wording of subparagraph (j) as a whole, he did not consider it necessary to single out certain acts such as mutilation or severe bodily harm. He also noted that, although the practice of reproducing the wording of existing conventions was undoubtedly a very valid one, it was not necessarily appropriate in all cases. In the context of the protection of human rights conventions, whose wording could stand a certain degree of generality, and a code of crimes, which required greater precision. The term “integrity” and even the term “dignity” were thus too vague. On the other hand, an expression such as “physical and mental health”, which was more precise, would be more readily grasped by both prosecutors and judges.

36. Mr. TOMUSCHAT said that he was against the idea of deleting the words “such as mutilation and severe bodily harm” because such a deletion would make the text too vague. Generally speaking, he agreed with the Chairman of the Drafting Committee that it was inadvisable to amend a text which was based on international instruments in force, themselves backed up by rules of customary law, and which was the result of lengthy efforts in the Drafting Committee.

37. Mr. YANKOV said that he was prepared to withdraw the proposal he had made at the preceding meeting for the deletion of the last part of the sentence and to accept the view of the majority.

38. Mr. SZEKELY noted that the terms used in subparagraph (j) had an antecedent and that, for that reason, it was difficult to change them without a precise explanation. With regard to the expression “physical and mental integrity”, he shared Mr. Rosenstock’s view and thought that the term “health” would be more appropriate. However, bearing in mind the wording used in existing international instruments, the Commission might confine itself to reversing the order of the words, so that health would come first and integrity second. As to the reference to “human dignity”, its deletion would not seem to be justified.

39. Mr. Sreenivasa Rao said that some of the acts which the Commission wished to mention in the draft Code undoubtedly had their place in the context of the promotion of human rights and the improvement of the well-being of mankind, but did not, perhaps, lend themselves to indictment or criminal prosecution. In his view, it was essential that all crimes covered by the text should meet the criteria of generality and gravity required by the Code and that, furthermore, they should be such as to give rise to the widest condemnation on the part of the international community. The Commission should therefore not refer to acts or activities whose character was localized, peripheral or even transitory.

40. Mr. YAMADA said he agreed with Mr. Tomuschat that the enumeration of a certain number of examples at the end of the text underscored the gravity of the crimes referred to in subparagraph (j) and should be maintained. The illogicality pointed out by Mr. Robinson had not existed in the original text prepared by the Drafting Committee and was the result of the proposal, made in plenary, for a separate subparagraph relating to rape.

41. Mr. de SARAM took the view that the purpose of article 17 was to cover crimes so massive as to come under the chapeau of the article, namely, crimes against humanity committed in a systematic manner or on a large scale.

42. Mr. MIKULKA said he regretted that, in amending the text proposed by the Drafting Committee, the Commission had, as pointed out by Mr. Robinson and Mr. Yamada, helped to make it unbalanced.

43. Mr. THIAM (Special Rapporteur) said that no text could be entirely satisfactory, especially in the area of law under consideration. At the preceding meeting, one of the members had criticized the expression “other inhumane acts” on the grounds that, in criminal law, an enumeration was necessary. Reference to the corresponding provisions of the statutes of the International Tribunal for the Former Yugoslavia and of the International Tribunal for Rwanda had shown that they spoke only of “other inhumane acts”. The Drafting Committee had therefore made an effort in relation to those existing instruments by trying to give the concept of “other inhumane acts” content by means of an illustrative and non-exhaustive enumeration. That did not mean that the expression itself was insufficient; the Drafting Committee had merely tried to explain it further. He would have no particular objection if the Commission deleted the enumeration, but to do so without a valid reason would amount to condemning the Drafting Committee’s efforts. He therefore proposed that the Commission should quite simply retain the proposed text.

44. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt subparagraph (j).

Subparagraph (j) was adopted.
45. The CHAIRMAN recalled that, before completing its consideration of article 17, the Commission still had to discuss subparagraph (f), which was under review in the Drafting Committee.

The meeting rose at 11.20 a.m.

2445th MEETING

Thursday, 20 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. Ginéy, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the new version of article 17, subparagraph (f), which read:

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

3. At the request of the Commission, the Drafting Committee had held two more meetings to see how subparagraph (f) could be formulated more precisely. In the light of the views expressed in the Commission in plenary, the Committee had concluded that the subparagraph should incorporate three elements. First, it should focus on “institutionalized discrimination”, a phrase inspired by the International Convention on the Suppression and Punishment of the Crime of Apartheid. However, the grounds for discrimination should not be limited to “race”, but should also include ethnic and religious grounds, as did the original text proposed by the Drafting Committee and the Chairman’s suggestion (2443rd meeting). Secondly, institutionalized discrimination, under that paragraph, would have to involve violations of fundamental human rights and freedoms. Thirdly, it must result in the serious disadvantaging of a part of the population. The Drafting Committee recommended the adoption of article 17, subparagraph (f), in its revised form.

4. Mr. VILLAGRAN KRAMER congratulated the Drafting Committee on producing a new text based on the Chairman’s suggestion. He had one question to put before deciding whether he would be able to support the new text. In the Spanish-speaking world, “institutionalization” occurred by virtue of laws or legal provisions. In referring to “institutionalized discrimination”, was the Drafting Committee envisaging de jure discrimination, or simply de facto discrimination?

5. Mr. THIAM (Special Rapporteur) said that in the discussion of the Chairman’s suggestion it had been agreed that, for reasons of concision, some of its elements would be consigned to the commentary. In that regard, he drew attention to the fact that, although the vague term “disadvantaging” had been the one eventually adopted, it had also been clearly understood that it meant the domination and oppression of one part of the population by another.

6. Mr. FOMBA said that, although he did not oppose the consensus in the Drafting Committee with regard to subparagraph (f), he was not entirely happy with the wording. The “racial” and “ethnic” grounds posed no problem, but he experienced some difficulty with the reference to discrimination on “religious” grounds. Although a Muslim, he was not sufficiently well versed in the political and social philosophy of Islam to be able objectively to appraise the positive or negative character of certain distinctions drawn in the Koran between, for example, the rights of men and of women. Religion, moreover, was not a major issue in his region, unlike some other parts of the world. That being said, contemporary political history showed that religion always involved an inherent risk of discrimination.