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Summary record of the 2442nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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had been reached that to provide such a definition did not form part of the Commission's task.

63. As for the decision to maintain the formula "as leader or organizer", it was important that article 15 should make it quite clear that only those in a policy-making or command position could be held responsible for a crime of aggression. If responsibility were extended to everyone involved in the act, the provision would become so diluted as to lose all meaning. It was true that the Charter of the Nürnberg Tribunal did refer to acts of complicity, but it should be remembered that all the individuals on trial at Nürnberg had been major war criminals and that no accomplices, even high-ranking ones, had been charged at that stage. He recommended that draft article 15 should be adopted as it stood.

64. Mr. EIRIKSSON said that, as a loyal member of the Drafting Committee, he associated himself with that recommendation. He did not think it was appropriate to amend article 2 and it was pointless to set up a working group to review it. Article 15 restricted responsibility for a crime of aggression to the category of leaders or organizers, but listed a wide range of activities that would make such individuals responsible for the crime. Any change in article 2, paragraph 3, could have the opposite effect, namely increasing the categories of individuals but reducing the number of activities. Such a course would be undesirable. As to the analyses of article 2, paragraph 3, by Messrs. Mahiou, Calero Rodrigues and Pellet, his own opinion was that the provisions in question could be divided into four categories. Subparagraph (*a*) would already be included in article 15. The second category could be said to include subparagraphs (*f*) and (*g*), in respect of which he agreed with Mr. Mahiou but differed from Mr. Pellet. For reasons of policy they should not apply to the crime of aggression. The third category, consisting of subparagraphs (*d*) and (*e*), namely abetting and participating, would, if applied to the crime of aggression, expand too far the definition of an individual responsible for the crime. Lastly, the provisions in subparagraphs (*b*) and (*c*) which really related to orders of a superior, would seem to be covered by the definition provided in article 15.

65. Mr. ROSENSTOCK said that he was in complete agreement with Mr. Tomuschat and Mr. Eiriksson and especially with Mr. Yamada's analysis and hence the conclusion that article 2, paragraph 2, should not be reopened for discussion. It was regrettable that some other members had chosen to use the present debate as an opportunity to advertise the appalling material contained in article 19 of part one of the draft on State responsibility. While recognizing that in some situations it might be necessary to go back to a decision already adopted, which might be the case with article 12, it would be imprudent to revert to article 2, paragraph 2, which the Commission had adopted in the full knowledge of what it was doing.

66. The CHAIRMAN pointed out that the Commission had decided to leave article 2, paragraph 2, in abeyance pending the discussion on article 15.

67. Mr. LUKASHUK said that, desirable as it might be to provide a definition of aggression, the Commission should recall that not only the United Nations but also many other academic and political organs had tried in vain to grapple with the problem. A decision to prepare such a definition would involve postponing the Commission's work on the draft Code, possibly for many years. He did not think that such a possibility should be envisaged, and again urged the Commission to adopt article 15 as formulated by the Drafting Committee.

68. Mr. ROBINSON said that an individual who actively participated in or ordered the planning, preparation, initiation or waging of aggression should be held responsible for a crime of aggression whether or not he did so as a leader or organizer.

69. The CHAIRMAN, further to a suggestion by Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), said that members of the Commission interested in further considering article 2, paragraph 2, could perhaps meet informally with a view to formulating suggestions for consideration at the next meeting.

70. Mr. EIRIKSSON said that, if a small group of members wanted to try to convince the majority to change its mind, it was of course free to do so, but not under the auspices of the Commission.

The meeting rose at 1.10 p.m.

2442nd MEETING

Friday, 14 June 1996, at 10.35 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, 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. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (*concluded*)*

[Agenda item 1]

1. The CHAIRMAN informed the Commission that the Enlarged Bureau had met immediately prior to the plenary meeting to decide on the programme of work for

* Resumed from the 2434th meeting.

the three-week period from Monday, 17 June to Friday, 5 July. He read out the programme proposed by the Enlarged Bureau, which had also been distributed in table form to all members of the Commission. If he heard no objections, he would take it that the Commission wished to adopt the proposed programme.

It was so decided.

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 15 (Crime of aggression) (*concluded*)

2. Mr. THIAM (Special Rapporteur) said that, in his view, it would be wiser to conclude article 15 first instead of discussing it simultaneously with article 2. He noted that a clear majority was emerging in favour of article 15 as proposed by the Drafting Committee. Some members had expressed reservations, but would not oppose the adoption of the text and only one member continued to call for a definition of the crime of aggression. The problem with the definition of aggression was not new. At first, the Commission had intended to use the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX), some members of the Commission being in favour of adopting it in full, while others preferred to leave out the provisions relating to the Security Council's jurisdiction. Consequently, he had used only article 2 of the Definition of Aggression, which defined aggression in very general terms. As a number of members had been of the opinion that even that very general definition had no place in the draft Code of Crimes against the Peace and Security of Mankind because it made reference to the use of force by a State, whereas the Code had to do with individual responsibility, he had proposed not to define aggression and it was with that in mind that the draft article proposed by the Drafting Committee had been drawn up. In his view, the Commission should retain the formulation proposed by the Drafting Committee and reach agreement on article 15 before taking up article 2.

3. The CHAIRMAN pointed out that article 2, paragraph 2, made reference to article 15, thereby justifying a discussion on both articles. At the adoption stage, however, he agreed that they must be separated.

4. Mr. BENNOUNA said that, on the whole, he endorsed the approach adopted by the Drafting Committee, it being understood that the custom and practice of the United Nations would give substance to the text. However, it would be useful to explain in detail the expression "actively participates" in the commentary, perhaps by citing practice.

5. The CHAIRMAN, speaking in his capacity as a member of the Commission, referred to the case of the mercenaries who had attacked Benin in 1977, concerning which the Security Council, in its resolution 405 (1977) of 14 April 1977, had used the word "aggression" without designating any State. Given that under article 15, aggression must be committed by a State, the problem arose whether mercenaries who had perpetrated aggression under the same circumstances could also be prosecuted under the Code.

6. Mr. THIAM (Special Rapporteur) said that the problem raised by the Chairman was very pertinent. The Commission had a tendency to adopt the terms of existing instruments, in the current instance from the Definition of Aggression, which spoke of aggression by one State against another. For his part, he remained convinced that leaders used the State apparatus to commit an aggression, which gave rise to two types of responsibility: an international responsibility of the State and an individual criminal responsibility of the leaders. Perhaps it should be stated in the commentary that aggression was a crime committed by the leaders of the State, and not by the State itself.

7. Mr. ROSENSTOCK said that he was against pursuing the discussion because all members of the Commission agreed that aggression was committed by a State and that the crime of aggression was committed by individuals who organized and ordered the aggression.

8. Mr. BARBOZA said that, inasmuch as part one of the draft articles on State responsibility[4] postulated that certain acts could be attributed to a State, the problem of mercenaries raised by the Chairman could be solved only as one of evidence as to the nature of those who had actually ordered the aggression. Since that approach might well be very difficult, however, the text should be left as it stood.

9. Mr. PELLET said that aggression was an internationally wrongful act by a State and a crime within the meaning of the law of international responsibility. But the current debate had been closed by article 3 of part one of the draft on State responsibility. Concerning the text of article 15, as Security Council resolution 405 (1977) spoke of an "act of armed aggression" without designating any State, the problem raised by the Chairman was a real one and he suggested that it should be solved by deleting the restriction introduced by the words "committed by a State" and leaving it, as suggested, to practice and custom to define aggression.

[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] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

10. Mr. EIRIKSSON said he was of the view that the text should remain as it stood.

11. Mr. KABATSI said that he found Mr. Pellet's proposal interesting because it covered situations such as the one referred to by the Chairman. However, he thought that it would be wiser not to reopen the discussion at such a late stage and to retain the text as it stood.

12. Mr. TOMUSCHAT said that he was also in favour of keeping the text unchanged. In his opinion, mercenaries who attacked a country from outside were simple criminals. They had no right to any legal protection and were covered by criminal law, by virtue of which they could be prosecuted for high treason or for many other reasons. There was no reason to devote special provisions to them in the Code. In actual fact, the point was to state expressly that starting a war, which in the past had been a sovereign decision of the State, was henceforth unlawful.

13. Mr. BENNOUNA noted that Security Council resolution 405 (1977) was the result of a political compromise within a political body. No State was named because powerful States, some of them with the right of veto, had wanted it that way. It was common practice in the United Nations not to designate States by name and the Commission could not derive rules therefrom, especially if that meant diluting the concept of aggression to the point where it was devoid of all substance. As Mr. Tomuschat had said, either mercenaries were simple criminals or they acted with the complicity or on the orders of a State. He had been in favour of including the notion of mercenary in the draft Code, but the Commission had decided otherwise and the problem should therefore not be reintroduced through article 15.

14. Mr. LUKASHUK said that he had two points to make. First, Mr. Pellet's proposal would alter the very concept of aggression. The subject of an aggression, like its target, could only be a State; that was a particularity relating to the concept of aggression. Secondly, that proposal would change the meaning of article 15 because, in order to determine the existence of a crime, the crime would already have had to be perpetrated by the State. The deletion of that condition would alter the very meaning of article 15 insofar as the planning or preparation of aggression would already be considered a crime in itself, regardless of whether the crime had been perpetrated or not. Mr. Pellet's proposal would thus modify two very important structures in an article which was the result of many years of work within the Commission. It would therefore be better for the Commission to adopt article 15 as it stood.

15. Mr. de SARAM, speaking as a member of the Drafting Committee, admitted that the question of transboundary attacks by non-governmental groups had not been discussed; perhaps it might be in the future. However, it would be a mistake to view those transboundary crimes, attacks or acts of violence perpetrated by non-governmental troops as being covered by ordinary criminal law.

16. Mr. FOMBA said that he fully understood the doubts on the expression "aggression committed by a State" expressed by Mr. Mahiou, who had wondered whether the scope of article 15 could not be enlarged to include individuals other than those currently covered, as well as the suggestion by Mr. Pellet in that regard. He was, however, prepared to endorse the wise solution advocated by Mr. Bennouna of retaining the text as it stood.

17. Mr. PAMBOU-TCHIVOUNDA said that, for want of anything better, the Commission should confine itself to the text before it. But he would like to make a comment, which might be considered a reservation, on the very nature and identity of the guilty party. To speak of an individual as leader or organizer was to go straight to the heart of the constitutional system of a State. In view of the wide variety of constitutional political systems and having regard, in particular, to public opinion, he wondered whether that description was apt to make the text suitable for use.

18. Mr. Sreenivasa RAO said that, no matter what, a text could never provide for all the ramifications of a particular situation. That was perhaps human and, in the event, having regard to the time limitation, quite acceptable. So far as the question of mercenaries was concerned, there was a sufficient body of law, doctrine and political and State opinion to serve as a guide.

19. Mr. GÜNEY said he agreed that article 15 should stand as drafted. The words "actively participates", however, introduced a subjective element that could give rise to different interpretations of a practical nature and even create a degree of confusion in future. It would therefore be advisable for the Special Rapporteur to clarify those words in the commentary and, if possible, even to give specific examples.

20. Mr. ROBINSON said that the tradition of respecting consensus in the Commission must not prevent it from examining proposals that warranted consideration such as the proposal submitted by Mr. Pellet. Mercenaries were capable of taking action that could threaten the territorial integrity and political independence of States and such action was therefore not to be confused with mere criminal activity. It was in that regard that he considered the proposal to omit the words "committed by a State" to be interesting and attractive because the omission of those words would not necessarily be tantamount to saying that aggression could be committed by individuals. State practice and customary law would then influence the courts that would be acting on the basis of article 15. If, however, the consensus in the Commission was in favour of retaining the article as drafted, he would go along with it.

21. Mr. SZEKELY said that, if the Commission deleted the words "committed by a State" from article 15, it would have to provide a definition of aggression in the text, as there would no longer be any clear point of reference. But, if it attempted to draw up a new definition of aggression covering not only States, but also mercenaries and other groups, it would never manage to pinpoint even the main elements of aggression. The only basis for the Commission was the definition of aggression perpetrated by a State, as provided for under article 15, which was applicable to individuals who could be regarded as accomplices. Mr. Pellet's proposed amendment would lead to problems which the Commission

would be unable to solve. The idea of an organizer, of a person who provoked an aggression, should therefore be retained in the article, which the Commission should adopt without change.

22. The CHAIRMAN said that the discussion had highlighted the many facets of the crime of aggression and also the difficulty the Commission had had in defining it. The definition at which it had arrived was perhaps not the best, but, for the time being, it was the least it could propose.

23. Mr. VILLAGRÁN KRAMER said that he was unable to join in the adoption of article 15, but would not seek a vote.

24. The CHAIRMAN, taking note of the reservations expressed by Mr. Villagrán Kramer, said that if he heard no objection, he would take it that the Commission wished to adopt article 15 as proposed by the Drafting Committee.

Article 15 was adopted.

ARTICLE 16 (Genocide)

25. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 16 had been provisionally adopted by the Drafting Committee at the forty-seventh session as article 19,[5] when it had reproduced articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide. At the current session, the Drafting Committee had made adjustments to the article to take account of the expanded scope of article 2 of the Code on individual responsibility. In the first place, paragraph 1, which had read: "An individual who commits an act of genocide shall be punished under the present Code", had been deleted because the issue was now covered by paragraph 1 of article 2. Similarly, paragraph 3, which identified acts entailing individual criminal responsibility such as conspiracy, incitement, attempt and complicity, had been deleted in view of the content of paragraph 3 of article 2. The text before the Commission corresponded to article II of the Convention. The Drafting Committee recommended the adoption of article 16 by the Commission.

26. Mr. IDRIS said that he would like to make four observations. First, following the debate on article 15 relating to the crime of aggression, he would also like to avoid in article 16 any strict or inflexible definition of the crime of genocide in the draft Code. He therefore proposed that the word "means" should be replaced by the word "includes". Secondly, in the main clause of the article, he proposed that the word "cultural" should be added after the word "racial". Thirdly, in subparagraph (*c*), he would like the words "calculated to" to be replaced by the words "intended to". Fourthly, article 16 was the only article in part two which did not include the word "crime". He therefore proposed that the title of the article should read "Crime of genocide" and that, as a consequential change, the word "acts" in the main clause of the article should be replaced by the word "crimes".

27. In making those proposals, he was fully aware that the article was taken from article II of the Convention on the Prevention and Punishment of the Crime of Genocide. In his view, however, the provisions of the Convention must be adapted to the draft Code.

28. Mr. THIAM (Special Rapporteur), replying to Mr. Idris' relevant and very discerning remarks, said that he could agree to his proposal that the title of the article should read: "Crime of genocide". He understood, however, that the authors of the Convention on the Prevention and Punishment of the Crime of Genocide had decided against the idea of "cultural genocide". It would therefore be better not to use it.

29. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), supporting the Special Rapporteur's last remark, read out paragraph (4) of the commentary to article 19 (Genocide) as adopted on first reading, in which it was explained that only acts of "physical genocide" and "biological genocide" were covered in the Convention on the Prevention and Punishment of the Crime of Genocide.[6]

30. Mr. TOMUSCHAT said that, while he found Mr. Idris' proposals very stimulating, it would be dangerous to change a set of established legal norms by enlarging the notion of "genocide". There was, however, no reason why the title of the draft article should not be amended as proposed. It would then be logical for the text itself to open with the words "The crime of genocide means". Those changes would not change the substance of the provision in any way.

31. Mr. BOWETT said he understood that there was no question of changing the text, which was taken from article II of the Convention on the Prevention and Punishment of the Crime of Genocide. He therefore wondered whether it was the Drafting Committee's view that the expression "racial group" embraced "tribal group". If so, that should be stated in the commentary.

32. Mr. THIAM (Special Rapporteur), replying to Mr. Bowett, said that, in his view, it was not excluded that tribes might wage a war for racial reasons or that one tribe might want to destroy another. He wondered, however, whether it was advisable to amend a provision in that way when it had already been adopted and which appeared in a convention. In his view, the expression "ethnic group" did embrace the concept of "tribal group" and that could be made clear in the commentary.

33. Mr. BOWETT said that, if he had understood the Special Rapporteur's reply, the commentary would include a statement that the draft article also covered the destruction of a tribal group.

34. Mr. YANKOV said that he was particularly pleased to support the proposal for the amendment of the title of the draft article, since the words "crime of genocide" appeared in the title of the Convention on the Prevention and Punishment of the Crime of Genocide and the wording of the article would thus be more complete and consistent.

[5] See 2437th meeting, footnote 4.

[6] *Yearbook . . . 1991*, vol. II (Part Two), p. 102.

35. Mr. FOMBA said that the terminology of international law was in general fairly vague as a direct consequence of the heterogeneous nature of international society.

36. With regard to the second proposal by Mr. Idris, he thought that it would be difficult to ascertain, for example, the degree of autonomy of a cultural group vis-à-vis the various categories of groups referred to. He himself had no solution to that problem, nor did he have any clearly defined position in that regard. He also noted that in the context of a possible revision of the Convention on the Prevention and Punishment of the Crime of Genocide, the problem arose of the definition of cultural genocide and political genocide. In the case of Rwanda, for example, the massacres of so-called "moderate" Hutus had been described by some as "genocide". However, given that they had been killed not because they were Hutus, but because they were political opponents, it was difficult to speak of "genocide". It was in that context that the problem of defining "political genocide" might arise. Those were questions of substance that called for a thorough debate.

37. He supported the proposed amendment to the title of the draft article. Mr. Bowett's question about the interpretation of the term "racial group" was also a substantive one: what exactly differentiated the expression "tribal group" from the other expressions used in the draft article, such as "ethnic group" or "racial group"?

38. For all those reasons, he was inclined to retain the draft article in the form proposed by the Drafting Committee.

39. Mr. GÜNEY said he understood and shared the concerns of those members of the Commission who felt that it was dangerous to reconsider concepts on which agreement had already been reached. He noted, however, that the Commission was empowered by its statute to promote not only the codification of international law, but also its progressive development. He thought that, in order to address the concern expressed by Mr. Idris, it would be sufficient to use the words "crime of genocide" both in the title and in the body of the draft article.

40. Mr. PAMBOU-TCHIVOUNDA said that he supported the proposal that the title of the draft article should be amended to read: "Crime of genocide". Furthermore, he could not but note that the Commission was a prisoner of its own methods of work: to say that it must not go back on the terminology used in a given instrument actually had the unfortunate effect of limiting its work of codification and, in practice, of compelling the codifiers to accept even things that might seem bizarre. It was a fact that the expressions used in the draft article under review were charged with subjective connotations. For example, what was to be understood by the expression "intent to destroy"? Must that intent be declared? How was it to be substantiated? Similarly, how was one to measure the seriousness of the harm and with reference to what yardstick? All those questions must be dealt with explicitly in the commentary if there was no other way of dealing with them.

41. Referring to the expression "any of the following acts", he wondered about the level of apprehension and characterization of the various acts listed in the draft article, since it meant that any one act triggered the same type of treatment as any other of those acts. Those acts were interdependent. But what if they were committed in a concerted fashion? Were the consequences the same in the case of the killing of members of a national, ethnic, racial or religious group, as such, and in the case of imposition of measures intended to prevent births within the group, regardless of whether the measures imposed were administrative measures, surgical interventions, the removal of organs, or other measures? All those problems would arise when the future instrument came to be applied.

42. The CHAIRMAN said that, during the consideration of draft article 2 *bis* it had been stressed that the seriousness of the punishment was linked to the character and nature of the crime considered. The solution to the problem of consequences referred to by Mr. Pambou-Tchivounda was thus to be found in that article.

43. Mr. EIRIKSSON said that he remained faithful to the results of the work of the Drafting Committee, of which he had been a member. With regard to the title of the draft article, the Drafting Committee had certainly had good reasons—albeit too subtle, perhaps—for keeping the title it proposed. It should be indicated in the commentary that there were crimes or acts enumerated in the Convention on the Prevention and Punishment of the Crime of Genocide that were not included in the draft article, but that were covered by the Code.

44. Mr. Sreenivasa RAO said he saw no disadvantages to the idea of amending the title of the draft article as proposed. He was satisfied with the explanations given regarding the Drafting Committee's intentions and the incorporation in the commentary of an explanation of the cultural aspects of the acts covered.

45. As for the proposal by Mr. Idris that, in the *chapeau*, the word "means" should be replaced by the word "includes", that would have the unfortunate effect of opening up the way for various interpretations, whereas what was needed was precision.

46. On a different matter, it was indisputable that the draft article should cover tribal groups. As to the terminology to be used for that purpose, it was necessary to adopt a flexible attitude and to avoid any terminology that might give rise to different interpretations, particularly as the question was the subject of intense debate in other bodies and no consensus had been reached. It would therefore be best to retain the text proposed by the Drafting Committee in its present form and it would suffice to indicate in the commentary that the article also covered acts of genocide committed against groups other than those specifically mentioned therein, such as tribal groups.

47. Mr. THIAM (Special Rapporteur), replying to a comment by Mr. Pambou-Tchivounda, said that it was for the courts to decide on intent and gravity. He did not see what could be added to article 16 to make it more explicit.

48. Mr. PAMBOU-TCHIVOUNDA, referring to the *chapeau* of the draft article, said that, in the present case,

it was the Commission that was defining acts of genocide. He proposed that the expression "with intent to" should be replaced by the expression "with the declared aim of". Intent must be deduced from declarations. In the absence of a declaration, how was responsibility for a crime of genocide to be imputed?

49. The CHAIRMAN said that the expression "with intent to" had given rise to no problems either during the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide or when States had submitted their observations. He reiterated that the Commission could not revise the Convention on that point.

50. He said that if he heard no objections, he would take it that the Commission wished to replace the title of the draft article by the title "Crime of genocide".

It was so agreed.

51. The CHAIRMAN suggested that logically that amendment required a consequential amendment of the *chapeau*, to read: "The crime of genocide means". If he heard no objection, he would take it that the Commission wished to adopt article 16 proposed by the Drafting Committee with that amendment.

Article 16, as amended, was adopted.

ARTICLE 17 (Crimes against humanity)

52. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), introducing article 17, said that the corresponding article as adopted on first reading (art. 21) had been entitled "Systematic or mass violations of human rights". The Drafting Committee, heeding the advice given by the Special Rapporteur in his thirteenth report,[7] had chosen to entitle the new article "Crimes against humanity", an established term used in several legal instruments adopted since the Second World War. The article differed in its structure from the one adopted on first reading because the issues of individual criminal responsibility and punishment were now dealt with in article 2.

53. The article as redrafted listed nine acts which, under the conditions spelled out in the *chapeau*, constituted crimes against humanity. The two requirements previously included, namely, that such acts must be committed "in a systematic manner or on a mass scale", had been retained, except that the adjective "mass" had been replaced by the adjective "large", which covered a greater number of situations. The Drafting Committee had added a third criterion, namely, that the action must be "instigated or directed by a Government or by any organization or group". It was thus expressly recognized that private individuals could be considered responsible for crimes against humanity only when their acts inserted themselves in the context of those three criteria. Acts committed by terrorists in such circumstances would thus qualify as crimes against humanity.

54. The five crimes listed in the article adopted on first reading had been retained. With regard to the French equivalent of the word "murder", which was also to be found in the article on war crimes, the Drafting Committee had considered it preferable to use the word *meurtre* in those cases rather than the word *assassinat* used in the French version of the texts on which the article was based. It would be explained in the commentary that the term *meurtre* was to be understood as meaning *homicide intentionnel*. The simpler term "enslavement", found in many legal instruments, had been used to refer to the crime of "establishing or maintaining over persons a status of slavery, servitude or forced labour", which had been included in the article adopted on first reading. As for the crime of persecution, the new text followed the texts of article 5, subparagraph (*h*), of the statute of the International Tribunal for the Former Yugoslavia[8] and article 3, subparagraph (*h*), of the statute of the International Tribunal for Rwanda.[9] In addition to persecution on political, racial or religious grounds, the texts now encompassed persecution on ethnic grounds, but they no longer included persecution on social or cultural grounds. It should also be noted that the crime of deportation or forcible transfer of population in subparagraph (*g*) was now qualified by the term "arbitrary" so as to exclude situations where such acts were committed for legitimate reasons, such as public safety and health, or for other reasons compatible with international law and human rights. That point would be explained in the commentary.

55. Four additional crimes had been included in article 17. First, the crime of extermination, which was to be found in a number of legal instruments such as the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, covered acts committed against a group of individuals, whereas murder, even when committed on a large scale or on a systematic basis, was nonetheless directed against a single individual. The criminal intent (*mens rea*) required for the two offences was therefore different. In addition, the act committed in order to carry out the offence of extermination involved an element of mass destruction which was not required for murder. In that regard, extermination was closely related to the crime of genocide in that both crimes were directed against a group of victims. However, the crime of extermination would apply to situations which would not be covered by the crime of genocide and in which criminal intent played an essential role. For example, extermination included killing members of a group which was not protected by the Convention on the Prevention and Punishment of the Crime of Genocide or of a group of individuals who did not share any common characteristics. It further applied to situations in which some members of a group were killed while others were spared.

56. A lengthy discussion had taken place in the Drafting Committee with regard to the crime listed in subparagraph (*f*). He stressed that the Committee was presenting the text of that subparagraph with very strong reservations on the part of some of its members. Some

[7] See 2441st meeting, footnote 9.

[8] See 2437th meeting, footnote 6.

[9] Ibid., footnote 7.

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 designation. Others had expressed doubts and had felt that, if institutionalized discrimination were nevertheless to be included, it should not be limited to discrimination on racial grounds. In particular, some members had taken the view that the subparagraph should also include gender among the grounds for institutionalized discrimination because they considered that serious bodily harm and injury to very substantial numbers of women amounted to institutionalized discrimination on the ground of gender. Other members of the Committee had not been certain that such practices, abhorrent as they might be, were crimes against the peace and security of mankind. It had been agreed that gender should not be specifically mentioned in the text of the subparagraph, but that it should be stated in the commentary that such practices against women, when conducted in a systematic manner or on a large scale, would amount to a crime against humanity in accordance with subparagraph (*f*).

57. With regard to forced disappearance of persons dealt with in subparagraph (*h*), the Drafting Committee had found it appropriate to mention that crime expressly in the article in view of the fact of the rather wide commission of the crime and taking into account the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly in resolution 47/133 and the Inter-American Convention on Forced Disappearances of Persons. The term "forced disappearance of persons" would be explained in the commentary. The explanation would be useful because the term might look rather unusual when translated into some languages, such as French.

58. Lastly, with regard to subparagraph (*i*), the Drafting Committee had decided, in accordance with the suggestion put forward by the Special Rapporteur in his thirteenth report, that "other inhumane acts" should be included in the definition of crimes against humanity. It had, however, decided to qualify the expression by the phrase "which severely damage physical or mental integrity, health or human dignity" and to give three examples of "other inhumane acts", namely, mutilation, severe bodily harm and sexual abuse, which, as would be noted in the commentary, were similar in nature to the acts mentioned in subparagraphs (*a*) to (*h*).

59. The Drafting Committee recommended that the Commission should adopt article 17.

60. Mr. ROBINSON said that he understood the reasons for the Drafting Committee's decision to add a third criterion for the definition of crimes against humanity to those already appearing in the text adopted on first reading. But what of acts such as rape that were not "instigated or directed", but only acquiesced, by a Government, an organization or a group? In his view, such acts when committed for political ends could be qualified as crimes against humanity even if they did not meet the proposed criterion. He therefore wondered whether it might not be better to delete the new criterion from the text of the article and incorporate the idea in the commentary, developing it further and, in particular, explaining that the acts in question could be committed not only at the instigation or under the direction of a Government, an organization or a group, but also with its acquiescence, and that those acts had to entail the criminal responsibility of the individual who committed them.

61. He further regretted that the only reference to sexual abuse was to be found in the context of "other inhumane acts" listed in subparagraph (*i*). It should be recalled that sexual abuses, often perpetrated against women, had been uncovered in the course of the events in the former Yugoslavia and in Rwanda and that a number of legal provisions relating to the protection of women's rights had been drafted in the past few years. The Commission could, in his view, contribute to the construction of that edifice by making rape and other forms of sexual abuse a separate category of crimes against humanity. If it did so, the reference to sexual abuse in subparagraph (*i*) would, of course, have to be deleted.

62. For the same reasons, he would have no objection to gender being included among the grounds for institutionalized discrimination listed in subparagraph (*f*). That would be a way of promoting standards for the protection of women and he failed to see how, unless gender were expressly mentioned in the article, it would be possible to explain in the commentary that discrimination based on gender could be qualified as a crime against humanity.

63. Mr. IDRIS said that he shared Mr. Robinson's views on the inclusion of rape and other forms of sexual abuse in the text of the article as a separate category of crimes against humanity and the inclusion of gender among the grounds for institutionalized discrimination in subparagraph (*f*). With regard to that subparagraph, he could not understand the absence of any reference to discrimination based on national origin, although that concept was included in the *chapeau* of article 16. He would appreciate some clarification of that point before taking a decision on the proposed article.

64. Mr. BOWETT said that he was concerned by the expression "in a systematic manner" which appeared in the *chapeau* of article 17. The concept was far too vague and could apply to acts other than crimes against humanity. What was really meant were acts committed in accordance with a preconceived policy. The phrase should therefore be replaced by the words "in pursuit of a preconceived policy", or else it should be explained in the commentary that "in a systematic manner" was to be understood to mean that the act was committed, not in a methodical or efficient manner, but in accordance with a preconceived and deliberate policy. Acquiescence, which Mr. Robinson wanted to see mentioned in the *chapeau*, would be incompatible with that concept because it was subsequent to the act and he could therefore not endorse the proposal.

65. Lastly, he thought that to include gender among the grounds for discrimination listed in subparagraph (*f*) would be going too far. The fact that the compulsory retirement age was 60 years for women and 65 years for men, as was the case in his country, was clearly a form of institutionalized discrimination—in that

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.