

Document:-
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Summary record of the 2418th meeting

Topic:
Other topics

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85. Mr. ARANGIO-RUIZ (Special Rapporteur) said everyone recognized that the interrelationship between article 12 and part three posed a problem. If some members were anxious to submit some articles with commentaries to the General Assembly, the Commission might send the commentaries to articles 11, 13 and 14. He did not think that it would look foolish. With regard to the previous speaker's remark about being held hostage, the real question was: who was being held hostage by whom?

86. Mr. ROSENSTOCK thanked the Special Rapporteur for his assurances that at least articles 11, 13 and 14 could be referred to the General Assembly, because that would be a step forward and would respond to what the Commission had been asked to do. In his view, it should also be possible to submit part three.

87. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was one thing to send the text of part three to the General Assembly with the small changes that had been suggested in the course of the current meeting, and quite another to send the commentary, which inevitably went beyond the individual articles and concerned the whole system and thus again tied in with article 12. As he saw it, the problem would not be resolved before the end of the current session.

88. Mr. EIRIKSSON said that, as a member of the Drafting Committee, he had never seen any such relationship with article 12. He had worked purely on part three. Much of the commentary to part three was purely functional. If the Special Rapporteur agreed, there could be a whole section of the commentary to article 12, in which he could reproduce his views.

89. Mr. PELLET said he wished it to be placed on record that he contested Mr. Rosenstock's interpretation of the adoption of article 12.

The meeting rose at 1.10 p.m.

2418th MEETING

Monday, 17 July 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

Draft report of the Commission on the work of its forty-seventh session

1. The CHAIRMAN suggested that the Commission should consider its draft report to the General Assembly paragraph by paragraph, beginning with chapter II. He invited the members of the Commission to inform the secretariat directly of minor changes that were purely of a drafting nature and to bring up in plenary only those changes that involved substantive issues. The objective was that the Commission should submit the best possible report to its parent body.

CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.509 and Corr.1)

A. Introduction

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

2. Mr. IDRIS said that he considered the words "several Governments" at the end of the paragraph to be an exaggeration, especially as, later on, in paragraph 18, the Commission stated that "the reductions ... relied too heavily on the views expressed by a limited number of Governments".

3. Mr. THIAM (Special Rapporteur), supported by Mr. MAHIOU, proposed that the word "several" should be replaced by "certain".

Paragraph 12, as amended, was adopted.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

5. Mr. RAZAFINDRALAMBO proposed that, in the third sentence, the word "perhaps" should be replaced by the words "at least".

Paragraph 15, as amended, was adopted.

Paragraphs 16 to 25

Paragraphs 16 to 25 were adopted.

Paragraph 26

5. Mr. TOMUSCHAT proposed that the second sentence should be deleted because the statute of an international criminal court could define the competence of the jurisdiction concerned, but could not establish substantive rules.

Paragraph 26, as amended, was adopted.

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

Paragraph 29

6. Mr. YANKOV expressed the view that the words "minimalist" and "maximalist" were not precise enough to be used in a report of the Commission. The reference was in fact to those members who advocated a short list of crimes to be included in the Code and those in favour of a longer list.

7. Mr. MAHIU said the purpose of paragraph 29 was to report on the various points of view expressed during the discussion of the list of crimes. In addition to the lack of precision referred to by Mr. Yankov, the two points of view were not treated equally, since two thirds of the paragraph were devoted to the so-called minimalist approach and only one third to the other. A number of views in favour of something in between the "maximalist" list adopted on first reading and the "minimalist" list in the Special Rapporteur's thirteenth report (A/CN.4/466) had also been expressed during the discussion. The paragraph therefore required more balanced and refined wording.

8. The CHAIRMAN suggested that the secretariat should be asked to redraft paragraph 29 to make it acceptable to everyone and that its consideration should be deferred until a later meeting.

It was so decided.

Paragraph 30

9. Mr. KABATSI said "international State crimes" should not be referred to in the penultimate sentence in order not to give the impression that all "State crimes" were crimes against the peace and security of mankind.

10. Messrs. MAHIU, TOMUSCHAT and KABATSI said that those words could refer only to article 19 of part one of the draft articles on State responsibility and that, if there was a link between the two topics, that should be clearly stated.

11. The CHAIRMAN suggested that the secretariat should check the meaning of those words and, if necessary, express the idea more clearly.

Paragraph 30 was adopted.

Paragraphs 31 and 32

Paragraphs 31 and 32 were adopted.

Paragraph 33

12. Mr. MAHIU proposed that, in the first sentence, the words "members favouring the maximalist approach as well as those favouring the minimalist approach" should be replaced by "members favouring one of the two approaches" because, on that point, they had the same view.

13. Mr. IDRIS, referring to the second sentence, said that it would be better to get straight to the point about the exclusion of certain crimes. In order to avoid using the words "minimize" and "undermine", he proposed the following wording:

"There were various suggestions for addressing these concerns, including: indicating that the exclusion of the crimes was without prejudice to the serious nature or the consequences of those crimes or to the existing practice and doctrine with respect to those crimes."

14. Mr. MAHIU said he was not convinced that the proposed text accurately reflected the idea which was contained in the sentence under consideration and which had been expressed by a number of members of the Commission during the discussion. The fear had been expressed, *inter alia*, that the exclusion of certain crimes from the list might give the impression that those crimes were not serious ones in other contexts or under other instruments. The Commission might be accused of minimizing the serious nature of certain crimes, such as colonialism, by excluding them from the list. It was therefore important to reflect that point of view, as the sentence now did, even if it was not the ideal solution.

15. Mr. THIAM (Special Rapporteur) said that, in fact, certain crimes had been excluded from the list not because of their degree of seriousness, but because of the technical and legal difficulties involved in defining them. Many diverging views had been expressed on the content of the crimes and the way they should be described or defined. That was the case of colonialism, on the definition of which no consensus had ever been reached. Those often insurmountable difficulties, and not the degree of seriousness of the crimes, had led him to shorten the list.

16. The CHAIRMAN suggested that Mr. Mahiou should submit a new wording for that sentence.

17. Mr. MAHIU said that the sentence could be retained as it stood, since it adequately reflected the different points of view expressed and would enable the Commission to deal with possible criticism.

Paragraph 33, as amended, was adopted.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

18. Mr. VARGAS CARREÑO said that the Treaty of Rio (Inter-American Treaty of Reciprocal Assistance), as referred to in the last sentence, had not been adopted by

OAS, but by the member States of that Organization. He therefore requested that the words “adopted by the Organization of American States” should be replaced by the words “adopted by the member States of the Organization of American States”.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 47

Paragraphs 36 to 47 were adopted.

Paragraph 48

19. Mr. TOMUSCHAT said he seemed to remember that the Special Rapporteur’s proposal that threat of aggression should be excluded from the list of crimes had been very widely supported by the members of the Commission and it would therefore be better to replace the words “Several members” by the words “Many members”.

Paragraph 48, as amended, was adopted.

Paragraphs 49 and 50

Paragraphs 49 and 50 were adopted.

Paragraph 51

20. Mr. MAHIU said that several points of view had been expressed on article 18 and that some had perhaps not been fully reflected in paragraph 51. For many members of the Commission, it would be difficult to delete that article, but others had added that, if it was retained, some of its elements might be included in other articles. As a justification for its exclusion, reference had been made to “the lack of a precise definition required for criminal law”. The wording adopted on first reading was admittedly quite broad and vague and he regretted that no attempt had been made to give a more precise definition of colonialism based, for example, on that to be found in General Assembly resolution 1514 (XV), concerning the Declaration on the granting of independence to colonial countries and peoples, or in the annex to Assembly resolution 2625 (XXV) concerning the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, in which colonialism and alien domination were defined much more precisely by reference, *inter alia*, to the Charter and the principles of human rights and international peace and security. The idea of incompatibility with the Charter and the principles of human rights suggested that, if article 18 was not retained, the issue would come up for discussion during the consideration of the article on human rights violations. He would none the less not insist that the text of paragraph 51 should be amended, but he would like his comment to be reflected in the summary record of the meeting.

21. Mr. RAZAFINDRALAMBO said that he had been in favour of retaining the crime of colonial domination and other forms of alien domination in the draft Code

and even of retaining the reference in article 15, paragraph 7,¹ to the national liberation struggle. He therefore fully supported the point of view expressed by Mr. Mahiou.

22. Mr. AL-BAHARNA said that the words “concerns regarding the necessary precision required by criminal law disregarded the historical significance of this crime” were not very clear. He did not see why, out of a concern for precision, account should not be taken of the historical significance of the crime. He would like some explanations on that point.

23. The CHAIRMAN said he thought that what was meant was that the historical significance of the crime should also be taken into consideration. The sentence should therefore be amended so as to remove any ambiguity.

Paragraph 51 was adopted on that understanding.

Paragraphs 52 to 57

Paragraphs 52 to 57 were adopted.

Paragraph 58

24. Mr. VARGAS CARREÑO proposed that the words “the imprecise definition of the crime, even with respect to South Africa” should be deleted because, in his opinion, apartheid had been very clearly defined in South Africa.

25. Mr. ROSENSTOCK said that it was because of the imprecision and generality of the International Convention on the Suppression and Punishment of the Crime of Apartheid that many States were not parties to that instrument. That argument was thus entirely relevant and had, moreover, been put forward during the debate on the question. It should therefore be included in paragraph 58.

26. The CHAIRMAN said that, in so far as the paragraph reflected the views expressed by some members on that question, those words should be retained.

Paragraph 58 was adopted.

Paragraph 59

27. Mr. IDRIS asked in which context it had been stated that purely hypothetical crimes should not be included in the Code. He did not think that apartheid was a purely hypothetical crime.

28. The CHAIRMAN said that the last sentence did not belong in paragraph 59, which reflected the idea that apartheid, in one form or another, should be included in the draft Code and suggested that it therefore should be deleted.

It was so agreed.

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

Paragraph 59, as amended, was adopted.

Paragraphs 60 to 62

Paragraphs 60 to 62 were adopted.

Paragraphs 63 and 64

29. Mr. VARGAS CARREÑO said that a new paragraph should be added between paragraphs 62 and 63 to reflect an important point, namely, whether crimes committed by individuals acting in their personal capacity and not as representatives of a State could in fact be regarded as crimes against humanity. He did not think so. Of course, the difference of opinion on that question was referred to in paragraph 64, but the wording of that paragraph was awkward and not very clear.

30. Mr. THIAM (Special Rapporteur) said that the question whether crimes against humanity could be committed only by agents of the State had been discussed at length by the Commission and it had finally reached the opposite conclusion. Such crimes could, for example, very well be committed by racist associations which were not in any way acting on behalf of a State.

31. Mr. MAHIU said that there were two schools of thought in that regard: some would consider, for example, that crimes committed by the Mafia were not crimes which came under the Code, since they were not committed by agents of the State, while others would, rather, be of the opinion that, regardless of who committed them, such crimes had to be covered by the Code.

32. The CHAIRMAN asked Mr. Vargas Carreño to draft a paragraph reflecting those two points of view.

33. Mr. VARGAS CARREÑO requested the Secretary to the Commission to read out the draft paragraph he had prepared.

34. Ms. DAUCHY (Secretary to the Commission) said that the new paragraph would read:

“With regard to the proposal by the Special Rapporteur that the Code should be taken as covering not only persons who acted as agents or representatives of a State, but also those who committed a crime in an individual capacity, there was no agreement in the Commission. While some members held that the Code should relate only to crimes committed by agents or representatives of the State or by persons acting with the authorization, support or acquiescence of the State, other members stated that they were in favour of including crimes committed by individuals even in the absence of links with the State. By way of example, reference was made to the members of certain non-State organizations or agencies which committed crimes of the kind covered by the article under consideration.”

35. The CHAIRMAN suggested that the proposed new paragraph should be adopted as paragraph 63 of the report. Former paragraph 63 would become paragraph 64 and the existing paragraph 64, which would no longer serve any purpose, would be deleted. If he heard no ob-

jection, he would take it that those suggestions were accepted.

New paragraphs 63 and 64 were adopted.

Paragraph 65

Paragraph 65 was adopted.

Paragraph 66

36. Mr. TOMUSCHAT said that the word “limit” in the second sentence was not a good choice because torture was a narrower and more specific concept than that of cruel, inhuman or degrading treatment or punishment. For logic’s sake, the word “limit” should be replaced by the word “extend” and the other language versions should be brought into line with the English text.

Paragraph 66, as amended, was adopted.

Paragraphs 67 to 70

Paragraphs 67 to 70 were adopted.

Paragraph 71

37. Mr. MAHIU suggested that, in the first line, the word “some” should be replaced by the word “several”, which better reflected the true situation.

38. Mr. THIAM (Special Rapporteur) said that he supported Mr. Mahiou’s proposal.

Paragraph 71, as amended, was adopted.

Paragraph 72

39. Mr. THIAM (Special Rapporteur) proposed that the word “some” in the first line should be replaced by the word “several”.

Paragraph 72, as amended, was adopted.

Paragraphs 73 and 74

Paragraphs 73 and 74 were adopted.

Paragraph 75

40. Mr. TOMUSCHAT said that, in the fourth sentence, the word “and” between the word “Conventions” and the words “Additional Protocol” might create confusion because it might suggest that article 3 common to the Geneva Conventions also appeared in the Additional Protocol. He therefore suggested that the word “and” should be replaced by a comma.

41. Mr. ROSENSTOCK said that the problem could be dealt with even more clearly if the word “and” was replaced by the words “as well as”.

Paragraph 75, as amended, was adopted.

Paragraphs 76 to 78

Paragraphs 76 to 78 were adopted.

Paragraph 79

42. Mr. LUKASHUK said that, even though it was difficult to draft a general definition of terrorism, the report should stress the importance the Commission attached to that problem, which was becoming more and more topical. The Sixth Committee should not be given the impression that the Commission was trying to avoid that question, on which a General Assembly resolution had recently been adopted, and that it did not want to include that crime in the draft Code.

43. The CHAIRMAN suggested that, in order to meet Mr. Lukashuk's concern, the beginning of the first sentence of paragraph 79 might begin with the following words: "While everyone recognized the danger of international terrorism,".

44. Mr. de SARAM said that he supported the opinion expressed by Mr. Lukashuk. In addition to the Chairman's suggestion, he proposed that, at the end of the first sentence, the words "should be included in the Code" should be replaced by the words "could, at this stage, in view of the continuing problems relating to its definition, be included in the Code".

45. The CHAIRMAN said that, if he heard no objection, he would take it that the two amendments were accepted.

Paragraph 79, as amended, was adopted.

Paragraphs 80 to 97

Paragraphs 80 to 97 were adopted.

Paragraph 98

46. Mr. TOMUSCHAT said that the last sentence was too vague in that it did not explain the discrepancy between the statutes of the international tribunals and the national legislation of the former Yugoslavia and Rwanda.

47. The CHAIRMAN said that the intended reference was to the death penalty. That could be explained in the sentence in question.

48. Mr. PAMBOU-TCHIVOUNDA said that the words "national legislation of the former Yugoslavia" were virtually meaningless.

49. Mr. RAZAFINDRALAMBO said that he agreed with that comment. Since the former Yugoslavia was now composed of several independent States, it would be more appropriate to say: "the national legislation of the States having formed the former Yugoslavia".

50. Mr. ROSENSTOCK said that he had no objection to those words, which referred to the legislation which had been in force in Yugoslavia when it had still existed,

the idea being that there could be no penalty without a law.

51. Mr. TOMUSCHAT said that he agreed with that point of view.

52. Mr. MAHIU said that it would have to be checked whether the legislation of the former Yugoslavia was not referred to in the statute of the tribunal set up to try the crimes committed in the former Yugoslavia.

53. Mr. KABATSI said that he agreed with the comment by Mr. Pambou-Tchivounda. Logically, it would be difficult to say that a statute was not consistent with national legislation which no longer existed as a result of the break-up of a State.

54. Mr. THIAM (Special Rapporteur) suggested that reference should be made to: "the legislation applicable in the former Yugoslavia".

55. Mr. PAMBOU-TCHIVOUNDA said that proposal was entirely in keeping with what the Commission meant to say. The word "national" should be deleted and the words "applicable in" should be added.

56. The CHAIRMAN suggested that paragraph 98 should be adopted with the inclusion of a reference to the death penalty and the amendments proposed by the Special Rapporteur and Mr. Pambou-Tchivounda.

It was so agreed.

Paragraph 98, as amended, was adopted.

Paragraphs 99 and 100

Paragraphs 99 and 100 were adopted.

Paragraph 101

57. Mr. IDRIS said that, although the Special Rapporteur had actually made the comment reflected in that paragraph, it might not be politically very sound to emphasize that point.

58. Mr. TOMUSCHAT proposed that the words "limited views of" should be replaced by the words "limited number of responses by".

59. Mr. THIAM (Special Rapporteur) said that he would not object to the deletion of paragraph 101, which only reflected a comment he had made orally.

60. Mr. ROSENSTOCK said that the reference to developing countries between dashes could be deleted, but it might be useful to let Governments know that the Commission could not take their views into account if those views had not been communicated to it.

61. Mr. PAMBOU-TCHIVOUNDA said that he endorsed Mr. Rosenstock's proposal that the paragraph should be maintained. He also wondered whether the statement it contained should not be softened by specifying that some members of the Commission had referred to the positions taken by Governments or their representatives in the Sixth Committee.

62. Mr. THIAM (Special Rapporteur) said that he could accept the proposal by Mr. Rosenstock. He would also agree that reference should be made to the fact to which Mr. Pambou-Tchivounda had drawn attention.

63. Mr. IDRIS said that Mr. Rosenstock's proposal met his concern and was entirely satisfactory.

64. The CHAIRMAN suggested that the words "—particularly of developing countries—" should be deleted and that Mr. Pambou-Tchivounda's idea of referring to statements made in the Sixth Committee should be adopted.

65. Mr. ROSENSTOCK said he did not think that the Commission should make a distinction only in that paragraph between the written comments of Governments and comments made by Governments in the Sixth Committee, all of which were and had been taken into account. It was none the less true that relatively few comments had been made. It was therefore totally unnecessary to amend that paragraph.

66. Mr. PAMBOU-TCHIVOUNDA said that, if the paragraph was not amended, the word "regretted" should be looked at once again.

67. The CHAIRMAN suggested that new wording for paragraph 101 should be submitted to the Commission later.

Paragraphs 102 to 107

Paragraphs 102 to 107 were adopted.

Paragraph 108

68. Mr. VARGAS CARREÑO proposed that, in the second sentence, the words "the view of Latin American members" should be replaced by the words "the view of some members" and that the words "necessarily pernicious" should be replaced by the words "always wrongful".

69. Mr. ROSENSTOCK said that he would like the second sentence to be purely and simply shortened. A full stop should be placed after the words "widely shared" and the second part of the sentence should be deleted.

Paragraph 108, as amended, was adopted.

Paragraphs 109 to 111

Paragraphs 109 to 111 were adopted.

Paragraph 112

70. Mr. GÜNEY said that the text proposed by the Special Rapporteur contained a definition. He therefore asked who was going to give a more acceptable definition and when. The wording of the paragraph should be changed so that it would reflect the debate more faithfully.

71. Mr. THIAM (Special Rapporteur) said that he would not object to the deletion of the paragraph if it was going to create problems. If it was retained, the words "more acceptable" should be replaced by the words "more precise".

72. Mr. TOMUSCHAT said that the debate was fully reported in paragraphs 79 to 85 of chapter II of the report and that paragraph 112 was only part of the "summing up of the debate by the Special Rapporteur".

73. The CHAIRMAN, supported by Mr. ROSENSTOCK, suggested that the paragraph should be amended to read: "If the crime of international terrorism were to be retained in the Code, he felt that it would be necessary to draft a more precise definition for the purposes of prosecution."

It was so agreed.

Paragraph 112, as amended, was adopted.

Paragraphs 113 to 115

Paragraphs 113 to 115 were adopted.

Paragraph 116

74. Mr. EIRIKSSON proposed that the words "Further to the decision reflected in paragraph 115 above" and the words "under the terms reflected in paragraph 114 above" should be deleted.

Paragraph 116, as amended, was adopted.

Paragraph 117

Paragraph 117 was adopted.

The meeting rose at 1.05 p.m.

2419th MEETING

Monday, 17 July 1995, at 3.15 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.
