

Document:-
A/CN.4/3263

Summary record of the 3263rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2015, vol. I

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seem necessary, since it was a clear and well-established general principle of the law of international organizations that those organizations could validly act only within their sphere of competence. He was nevertheless prepared to meet that concern by using the expression “competent organ” in the context of the practice of the organization. However, he was not sure that it was necessary, as Mr. Murphy had proposed, to include a reference to “rules of procedure”, since, in contrast to the rules of procedure of conferences of States parties, the basic rules of procedure for international organizations were contained in their constituent instruments.

26. Messrs. Forteau, McRae, Kolodkin, Peter and Murphy had expressed the view that paragraph 2 of draft conclusion 5, which had been provisionally adopted,¹⁴⁷ could be read as excluding the practice of international organizations. They had therefore suggested that draft conclusion 5 should specify that it applied only “subject to draft conclusion 11”. While, as Mr. Niehaus had pointed out, that might indeed be a useful clarification, it should be made either at the end of the first reading or during the second reading of the draft conclusions. That point, which had already been flagged in the commentary to draft conclusion 5, could be further explained in the commentary to draft conclusion 11. Similarly, Mr. Forteau’s proposal to revisit draft conclusion 4, paragraph 3, and draft conclusion 6, paragraph 3, could also be considered at a later stage, if necessary.

27. He noted that Mr. Murase wished to alter the designation of the final product of the Commission’s work, but it was his understanding that the term “conclusions” referred not only to purely factual statements but that it might also include normative statements. Like Mr. Niehaus, he considered, therefore, that it was not necessary to reopen the debate on that point or, for that matter, the debate on the outcome of the Commission’s work on the identification of customary international law.

28. In conclusion, he said that the statements of many of the members of the Commission who had taken the floor seemed to reflect an underlying concern that he wished to diminish the primary role of States in the interpretation of treaties and to elevate the role of international organizations to an inappropriate level. Those concerns were somewhat surprising because he had been careful in trying to adhere strictly to the case law of international courts, in particular that of the International Court of Justice. Furthermore, he had refrained from adopting a “constitutionalist” approach to the interpretation of the constituent instruments of international organizations or any other theoretical approach that was not well established. He reaffirmed the primary role of States in the proper interpretation and development of constituent instruments of international organizations and expressed the hope that the members of the Commission would take a balanced approach which took full account of the accepted judicial practice.

The meeting rose at 10.45 a.m.

3263rd MEETING

Friday, 5 June 2015, at 10 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Kolodkin, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Crimes against humanity (*concluded*)* (A/CN.4/678, Part II, sect. I, A/CN.4/680, A/CN.4/L.853)

[Agenda item 10]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. FORTEAU (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles on crimes against humanity, as adopted by the Drafting Committee, and as contained in document A/CN.4/L.853, which read:

CRIMES AGAINST HUMANITY

Draft article 1. Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Draft article 2. General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Draft article 3. Definition of crimes against humanity

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

¹⁴⁷ *Yearbook ... 2013*, vol. II (Part Two), p. 34.

* Resumed from the 3258th meeting.

- (i) enforced disappearance of persons;
- (j) the crime of apartheid;
- (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) “extermination” includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) “deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) “persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) “the crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Draft article 4. Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

2. The Drafting Committee had devoted four meetings, from 28 May to 2 June 2015, to its consideration of the draft articles on the topic of crimes against humanity. It had examined the two draft articles originally proposed by the Special Rapporteur in his first report (A/CN.4/680), together with a number of amendments to respond to suggestions made or concerns raised during the debate in plenary session. The Drafting Committee had provisionally adopted a total of four draft articles on the topic during the current session.

3. He commended the Special Rapporteur, whose mastery of the subject, guidance and cooperative attitude had greatly facilitated the work of the Drafting Committee. Thanks were also due to the members of the Drafting Committee and the secretariat for their work as well as to Mr. Tladi, who had chaired the Drafting Committee’s first meeting.

4. Turning to the draft articles, he recalled that, during the plenary debate, members had stressed the need for a first draft article dealing with the scope of the draft articles. Furthermore, the view had been expressed that the original draft article 1 was unbalanced, as it purported to address both the prevention and punishment aspects, and that it could be divided into two separate draft articles. Accordingly, the Special Rapporteur had suggested a new draft article to the Drafting Committee entitled “Scope”, which had been provisionally adopted as draft article 1. He had further suggested that the original draft article 1 be divided into two draft articles, which had been provisionally adopted as draft articles 2 and 4. The original draft article 2 had been retained largely as originally worded, but provisionally adopted as draft article 3.

5. Draft article 1 was based on the model usually followed by the Commission in its work, including the 1996 draft code of crimes against the peace and security of mankind.¹⁴⁸ The Drafting Committee had considered that the draft article should mention only those elements that fell strictly within the scope of the project. The title of the project, “Crimes against humanity”, was relatively general and the Drafting Committee had deemed it appropriate to clarify from the outset that the draft articles applied to “the prevention and punishment” of such crimes. As highlighted by the Special Rapporteur and several Commission members during the plenary debate, a legal framework for dealing with crimes against humanity already existed, consisting of various international conventions, national laws, and instruments of the Commission, as well as of the statutes and case law of international criminal courts and tribunals. The Drafting Committee had considered that the draft articles were not intended to replace but to complement that framework, filling the gap in matters relating to the prevention and punishment of crimes against humanity. Consequently, draft article 1 stressed that the draft articles would focus on the prevention and punishment of such, the two main aspects that would be developed in future reports and related draft articles, particularly in relation to capacity-building within national legal systems and the promotion of inter-State cooperation.

¹⁴⁸ *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

6. Draft article 2 entitled “General obligation” was based on draft article 1, paragraph 1, as contained in the first report. The purpose of the umbrella provision was to identify a general obligation that was applicable to the entire set of draft articles, and not only to the prevention aspect. The obligation thus warranted its own draft article. The Drafting Committee had agreed that the general obligation to prevent and punish should be fulfilled through specific obligations to prevent and to punish that would be set out in more detail in subsequent draft articles.

7. Draft article 2 stated that “[c]rimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish”. The words “undertake to” had been used rather than “shall” in line with the obligation set forth in article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Moreover, in that connection it should be noted that, in its 2007 judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, when interpreting article 1 of the Convention, the International Court of Justice had stated that the ordinary meaning of the word “undertake” was “to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation” (para. 162 of the judgment).

8. Draft article 2 qualified crimes against humanity as “crimes under international law”, an expression used by the Commission, *inter alia*, in article 1, paragraph 2, of the 1996 draft code of crimes against the peace and security of mankind. The concept of “crimes under international law”, which had evolved since the International Military Tribunal, encompassed what were referred to as “core crimes”, namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The use of the expression implied that the concept of crimes against humanity was based on customary international law, irrespective of its recognition under domestic law, as recognized in Principle I of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the Commission in 1950, which stated that “[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”.¹⁴⁹ The Drafting Committee had wondered whether it might be appropriate to describe crimes against humanity in the draft article as one of the “most serious crimes of concern to the international community as a whole”, but had decided that such language would be better placed in a preamble or introduction.

9. As to the expression “whether or not committed in time of armed conflict”, the Drafting Committee had considered it important to maintain that part of the Special Rapporteur’s original proposal in view of the evolution of the definition of crimes against humanity. As explained in the first report, those crimes had originally been linked to the existence of an armed conflict in the context of the International Military Tribunal. Customary international

law had evolved since then, and it was now firmly established that no such connection was required. In addition, further to the debate in plenary session, the Special Rapporteur had suggested that the outdated term “state of war or threat of war” should be replaced with the term “armed conflict”, in keeping with contemporary international law. The verb “confirm”, drawn from the Convention on the Prevention and Punishment of the Crime of Genocide, had not been used in the draft article for similar reasons. Finally, in the light of the debate on the outcome of the topic, the Special Rapporteur had stated his preference for “States” rather than “State party”, in order not to prejudice the Commission’s final recommendation on the matter.

10. Draft article 3 was entitled “Definition of crimes against humanity” and corresponded to draft article 2 as it appeared in the first report. Paragraphs 1, 2 and 3 set out the definition of crimes against humanity and essentially reproduced article 7 of the Rome Statute of the International Criminal Court. There had been general agreement in plenary session and in the Drafting Committee that the definition of crimes against humanity contained in the Statute should not be changed by the Commission in its work on the topic; however, three non-substantive changes had been made. First, paragraph 1 of the draft article began with the words “For the purpose of the present draft articles”, while the Statute referred to “this Statute”. Second, the act of persecution defined in paragraph 1 (*h*) of the draft article referred to any act “in connection with the crime of genocide or war crimes”, while the Statute referred to “any crime within the jurisdiction of the Court”. Third, paragraph 3 of the draft article began with the words “For the purpose of the present draft articles” and not with “For the purpose of this Statute”, as in the Statute.

11. Paragraph 4 was a new provision based on a proposal made during the plenary debate that had received broad support. Its purpose was to indicate that the definition used in the draft articles was without prejudice to any broader definition provided for in other existing international instruments or national laws, as well as to the adoption of a broader definition in international instruments or national laws in the future. Having noted that there were similar clauses in article 10 of the Rome Statute of the International Criminal Court and in article 1 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, the Drafting Committee had considered it appropriate to use the term “international instrument”, as the term was broader than binding international agreements and covered non-binding declarations by States as well.

12. While the Drafting Committee had been in favour of the inclusion of paragraph 4, it had also been of the view that either the preamble or introduction to the draft articles should indicate that one of the main objectives of the draft articles was the harmonization of national laws, which could serve as the basis for international cooperation in the future. It should be noted that any element in addition to the definition contained in the draft articles used in a national law would not come under the scope of the draft articles. The view had also been expressed that the position of paragraph 4 might be reviewed at a later stage of the Commission’s work on the topic.

¹⁴⁹ *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

13. Draft article 4 entitled “Obligation of prevention” was based on draft article 1, paragraphs 2 and 3, as contained in the first report. The purpose of draft article 4 was to set forth the various elements that collectively promoted the prevention of crimes against humanity. The *chapeau* of paragraph 1 set out the specific obligation on States to prevent crimes against humanity and the verb “undertakes” had been used for consistency with draft article 2. That undertaking meant that States should refrain from committing crimes against humanity themselves in the light of the qualification of the crime of genocide by the International Court of Justice in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case as “a crime under international law”. It also meant that States should employ the means at their disposal to prevent persons or groups not directly under their authority from committing crimes against humanity. The Drafting Committee had considered it appropriate to include another important aspect in the *chapeau*, namely the undertaking to prevent crimes against humanity in conformity with international law. Accordingly, the measures to be taken by States to fulfil that obligation had to be consistent with the existing rules of international law; in other words, States could not rely on their obligation of prevention as set forth in the draft articles as a justification for the violation of existing rules, in particular those relating to the use of force.

14. Paragraph 1 (a) described certain specific measures that States must pursue in fulfilment of the obligation to prevent and was inspired by the wording of article 2, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. It specified that such measures should be taken by a State “in any territory under its jurisdiction or control”, an expression that encapsulated both the *de jure* territory of the State and the territory under its *de facto* control.

15. Paragraph 1 (b), which addressed the issue of co-operation, had been included in the light of the general consensus that had emerged during the plenary debate regarding the importance of cooperation as an aspect of the obligation of prevention. It stressed that States should cooperate with one another and with relevant intergovernmental organizations. The relevance of any particular intergovernmental organization would depend on, among other things, the organization’s functions, the relationship of the State to that organization and the context in which the need for cooperation arose. Paragraph 1 (b) further stressed that States should cooperate, as appropriate, with other organizations. Those organizations included NGOs that might play an important role in the prevention of crimes against humanity in specific countries. The term “as appropriate” was used to indicate that the obligation of cooperation, in addition to being contextual in nature, did not extend to the same extent to those organizations as it did to States and relevant intergovernmental organizations.

16. Draft article 4, paragraph 2, was based on draft article 1, paragraph 3, as contained in the first report and reproduced the wording of article 2, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. The advantage of that

wording with respect to crimes against humanity was that it was drafted in a manner that related to the conduct of both States and non-State actors. The wording had been refined to fit better in the context of crimes against humanity. As in draft article 2, the outdated expression “a state of war or a threat of war” had been replaced with the term “armed conflict”. The Drafting Committee had also considered it more appropriate to use the words “such as” rather than “whether” to stress that the examples given were not meant to be exhaustive. A discussion had taken place in the Drafting Committee on where best to place the paragraph, including whether it might be located in draft article 2 or as a self-standing provision. Following an extensive discussion, it had been agreed to leave the question in abeyance until further progress had been made on the topic, since the scope of the provision had thus far been dealt with only in the context of prevention.

17. In conclusion, he expressed the hope that the Commission would be in a position to adopt the draft articles on crimes against humanity, as contained in document A/CN.4/L.853.

Draft articles 1 to 3

Draft articles 1 to 3 were adopted.

Draft article 4

18. Ms. ESCOBAR HERNÁNDEZ said that the Spanish wording was not entirely accurate and should be aligned with the French text. She would submit a proposal in that regard following consultations with Spanish-speaking members of the Commission.

19. Mr. KOLODKIN said that the Russian text should also be aligned with the French version.

Draft article 4 was adopted, subject to the necessary amendments to the Russian and Spanish texts.

20. The CHAIRPERSON said that he took it that the Commission wished to adopt the report of the Drafting Committee on crimes against humanity contained in document A/CN.4/L.853, as a whole, subject to editorial amendments to the Russian and Spanish versions of draft article 4.

It was so decided.

Tribute to George Korontzis, Secretary to the Commission, on the occasion of his retirement

21. Mr. PETRIČ said that he wished to express his deep appreciation to Mr. Korontzis for the friendly, calm and professional manner in which he had carried out his duties. He wished him every success for the future and a long and happy retirement.

22. The CHAIRPERSON said that Mr. Korontzis had had a long and distinguished career as an international lawyer. After first serving as legal adviser at the Greek Ministry of Foreign Affairs, Mr. Korontzis had joined the Treaty Section of the United Nations Office of Legal Affairs in 1987. He had moved to the Codification Division in 1995 and had been one of the core members

servicing the Commission ever since. Since becoming Secretary to the Commission in 2013, he had drawn on his many years of experience to guide it with the skill and wisdom of an international lawyer and diplomat. The breadth of his knowledge of the Commission's substantive work, its procedures and working methods had enabled the Commission to function smoothly and effectively. He had been at the heart of the Commission's achievements over the past 20 years and would be sorely missed by all of its members. On behalf of the Commission, he thanked Mr. Korontzis for his professionalism and dedicated service to the United Nations and wished him well in his retirement and every success in his future ventures.

23. Mr. HASSOUNA said that he believed that the Chairperson had accurately expressed the feelings of all the Commission's members regarding the departure of Mr. Korontzis. He wished to express his sincere thanks to Mr. Korontzis for all his hard work with the secretariat behind the scenes, which had contributed greatly to the smooth operation of the Commission. He wished him a long and happy retirement.

24. Mr. KORONTZIS (Secretary to the Commission) said that he was overwhelmed by the kind words and praise that he had received from all members of the Commission and was most grateful for the graciousness that had been shown to him. The happiest memories of his long career with the United Nations were all linked

to the International Law Commission. The Commission was a unique body, whose members shared a passion for international law. In some ways that passion resembled a religion, since it embodied the eternal aspirations of humanity to law and justice on a universal scale. The sacred texts of that religion had been prepared quietly with devotion and zeal by the Commission for almost 70 years on the shores of Lake Geneva and they had come to form the cornerstones of the edifice of international law. He liked to imagine that edifice as a temple and the Commission members as its high priests. He would always be grateful and proud to have been a simple servant in that glorious and splendid temple.

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

[Agenda item 1]

25. After the usual exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-seventh session closed.

The meeting rose at 10.50 a.m.

* Resumed from the 3261st meeting.