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**A/CN.4/L.505**

**Draft Code of Crimes against the Peace and Security of Mankind. Proposal by Mr. E. Vargas Carreño: article 21 - reproduced in Yearbook...1995, vol. II (Part Two), para. 96**

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

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members questioned whether it was necessary and suggested that its inclusion might upset the balance of the draft article. There was a suggestion to extend the provision to cruel, inhuman or degrading treatment or punishment based on article 7 of the International Covenant on Civil and Political Rights. There was a further suggestion to consider the definition of torture in greater detail in the commentary to the article rather than in the text.

93. The reference to "persecution" in the fourth subparagraph was questioned as vague and overly broad. A preference was expressed for the earlier wording of "persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale". The view was expressed that even this language went beyond the Charter of the Nürnberg Tribunal, which required that such acts be in execution of or in connection with other crimes within its jurisdiction, and the statute of the International Tribunal for the Former Yugoslavia, which covered such acts only if they were committed in armed conflict.

94. While expressing support for the inclusion of "Deportation or forcible transfer of population" in the fifth subparagraph, some members felt the provision required greater clarity and precision to avoid including transfers of population that would be legally acceptable, for example, for reasons relating to the protection of the population, health considerations or economic development. The view was expressed that the provision should be limited to the deportation or forcible transfer of population on social, political, racial, religious or cultural grounds contrary to the relevant human rights instruments.

95. With regard to "other inhumane acts" covered by the sixth subparagraph, the view was expressed that the idea of providing a general category of such acts should be scrutinized very carefully. While some members felt that the phrase, which appeared in other similar instruments, should be retained, other members thought that it was too vague for the definition of a crime. There was also a suggestion to supplement the words "all other inhumane acts" by the phrase "perpetrated on a mass scale".

96. The view was expressed that forced disappearances, which constituted one of the most serious crimes of the second half of the twentieth century in some parts of the world, should be included as serious violations of human rights constituting crimes against the peace and security of mankind. While noting the difficulties involved in defining a crime in which the victims often disappeared without a trace, a proposed definition of enforced disappearances was submitted (A/CN.4/L.505)<sup>55</sup> based on the Inter-American Convention on Forced Dis-

appearance of Persons and the Declaration on the Protection of All Persons from Enforced Disappearance contained in General Assembly resolution 47/133. Some members expressed their support for including the practice of systematic and forced disappearance of persons in the present article and for considering the proposed definition in the Drafting Committee.

97. As mentioned previously, several members felt that institutionalized racial discrimination should be included in article 21 as a consequence of the proposed deletion of article 20 concerning apartheid.

#### ARTICLE 22 (Exceptionally serious war crimes)<sup>56</sup>

98. Several members welcomed the Special Rapporteur's decision to revert to the traditional notion of war crimes and to abandon the idea of introducing the new concept of "exceptionally serious war crimes" which had given rise to concerns regarding its meaning and its

"(b) Enforced disappearance of persons. For the purposes of this Code, enforced disappearance shall be considered to be the act of unlawfully depriving a person of his freedom, in whatever way, followed by an absence of information or a refusal to acknowledge his deprivation of freedom or to give information on the whereabouts of that person, thereby impeding the exercise of all his rights;

"(c) Torture;

"shall, on conviction thereof, be sentenced to . . .

"2. An agent or representative of a State who in the exercise of his functions participates in the adoption of acts or legislative, executive, administrative or any other measures which, *de jure* or *de facto*, entail:

"(a) Establishing or maintaining over persons a status of slavery, servitude, or forced labour;

"(b) Institutionalization of racial discrimination;

"(c) Deportation or forcible transfer of population on social, political, racial, religious or cultural grounds;

"shall, on conviction thereof, be sentenced to . . ."

<sup>56</sup> Draft article 22 provisionally adopted by the Commission on first reading reads as follows:

#### Article 22. Exceptionally serious war crimes

"1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to . . .].

"2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

"(a) Acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

"(b) Establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

"(c) Use of unlawful weapons;

"(d) Employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

"(e) Large-scale destruction of civilian property;

"(f) Wilful attacks on property of exceptional religious, historical or cultural value."

<sup>55</sup> The definition proposed by Mr. Vargas Carreño read as follows:

"Article 21. Systematic or mass violations of human rights

"1. An agent or representative of a State or anyone who acts with the authorization, support or acquiescence of a State and commits or orders the commission in a systematic or mass manner of any of the following acts:

"(a) Murder;