

Document:-
A/CN.4/SR.2100

Summary record of the 2100th meeting

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

Extract from the Yearbook of the International Law Commission:-
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48. In reply to Mr. Koroma, who had argued that any breach of the Geneva Conventions would constitute a war crime, he pointed out that that was not what was said in article 85, paragraph 5, of Additional Protocol I, on the repression of breaches: "Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes." For a crime to exist, according to that paragraph, the breach must therefore be a "grave" one. He agreed, however, with Mr. Barboza's view of the matter, which corresponded to the concept of a grave breach as referred to in the Conventions and the Additional Protocols thereto, particularly article 147 of the Fourth Convention,²¹ which read:

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

49. It was thus apparent that the Geneva Conventions and the Additional Protocols thereto did not refer only to breaches and grave breaches; they specified which acts constituted grave breaches. The Commission could make use of them, for example, to draw up a list of crimes, although he personally had doubts about the advisability of a list, since it was impossible to compile a complete list and an indicative list would not serve much purpose in legal terms. If the Commission wanted to refer to grave breaches, it could at least follow the example set in those instruments and state which acts constituted grave breaches.

50. Mr. BARSEGOV said he thought that the Commission's work on the present topic, as on other topics, would benefit if the members of the Commission were better informed about the work of other United Nations bodies. For example, the Sub-Commission on Prevention of Discrimination and Protection of Minorities had been dealing with questions of genocide for a very long time and it had carried out studies with a view to strengthening the effectiveness of the Convention on the Prevention and Punishment of the Crime of Genocide. Personally, he was not very optimistic about the action taken by States to combat genocide: there had been many acts of genocide since the Convention had been adopted and it had never been implemented. That was, however, the very reason why the Sub-Commission was concentrating on the problem. He asked whether the Secretariat could circulate to the members of the Commission the 1978 study on the question of the prevention and punishment of the crime of genocide²² and the revised and updated version of that study prepared by B. Whitaker in 1985,²³ or at least the latter document.

51. The CHAIRMAN said that, although the Planning Group had discussed that point at the previous session, it might be advisable to revert to it, since it could well be

useful to have certain documents available for reference purposes, including the studies mentioned by Mr. Barsegov, but also the draft international penal code of the International Association for Penal Law, with which all members of the Commission might not be familiar. He suggested that, in future, the special rapporteurs should be invited to give the Secretariat a list of the documents which members of the Commission might need when studying their reports.

52. Mr. CALERO RODRIGUES recalled that, in 1983, the Secretariat had prepared a compendium of international instruments relevant to the draft code.²⁴ If the Secretariat could not circulate all the instruments mentioned therein, perhaps it could update the compendium itself.

53. The CHAIRMAN pointed out that the compendium had also been circulated at the previous session in its original form.

54. Mr. KOROMA said that he was surprised to read in the penultimate paragraph of document ILC(XLI)/Conf.Room Doc.2 that the Commission would apply its work programme "without undue wastage of Secretariat resources". The Commission was not in the habit of wasting the resources at its disposal. The phrase implied a criticism of the Commission and should be deleted.

The meeting rose at 1 p.m.

²⁴ Document A/CN.4/368 and Add.1 (mimeographed).

2100th MEETING

Thursday, 11 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/411,² A/CN.4/419,³ A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

²¹ Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (United Nations, *Treaty Series*, vol. 75, p. 287).

²² E/CN.4/Sub.2/416.

²³ E/CN.4/Sub.2/1985/6 and Corr.1.

¹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

² Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

ARTICLE 13 (War crimes) and

ARTICLE 14 (Crimes against humanity)⁴ (continued)

1. Mr. ROUCOUNAS, referring to draft article 14, said that, like Mr. Barsegov (2099th meeting), he had been tempted when analysing the proposed text to seek out other documents relating to the crime of genocide produced by United Nations human rights bodies. The most recent report on the question, prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1985,⁵ revealed that genocide was, unfortunately, not confined to the past. As Mr. Boutros-Ghali had pointed out (2097th meeting), in some cases it had been possible to mobilize world public opinion only after the event. Moreover, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide had rarely been invoked in the courts: only one such case was referred to in the 1985 report.

2. The Special Rapporteur's approach in article 14 had considerable merit, not least in that he had inserted the word "including" before the list of crimes of genocide in paragraph 1. Under the 1948 Convention, competence in such cases was confined to the courts of the country or territory in which the alleged acts had been committed, a restriction which was only partly removed by General Assembly resolution 3074 (XXVIII) of 3 December 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. The draft code under consideration addressed those shortcomings and expanded the scope of the concept of genocide to cover acts intended to bring about the destruction in whole or in part of a national, ethnic, racial or religious group.

3. Whereas the definition in the 1948 Convention did not extend to all acts of genocide, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* had been criticized by some Governments as being too broad. In his view, the first alternative proposed for paragraph 2 of article 14 should not be used, for the reasons he had explained (2096th meeting) in connection with the first alternative of draft article 13. It was perfectly possible to adopt language identical or similar to that of a convention without citing the instrument *expressis verbis* and to provide the necessary references in the commentary. In the second alternative of paragraph 2, it would be wise to delete the words between square brackets, "as practised in southern Africa", in the interests of bringing the introductory clause into line with the description that followed. Indeed, the whole of the introductory clause could usefully be re-examined.

4. In the matter of slavery (para. 3), the often quoted *obiter dictum* of the ICJ on obligations *erga omnes* had given rise to an extensive literature. However, the ICJ had clearly stated that at least three crimes were universally punishable, and it was plain that that aspect should be mentioned in the draft. The Commission could choose between the traditional concept of slavery as embodied in the 1926 Slavery Convention⁶ and the broader definition

in the 1956 Supplementary Convention,⁷ which spoke of "slavery . . . and institutions and practices similar to slavery". The competent United Nations bodies, in particular the Sub-Commission on Prevention of Discrimination and Protection of Minorities, had studied the problems relating to slavery and their reports could have a bearing on the formulation of the draft, since the concept of slavery had broadened in scope in recent years to include debt bondage and a variety of other forms of exploitation.

5. Attention should also be paid to the scope of the notion of forced labour, which had been approached differently by different organizations in the United Nations system and in the relevant international instruments. The International Labour Office, for example, tended to place a broad interpretation on ILO Convention No. 105 concerning the Abolition of Forced Labour.⁸ It might be appropriate to refer to "slavery or forced labour similar to slavery" in order to highlight the connection between the two forms of exploitation and to indicate that both were crimes against the peace and security of mankind.

6. As to the expulsion of populations (para. 4), he had referred at the previous session to article 85 of Additional Protocol I⁹ to the 1949 Geneva Conventions, but mention should also be made of article 147, on grave breaches, of the Fourth Geneva Convention,¹⁰ which was universally accepted. The commentary prepared by Pictet in 1956¹¹ gave details in that regard and the analysis of article 49 of the Convention, on deportations, transfers and evacuations, indicated the scope of the prohibition. In addition, Schwarzenberger had explained the situation in the light of the 1907 Hague Convention and the relevant customary law, stating that "the illegality was taken for granted".¹²

7. Lastly, in his analysis of attacks on property in his seventh report (A/CN.4/419, paras. 47 *et seq.*), the Special Rapporteur properly distinguished between the destruction of property occurring in situations of armed conflict and that occurring when there was no armed conflict. He endorsed the criterion of mass scale used by the Special Rapporteur, and approved of the references to cultural genocide, which had not been covered by the 1948 Genocide Convention. Similarly, it was right to emphasize that the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict¹³ was also aimed at the protection of such property in peacetime. Furthermore, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage¹⁴ was relevant to the question of attacks on cultural property in that it contained provisions on specified property registered and recognized as belonging to the common heritage of mankind.

⁷ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (United Nations, *Treaty Series*, vol. 266, p. 3).

⁸ See 2096th meeting, footnote 24.

⁹ *Ibid.*, footnote 11.

¹⁰ See 2099th meeting, footnote 21.

¹¹ J. S. Pictet, ed., *Commentary—Fourth Geneva Convention* (trans. R. Griffin and C. W. Dumbleton) (ICRC, 1958).

¹² G. Schwarzenberger, *International Law* (London, Stevens & Sons, 1968), vol. II, *The Law of Armed Conflict*, p. 227.

¹³ United Nations, *Treaty Series*, vol. 249, p. 215.

¹⁴ UNESCO, *Records of the General Conference, Seventeenth Session, Paris, 17 October to 21 November 1972*, vol. 1, *Resolutions, Recommendations*, p. 135.

⁴ For the texts, see 2096th meeting, para. 2.

⁵ E/CN.4/Sub.2/1985/6 and Corr.1.

⁶ See 2099th meeting, footnote 17.

8. Mr. SOLARI TUDELA said that he welcomed the Special Rapporteur's proposals, but had difficulty in accepting the first alternative of draft article 13 in that it referred to "the laws or customs of war", an expression which gave rise to a terminological problem since it embodied a concept superseded by developments in humanitarian law. War itself was outlawed by the Charter of the United Nations and hence that formulation was obsolete. The first alternative also posed a problem of substance, for the reference to Additional Protocol I to the 1949 Geneva Conventions could occasion difficulties for States not parties to that instrument.

9. If the second alternative was adopted, however, it should be understood that the international agreements referred to therein were those which enjoyed the support of a representative majority of States: to insist that the instruments concerned must be universally accepted would be to place obstacles in the path of codification and of general acceptance of the code itself.

10. In terms of drafting, the text should provide both a general definition of war crimes and a list of such crimes, albeit not an exhaustive one. Such an approach would be consistent with established precedents.

11. In draft article 14, on crimes against humanity, the Special Rapporteur's approach was different. The constant development of international penal law, which now encompassed crimes such as *apartheid*, offences against the human environment and the expulsion of populations—none of which was covered by the 1954 draft code—made it necessary to adopt a twofold definition, partly general and partly illustrative.

12. On the whole he agreed with the scope of the crime of genocide as set out in paragraph 1, which was compatible with the Convention on the Prevention and Punishment of the Crime of Genocide and with article 2, paragraph (10), of the 1954 draft code.

13. Of the alternative versions of paragraph 2, on *apartheid*, the second was the more detailed and therefore more suitable. Since the term itself derived its existence from the system practised in southern Africa, he saw no reason not to refer specifically to that region in the commentary to the article.

14. Some clarification was called for in paragraph 3, on slavery, bondage and forced labour. The paragraph incorporated in the draft code offences which constituted not only a breach of humanitarian law, but also a crime against humanity, and which would thus fall into the highest category of offence in international criminal law. The text should be made clearer so as to indicate what constituted such offences.

15. It was proper for the article to mention expulsion of populations from their territory (para. 4). His own country had itself experienced such a situation in the twentieth century, and the inclusion of such a crime in the draft code would help to prevent occurrences of that kind in the future. Paragraph 5, on inhuman acts, was acceptable in principle, but greater detail was needed with regard to the cases of persecution referred to. Persecution took very many different forms.

16. Finally, paragraph 6, which was designed to punish offences against vital human assets such as the human environment, provided that such acts would be considered as

crimes against humanity so long as they were serious and intentional. There was a tendency nowadays to include that type of offence in criminal law: in France, for example, the Penal Code was to be revised to include a section on environmental crimes. At least one member of the Commission had emphasized the need for the element of intent to be present as a condition for identifying such offences, as the proposed text provided.

17. In wartime, acts which intentionally damaged the environment could be characterized without difficulty as war crimes and crimes against humanity: a nuclear attack or the use of chemical weapons would qualify for such twin characterization. A crime against humanity, however, could be committed in peacetime as well as in wartime. But in peacetime, an offence against the environment was more difficult to characterize, for even when the damage was serious the intention was in many cases something else. It might lie, for example, in the pursuit of financial gain, as in the case of the manufacture of chlorofluorocarbons, which destroyed the ozone layer and could turn the planet into a desert; or it might lie in the search for technological progress, as in the case of nuclear testing. In both cases, the intention would not have been to destroy or harm the environment, no matter how serious the damage actually was. Thus, instead of specifying intent, it should be provided that the acts in question must have been committed intentionally or knowingly against a vital human asset.

18. The purpose of the code was not merely to punish, but also to prevent, and in that way it would better achieve the objective of protecting vital human assets.

19. Mr. DÍAZ GONZÁLEZ said that the seventh report (A/CN.4/419) was a logical sequel to the Special Rapporteur's earlier reports and to the debates on the topic in the Commission and in the Sixth Committee of the General Assembly.

20. With regard to draft article 13, he would point out that the Charter of the United Nations contained a denunciation of war and it thus seemed out of place to refer to the "laws or customs of war" in the draft code. He therefore preferred the second alternative of the article, provided it was clearly established, by using the definition contained in the first alternative, that "armed conflict" included both international and non-international armed conflict.

21. The concept of a "serious violation", or grave breach, of the rules of international law had undergone considerable development, and had been characterized as an international crime both by the Nürnberg Tribunal and in the 1949 Geneva Conventions. The gravity of the breach contained a subjective element not readily open to definition. He therefore agreed with the view that a non-exhaustive list of examples of war crimes should be drawn up; such a list would also constitute a parallel to the lists of crimes against peace and crimes against humanity. Much work would be needed, however, to satisfy everybody who wished to include particular crimes. Defining the gravity of a breach was a practical as well as a theoretical problem. He wondered whether a series of murders by twos or threes would be a more or less heinous crime than rounding up the entire population of a village and shooting them. Given equal numbers, the result, namely the annihilation of a population, would be the same.

22. There were still certain difficulties to be overcome with regard to the second alternative. As for the expression

“laws or customs of war”, it could be replaced by “principles and rules of international law”.

23. With regard to draft article 14, he agreed with Mr. Boutros-Ghali (2097th meeting) that *apartheid*, as an institutionalized practice, was not confined to South Africa. There had in fact been cases in Latin America where an indigenous people had been eliminated in order to gain control over its territory and develop the land for other purposes. Such cases constituted a twofold crime: the crime of genocide, and a crime against humanity in that the environment and the ecological system were destroyed. In North America, too, minority populations had been herded into reserves. In law, to deprive a people on linguistic or cultural grounds of the right to enjoy the fruits of progress was a crime. Accordingly, he preferred the second alternative proposed for paragraph 2, which was much more specific and contained a non-exhaustive list of acts constituting *apartheid*. The words “as practised in southern Africa”, in square brackets, should be deleted.

24. As for other crimes against humanity, some did not appear in the list, such as drug trafficking, which was an international offence under a series of existing international conventions. As an attack on the health of all humanity, it ought to be treated as a crime against humanity. Other comparable crimes were the use of nuclear devices in peacetime to destroy the environment, and the use of chemical weapons having indiscriminate effects during armed conflicts.

25. It was not anachronistic to include slavery in the list of crimes against humanity. It was, moreover, prohibited by the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, as well as by article 99 of the 1982 United Nations Convention on the Law of the Sea.¹⁵ It should therefore be mentioned in the draft, but the definition should be brought up to date. As for the expulsion or forcible transfer of populations from their territories, it was vitally important that it should feature as a crime against humanity, in the formulation proposed by the Special Rapporteur (para. 4). Latin America was still suffering the effects of such forcible transfers by the colonialists. It was also right for forced labour to be included in the draft, since that, too, was part of the colonial system. Populations were sometimes transferred in order to transform the demographic composition of a territory, as had occurred in the Malvinas (Falkland) Islands, where the entire population had been expelled and replaced by settlers.

26. The inhuman acts enumerated in paragraph 5 should include the destruction of homes as well as the mass destruction of property. He agreed with the formulation of paragraph 6, especially the inclusion of the intentional element, which was fundamental in all penal law systems. Deliberate damage to a vital human asset might include the destruction of the environment and the property of an ethnic group.

27. Lastly, the Commission should seek to relate the content of articles 13 and 14 to article 19 of part 1 of the draft articles on State responsibility.¹⁶

¹⁵ *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

¹⁶ See 2096th meeting, footnote 19.

28. Mr. Barsegov recalled that, at the Commission's thirty-ninth session, during the consideration of the Special Rapporteur's fifth report, he had pointed out that two notions, namely “motive” and “intent” as subjective constitutive elements of a crime, were not properly distinguished in the draft code, although they were separately identified in all legal systems.¹⁷ Intent as a constitutive element of such crimes as genocide and *apartheid* was a well-established concept. It was, however, not clear whether the term “motive” was used in connection with crimes against humanity, as in previous reports, as a subjective constitutive element of the crime. It seemed that, in draft article 14, the Special Rapporteur was treating the existence of a motive as rendering the acts criminal. He wished, therefore, to clarify the significance of subjective elements in crimes against humanity, in particular genocide and *apartheid*.

29. According to the 1985 report on genocide prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities:¹⁸

It is the element of intent to destroy a designated group wholly or partially which raises crimes of mass murder and against humanity to qualify as the special crime of genocide . . . Motive, on the other hand, is not mentioned as being relevant. (Para. 38.)

Evidence of that element of subjective intent was far more difficult to adduce than an objective test (para. 39); other cases of genocide were unlikely to be as thoroughly documented as the acts of genocide perpetrated by the Nazi régime. A court must therefore be able to infer the necessary intent from a sufficient body of evidence. In certain cases, that might include actions or omissions of such a degree of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the likely consequences of his conduct. That was a generally held view concerning the crime of genocide. Pieter Drost, in his 1959 study on genocide, had commented that, in the absence of any words to the contrary, the text of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide offered no pretext to presume the presence of an unwritten, additional element in the definition of the crime.¹⁹ Whatever the reasons for its perpetration, whatever the open or secret motives for the acts or measures directed against the life of the protected group, if the members of the group as such were destroyed, the crime of genocide was being committed.

30. Furthermore, article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*²⁰ stated:

International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations . . . whenever they:

(a) commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II . . . ;

. . .

¹⁷ See *Yearbook . . . 1987*, vol. I, pp. 46 *et seq.*, 1999th meeting, paras. 15 *et seq.*

¹⁸ See footnote 5 above.

¹⁹ P. N. Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples* (Leyden, A. W. Sythoff, 1959), book II, *Genocide*, p. 84.

²⁰ United Nations, *Treaty Series*, vol. 1015, p. 243.

That was an important provision which must be taken into account in the definition of genocide, *apartheid* and all other acts of the same kind covered by draft article 14.

31. Some members of the Commission had objected that, in paragraph 1 of article 14, the way in which the acts included within the definition of genocide were listed was not adequate as it gave the impression that the list was not exhaustive. That criticism was not justified, first because, in his view, it had no basis, and secondly, and more importantly, because the drafters of the 1948 Convention on Genocide had not included therein all the acts constituting the crime. At the time when the Convention was being elaborated, some representatives in the Sixth Committee of the General Assembly had pointed out that it was impossible to devise such an exhaustive list, since the concept of genocide was new and there was no way of foreseeing all the methods that might be resorted to by the perpetrators of genocide. Those representatives had referred to the Charter of the Nürnberg Tribunal in support of the argument that crimes other than those already qualified as war crimes could be tried as acts of genocide. Others had expressed the view that, in the absence of an exhaustive list, the principle *nulla poena sine lege* would be infringed. The feeling had been that a merely indicative list could give rise to problems of interpretation: the same acts might be regarded as a crime by one country, but not by another. It had also been argued that a subsequent updating of the list would always be possible, even though, in existing political conditions, the possibilities of supplementing the list were very narrow. Ultimately the latter considerations had prevailed.

32. The 1948 Convention had been elaborated in haste, under the impact of the events which had occurred in the Second World War. It had failed to take account of many existing precedents in which whole populations had been destroyed by depriving them of their means of subsistence, such as soil and water, or forcing them to emigrate—practices which had eliminated entire groups and which had been fully revealed after the adoption of the Convention. Moreover, not only acts, but also omissions might have the same effect. The 1985 report to which he had already referred (para. 29 above) explained that the conduct listed in articles II and III of the Convention as being punishable as genocide consisted exclusively of the commission of certain actions, but that results similar to those of the acts referred to in article II (b) and (c), for example, might be achieved by conscious acts of advertent omission (para. 40). In certain cases, calculated neglect or negligence might be sufficient to destroy a designated group, wholly or partially, through, for instance, famine or disease. Article II of the Convention was reflected in draft article 14. It was true that the formulation in paragraph 1 (iii) of the draft article, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, would include the death of an entire group from conditions such as cold, hunger or disease caused by so-called deportations.

33. It was clear that the deportation of entire populations could not be justified on grounds of State security or a state of war. He could not agree with Mr. Reuter (2098th meeting) that deportation was sometimes the lesser of two evils. It was true that deportations had sometimes occurred on the basis of international agreements, for example an

exchange of populations in the context of a peace treaty. But the Commission was not considering that kind of deportation. There were historical precedents of deportation being carried out deliberately for the purpose of eliminating or destroying a national group, on religious or racial grounds. There was much documented evidence of deportations of that type. Certain such evidence could be found in reports by German consular and diplomatic agents in the Ottoman Empire, who had described the deportations as tantamount to mass destruction. Another impartial source was the memoirs of the United States Ambassador, Henry Morgenthau. Those deportations had been so effective as a method of destroying a minority group that they became a model for the mass removals of peoples to concentration camps, and their destruction by the Nazis, and provided a basis for qualifying that type of deportation as an international crime.

34. He agreed with the Special Rapporteur and Mr. Roucouas that mass compulsory deportation was in itself an international crime against humanity. At the same time, the Commission should not disregard the links between deportations and the crime of genocide. The Drafting Committee should take account of the fact that acts intended to extirpate whole populations on the grounds of nationality, race or religion could amount to genocide.

35. Draft articles 13 and 14 could, he thought, be referred to the Drafting Committee for further consideration in the light of the comments made by members of the Commission.

36. Mr. HAYES said that the Special Rapporteur's excellent seventh report (A/CN.4/419) dealt with a difficult and delicate aspect of a topic that was difficult and delicate in its entirety, and it did so with the Special Rapporteur's usual erudition and adroit formulation.

37. He appreciated the Special Rapporteur's analysis of the concept of crimes against humanity and the account of the history of the concept (*ibid.*, paras. 33-42), particularly its evolutionary separation from the concept of war crimes. The distinction drawn between those two kinds of crimes (*ibid.*, para. 40) was fully convincing and he endorsed the conclusion that “crimes against humanity” should be retained as a separate category, even if some of the acts involved could also fall into the category of war crimes.

38. His own preference was for the second alternative of draft article 13, and he believed that the expression “war crimes” should be retained because of its useful connotations as to the nature of the crimes. The second alternative, while also using the more modern expression “armed conflict”, nevertheless preserved the historical basis for identification of the category of crimes in question. However, the general definition should be supplemented by a list, clearly identified as non-exhaustive and purely indicative. Material for such a list could be found in the various instruments in force.

39. The word “serious” should certainly be retained. The Commission had reached the conclusion that only serious offences should be regarded as crimes against the peace and security of mankind for inclusion in the draft code, a conclusion that logically applied within each of the categories of such crimes. He understood the view of those who believed that any breach of the relevant international rules must be regarded as a war crime, but at the same

time felt that only serious breaches should be included in the code itself. Lesser breaches should be left to national law and to domestic jurisdiction. That distinction owed something to the concept of a "grave breach" contained in the 1949 Geneva Conventions, but he agreed with the Special Rapporteur (*ibid.*, para. 19) that draft article 13 should use the expression "serious violation" rather than "grave breach", because the two concepts did not coincide.

40. With regard to draft article 14, he firmly supported the remarks made by Mr. Calero Rodrigues (2099th meeting) on the need to define crimes on the basis of acts rather than policies or practices, although acts could of course be the result of a policy and/or part of a practice, a factor that would make the act more serious. The definition of genocide in paragraph 1 supported that argument, since the word "act" was used in the introductory clause, and the list in subparagraphs (i) to (v) constituted a series of acts. The first alternative of paragraph 2, on *apartheid*, also met that argument, but he preferred the second alternative for other reasons. It would need to be adapted, yet the adaptation should not prove too difficult. Like others, he thought that the reference between square brackets to southern Africa should be deleted.

41. In paragraph 5, the word "other" before "inhuman acts" was very significant, since that formulation made it abundantly clear that genocide and the other crimes mentioned in the preceding paragraphs of the article were also inhuman acts. It would be interesting to learn in connection with those "other inhuman acts" whether the Special Rapporteur was satisfied that the text of paragraph 5 reflected fully the comments he made in his report (A/CN.4/419, paras. 44-46) and that those comments were sufficient to ensure that the provision was interpreted in accordance with the Special Rapporteur's concerns.

42. Paragraph 6 was a welcome addition to the list of crimes set out in the article. Finally, both articles 13 and 14 could be referred to the Drafting Committee for consideration in the light of the discussion.

43. Mr. TOMUSCHAT said that the lengthy debate made it easier to form an opinion on the question whether a list should be attached to the definition of war crimes. For his part, he believed that it was not the Commission's task to re-invent humanitarian law, which had taken shape immediately after the Second World War in the four Geneva Conventions of 1949,²¹ supplemented in 1977 by Additional Protocols I and II.²²

44. The first of those Protocols largely reflected the consensus of the community of States. There were, of course, a few difficult points of disagreement which had led a considerable number of States to refrain from ratifying Protocol I, but as far as he knew, article 85 was not one of the controversial provisions. It was in line with articles 129 and 130 of the Third Geneva Convention relative to the Treatment of Prisoners of War, as well as with articles 146 and 147 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The key concept in all those instruments was that of a "grave" breach. The authors of the Geneva Conventions had made a thorough examination of the question before they had

adopted the criterion of gravity, which had later been embodied explicitly in article 85, paragraph 5, of Additional Protocol I in order to characterize war crimes. There could be no question of broadening the concept of a "war crime". The draft code should cover only the most serious and gravest violations. Minor breaches, or technical violations of the laws of war, were not relevant for present purposes.

45. The question then arose as to how to define gravity. There were two ways of doing so, one being to base it on the nature of the crime, and the other being to take into account the consequences of the crime as they arose in the concrete circumstances of its commission. The Geneva Conventions and the Additional Protocols clearly adopted the first approach. Those instruments described a certain number of violations as "grave breaches" because of their characteristics. Moreover, the lists contained in those instruments were exhaustive. Lastly, the fact that a violation produced particularly serious consequences did not make it fall within the scope of the definition of "grave breaches".

46. Those ideas had perhaps been new by comparison with pre-existing law. Lauterpacht, in his *International Law*, did not mention "grave breaches" but defined war crimes as "criminal acts contrary to the laws of war",²³ a definition that was outmoded because the Geneva Conventions had since been ratified by nearly all States. It should be added that the ICJ, in its judgment in the *Nicaragua* case, had held that there existed customary rules or "general principles of humanitarian law to which the [Geneva] Conventions merely give specific expression".²⁴ As he saw it, it was therefore essential to bring the work on the draft code into line with the humanitarian law of the Geneva Conventions.

47. As to the question of means of warfare, the conventions on the subject did not contain any provisions on individual responsibility of members of the armed forces. That could be partly explained by the fact that some of the conventions had been concluded at a time when the responsibility of individuals under international law had not yet been developed. Such was the case of the Hague Declaration of 1899 concerning expanding bullets²⁵ and the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.²⁶ More recently, there were the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,²⁷ and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and the Protocols thereto.²⁸ It should be borne in mind that those instruments prohibited certain weapons in themselves, regardless of their consequences. The prohibition embodied

²³ L. Oppenheim, *International Law: A Treatise*, 7th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1952), vol. II, *Disputes, War and Neutrality*, p. 567, para. 251.

²⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 114, para. 220.

²⁵ See J. B. Scott, *op. cit.* (2096th meeting, footnote 5), p. 227.

²⁶ League of Nations, *Treaty Series*, vol. XCIV, p. 65.

²⁷ United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 118.

²⁸ United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), pp. 113 *et seq.*

²¹ See 2096th meeting, footnote 10.

²² *Ibid.*, footnotes 11 and 17.

in the 1925 Geneva Protocol would thus appear to be a good candidate for inclusion in the list of war crimes in the draft code. A difficulty arose, however, with regard to reprisals. If a prohibition on the use of certain weapons was included, it would also be necessary to frame provisions on countermeasures and their limitations. The task was an arduous one, but it had to be faced.

48. The Commission had the choice of a flexible or a rigid approach for the draft code. With a rigid approach, the code would not automatically allow for future developments. As a compromise solution, however, one could envisage listing all the acts described as grave breaches in the four Geneva Conventions and in article 85 of Additional Protocol I. The relevant provisions could be said to reflect customary law on the subject.

49. With reference to certain points discussed at length by Mr. Pawlak at the 2097th meeting, it was gratifying that the frontier problems between his own country and Poland had been settled by the Warsaw Agreement of 7 December 1970, which had normalized relations between the two countries. The Federal Republic of Germany had declared in that Agreement that it had no frontier claims against Poland. Nevertheless, the expulsion of the German populations to the east of the Oder-Neisse line constituted a clear example of "expulsion or forcible transfer of populations from their territory", as referred to in paragraph 4 (a) of draft article 14. He fully recognized the extent of human suffering inflicted by Hitler's Reich upon Poland and the Soviet Union: the populations of the then occupied territories had lived under arbitrary rule of the most ruthless kind. That did not, however, justify uprooting whole populations from the ancestral territories in which they had lived for centuries. The case was indeed one of expulsion, even if a different form of language had been employed in the Potsdam Agreement of 2 August 1945. Moreover, the territory from which those populations had been expelled had been German territory, and the Allied Powers could not dispose of it. As far as he was concerned, in a world which was marked by the prohibition of the use of force and by the right of peoples to self-determination, the forcible transfer of populations was one of the gravest crimes imaginable. He had not been convinced by the objections put forward by Mr. Reuter (2098th meeting): an exchange of populations by treaty between two States was something quite different from a forcible unilateral transfer.

50. In legal doctrine, many authors had asked themselves whether the rules of *jus cogens* were not identical to those underlying international crimes. Clearly, that was not the case. Two States could undertake action which, if it were carried out unilaterally by one of them, could amount to a breach of article 19 of part 1 of the draft articles on State responsibility.²⁹ Additionally, in the latter case the acting individuals could incur personal criminal responsibility under the code.

51. His views were supported by Principle VI of the Nürnberg Principles³⁰ formulated by the Commission, by articles 43 *et seq.* of the Regulations annexed to the 1907 Hague Convention,³¹ by article 49 of the Fourth Geneva

Convention, and by article 85, paragraph 4 (a), of Additional Protocol I. In that regard, he wished to reiterate his support for the idea of establishing an international criminal jurisdiction for the task of penalizing the crimes set out in the code. An impartial and objective adjudicating body was essential in order to avoid the same breach being given different treatment in different countries, each under its own laws. The whole code had a highly political content. In principle, that fact should not frighten jurists. A constitution, for example, was a political document. Nevertheless, in criminal law it was necessary to avoid excessive politicization. The Commission should endeavour to do so to the fullest possible extent. An international criminal court must adjudicate in complete objectivity. As administered by such a court, the code would become an instrument in full consonance with the requirements of the rule of law.

52. Mr. REUTER said he wished to explain that he in no way defended the expulsion or transfer of populations from their territories, which he regarded as abominable. Indeed, his own family had suffered on that score. His point had simply been that, if the Commission was to develop the idea of prohibiting such expulsions or transfers, as it must, he would never feel obliged, either morally or legally, to condemn certain international agreements which had been concluded in extremely serious and exceptional circumstances with the object of preserving the peace. Still less would he be able to condemn a federal State which, in order to achieve total peace and avoid bloodshed, felt compelled to encourage certain movements of population—under humane conditions of course. In order not to obstruct the work of the Commission, he was prepared to agree to a total condemnation, without exception, of such a practice. None the less, there were cases, albeit very limited, in which it was the lesser of two evils. Mr. Tomuschat was not convinced by his arguments, but he himself was unable to accept certain consequences of Mr. Tomuschat's analysis of treaties and custom.

53. The reason why he did not want a list of crimes was that he wanted more than a list, and perhaps more than one article. He did not want some makeshift legal provision, but a well-formulated one. The Commission could not discharge its duty simply by incorporating into the draft code certain terms, such as *apartheid* and genocide, and leaving it to the dictionary to provide the meaning, particularly if new crimes were to be covered, as appeared to be the deep desire of the majority of the members of the Commission.

54. He was grateful to Mr. Tomuschat for raising a serious problem that exercised him constantly, namely reprisals. It was a problem of which the Commission must at least take cognizance. His fear was that, when it came to the law of war, Governments now accepted the idea that they could react by using the same methods as those used against them. Draft article 14, however, was concerned with a different matter involving human rights and international judicial decisions under which the rule of reciprocity had not been recognized as an excuse. Supposing, for instance, that State A behaved towards a minority from State B in its territory in a manner that amounted to a crime against humanity, would State B have the right to act in the same way towards an ethnic minority of State A in its territory? Or supposing, again, that a State cut off the hands of prisoners of war in its custody, would the

²⁹ See 2096th meeting, footnote 19.

³⁰ *Ibid.*, footnote 14.

³¹ *Ibid.*, footnote 5.

State from which the prisoners came have the right to do likewise? In both cases, the logical response seemed to be in the negative. He trusted that, in developing the list of crimes item by item, the Commission would consider the problem and decide whether it wished to solve it, or indeed could solve it.

55. Mr. BEESLEY commended the Special Rapporteur on his seventh report (A/CN.4/419) and on the impressive work done in a delicate and difficult area.

56. In considering the reports on the topic, he adopted two yardsticks, the first of which concerned the extent to which the draft articles and accompanying commentaries made a contribution to the existing system of international law and, in the present case, to humanitarian law and fundamental rights. On that basis, the seventh report shed considerable light on the subject. His second yardstick was concerned with how a particular article would be implemented in practice. There, however, his problem had always been that there was no appropriate existing tribunal to apply the law. Since it might be a long time before an international tribunal was set up, he inclined to the view that national tribunals should be used, but considered that they should have an international component, sitting with a judge from the accusing State, a judge from the State of the accused, and at least one or two more judges from other, different jurisdictions.

57. While he was persuaded by the Special Rapporteur's logic concerning the undesirability of a list of crimes, he had to confess to some illogicality in his own appreciation of the situation, since he would feel easier in his own mind with a list than with a generic definition, always provided, of course, that it was a non-exhaustive list to which any national tribunal could add as it chose.

58. Another troubling question was the extent to which the Commission could attempt to legislate on matters already dealt with in international conventions. By and large, he agreed that the Commission had not only a right, but virtually a duty to develop the law. However, it also had to be very careful and very precise about varying the wording of pre-existing texts.

59. An ancillary point concerned the distinction between the concept of war crimes and that of grave breaches within the meaning of the 1949 Geneva Conventions and Additional Protocol I thereto. He tended to agree with the Special Rapporteur that there was a distinction, although, as the Special Rapporteur pointed out (*ibid.*, para. 40), a single act could be both a war crime and a crime against humanity.

60. In his opinion, it was necessary to address attacks on property *per se*. For instance, all the housing in a given area might be destroyed, or such vital necessities as the entire electrical or water system. He had no doubt that attacks on the environment could in certain circumstances constitute a very grave crime—a crime against humanity rather than a war crime as such, although he would not rule out the latter.

61. The two alternatives of draft article 13 proposed by the Special Rapporteur were not really mutually exclusive, and possibly the Drafting Committee might wish to produce a text that incorporated paragraph (b) of the first alternative with paragraphs (a) and (b) of the second. In so

doing, it would have to deal with the distinction between war crimes and grave breaches of humanitarian law, although that was not necessarily a disadvantage. He was reluctant to accept the introduction of a subjective term like "serious", even though he was well aware of the history of the term "grave breach", and tended to favour some term such as "deliberate" or "recklessly negligent". The concept of seriousness itself should, however, be built into the text of the commentary, it being left to the tribunal, if the Commission agreed on one, to determine guilt or innocence and the penalty to be imposed. Clearly, it was no longer possible to refer simply to the law of The Hague and the law of Geneva. There was at once a merger and a distinction to be borne in mind, and article 13 could perhaps be redrafted to reflect that.

62. As to draft article 14, he agreed that both the concept of genocide and the term itself should be included. The same applied to the provision on *apartheid*, although it was not wise to refer specifically to a particular country which had originated and practised the concept so destructively for so many years. The Commission must legislate for the future, not just for the past and the present. Further thought should be given to the extent to which the article used a pre-existing text and, in particular, the Commission should be meticulous when using definitions taken from existing instruments.

63. He tended to favour the second alternative of paragraph 2, even though he had reservations about the end-product because of the dangers of incorporating an exhaustive list, to which reference had already been made.

64. Lastly, he remained of the view that the concept of *mens rea* as utilized in English common law was important and continued to think, particularly in the light of Mr. Barsegov's remarks, that motives were not at issue. The intent to commit a crime of so serious a nature that it warranted inclusion in the draft code was the important thing. The differences among members of the Commission in that regard appeared to have been narrowed.

65. Mr. PAWLAK said that he, like Mr. Tomuschat, welcomed the Agreement of 7 December 1970 between Poland and the Federal Republic of Germany as an important factor for security in Europe and bilateral relations between the two countries. However, he felt bound to clarify a few points. In the first place, the reference by Mr. Tomuschat (2096th meeting) to the transfer of the German population from Poland to Germany after the Second World War was not relevant in the context of paragraph 4 of draft article 14. As he himself had explained (2097th meeting), that transfer had taken place in the framework of the fundamental objectives of the Potsdam Agreement of 2 August 1945, under which there had been an obligation to repatriate the German population from Poland.

66. Secondly, the displacement or transfer of a population as part of the settlement of border problems was not to be regarded as a reprisal. It was a matter of international agreement whereby, following a war, one country ceded part of its territory to another.

67. Thirdly, the population transfer under the Potsdam Agreement had not been unlawful, having been conducted under the authority and control of the Allied Powers, which had been required to report back to their Governments.

68. Lastly, the Agreement of 7 December 1970 had been the second Polish/German treaty on border issues, the first having been signed on 6 July 1950 between Poland and the German Democratic Republic. Both treaties referred to the existing border between Poland and Germany as having been established by the Potsdam Agreement.

The meeting rose at 1.05 p.m.

2101st MEETING

Friday, 12 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/411,² A/CN.4/419,³ A/CN.4/L.431, sect. D, ILC(XLI)/Conf.Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes) *and*

ARTICLE 14 (Crimes against humanity)⁴ (*continued*)

1. Mr. JACOVIDES said that, with the conclusion of the draft code, the Commission would have provided the international community with an instrument of deterrence and punishment.

2. With regard to draft article 13, the Special Rapporteur had indicated that the problems which arose related to the definition of war crimes, to terminology and to the concept of gravity. He agreed that a general definition of war crimes should be laid down and that it should be left to judges to decide on its application in each particular case in the light of the evolution and progressive development of the law. The law of war derived from certain customs and practices which had gradually gained recognition, as

well as from the general principles of justice as recognized by jurists and endorsed by the practice of military courts. Hence, it was not a static law, but a law which, through a process of continual adaptation, followed the needs of a changing world; treaties, for the most part, were no more than an expression and definition of the principles of law that already existed.

3. With regard to terminology, he considered that the choice between "war" and "armed conflict" was less clear. Since war had, in theory, been outlawed with the adoption of the rules of *jus cogens* enshrined in the Charter of the United Nations and various other international instruments, the expression "armed conflict" would be more in keeping with present-day terminology. None the less, the expression "laws or customs of war", which was found in many international conventions in force, as well as in national laws, should not be discarded, on the understanding that its use did not sanction war.

4. He commended the Special Rapporteur for having adopted the concept of gravity in the definition of war crimes. He considered that, like the 1949 Geneva Conventions and Additional Protocol I thereto, the draft code should make a distinction between grave breaches and other breaches and that, if the code was to be effective, it should cover only the former. That was one of the reasons why many members had insisted that, in the English title of the topic, the word "crimes" should be used instead of "offences". In his view, therefore, the square brackets in paragraph (a) of the first alternative of article 13 should be removed.

5. In general, however, the second alternative of article 13 seemed preferable to him, because it used terminology that was more modern and closer to humanitarian law as codified.

6. Crimes against humanity, dealt with in draft article 14, had initially been linked to a state of belligerency but were now separate from war crimes. No doubt the same act could be both a war crime and a crime against humanity, but the concept of a crime against humanity was broader, since war crimes were committed only in time of war and as between belligerents.

7. With regard to inhuman acts, the Special Rapporteur had, in his seventh report (A/CN.4/419, paras. 43 *et seq.*), rightly drawn attention to the many criteria at issue—moral, ideological, methodological and nationalistic, for instance—in the case of attacks against persons and attacks against property and, in particular, against monuments of historical, architectural or artistic significance, such as those classified by UNESCO as belonging to the heritage of mankind. Indeed, there were already conventions on the protection in wartime and peacetime of artistic and scientific institutions and historical monuments. Cyprus had none the less had experience, as a result of foreign occupation, of the systematic destruction of its cultural heritage, when priceless antiques and objects of religious significance had been plundered and sold on the black market.

8. He was in general agreement with the list of crimes against humanity set out in article 14, but reserved the right to revert to the matter in more detail. Genocide was such a crime, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, which could be

¹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

² Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

⁴ For the texts, see 2096th meeting, para. 2.