Document:-

A/CN.4/SR.2239

Summary record of the 2239th 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:-

1991, vol. I

the United States of America.[14] Those elements should be kept, regardless of the exact title of the article. A key element of the definition lay in the use of force or organized terror against another State. Drafting improvements to article 17 and a decision on the words in square brackets should be left for the second reading.

57. Mr. PELLET said he could not accept article 17 in its present form. Taken literally, it would mean that the President of the United States of America would have to be indicted by an international criminal court for a crime against the peace and security of mankind. It was precisely because he felt that that would be unreasonable that he objected to the article. The Commission must take a responsible stance, in the light of international realities. He did not support either United States intervention in Nicaragua, or acts of intervention by other countries, but was disturbed by the idea that they could be characterized as crimes against the peace and security of mankind. Indeed the very title of the article invited misinterpretation and misuse for political ends. He proposed that it should be replaced by "subversive activities". As to the content of the article, he agreed with Mr. Calero Rodrigues that, if the article was retained, the words in square brackets should be deleted.

58. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that the words "by another individual" in paragraph 1 should be deleted, and replaced by "an act".

59. Mr. ARANGIO-RUIZ, referring to paragraph 1, said he agreed with the views expressed by Mr. Calero Rodrigues and Mr. Pellet on the question of intervention. It was a singularly difficult concept to define. Inevitably, article 17 was somewhat vague, since a crime was a highly specific matter. However, the actions of the United States of America or any other particular country were not relevant to the condemnation of intervention as such.

60. Mr. EIRIKSSON said that he had a number of reservations about the article, but they related to the title rather than to the substance.

61. The CHAIRMAN, speaking as a member of the Commission, said that the difficulty of characterizing the crime of intervention was well known. Acts carried out with the consent of the second State would of course escape the rubric of intervention. Paragraph 2 sought to define the scope of the article, and to indicate the criminal elements in intervention. It did not take a political stance. As for paragraph 3, he felt, as a member of the Drafting Committee, that it did not properly belong in the article. However, it was a wise decision to refer the article as a whole to the General Assembly for comments and advice, with a view to making improvements on second reading.

62. Mr. BARSEGOV said that paragraph 3 was drawn from General Assembly resolution 36/103, containing the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. Likewise, the definition of aggression in the draft articles was based on the relevant General Assembly resolution.

[14] See 2209th meeting, footnote 6.

63. Mr. McCAFFREY said that although he had not spoken during the discussion, he wished to place on record that his views were unchanged since the Commission's previous adoption of article 17, without the new paragraph 1.[15]

64. The CHAIRMAN suggested that the Commission should adopt article 17 with the amendment to paragraph 1 proposed by the Chairman of the Drafting Committee. He endorsed the latter's proposal to retain paragraph 2 in its present form. Paragraph 3 would likewise be retained.

Article 17, as amended, was adopted.

The meeting rose at 1.05 p.m.

[15] Adopted as article 14 (Intervention) at the forty-first session, in 1989.

2239th MEETING

Thursday, 11 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/435 and Add.1,[2] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 18 (Colonial domination and other forms of alien domination) (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of article 18.

[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... 1991*, vol. II (Part One).

2. Mr. PAWLAK (Chairman of the Drafting Committee) said it had been proposed (2237th meeting) that the words "another individual" should be deleted and that the words "to establish or maintain" should be replaced by the words "the establishment or maintenance". As thus amended, article 18 would read:

"Article 18. Colonial domination and other forms of alien domination

"An individual who as leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to . . .]."

3. Mr. THIAM (Special Rapporteur) said that he agreed with those changes.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 18, as amended.

Article 18, as amended, was adopted.

ARTICLE 19 (Genocide)

5. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 19 which read:

Article 19. Genocide

1. An individual who commits or orders the commission by another individual of an act of genocide shall, on conviction thereof, be sentenced [to . . .].

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) imposing measures intended to prevent births within the group;

(*e*) forcibly transferring children of the group to another group.

6. Mr. PAWLAK (Chairman of the Drafting Committee) explained that article 19 (Genocide), as well as articles 20, 21, 22 and 26, had been worked out at the present session. Its scope *ratione personae* extended to all individuals.

7. With regard to the definition of the crime of genocide contained in paragraph 2, it would be recalled that, in plenary, the Commission had generally approved the approach taken by the Special Rapporteur in closely following the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Drafting Committee had, however, felt that the limitative list of acts constituting genocide which was to be found in article II of that Convention should not be made into an open list, as had been suggested by the Special Rapporteur. In the Committee's view, the principle *nullum crimen sine lege* required that the list should be exhaustive. Furthermore, it would be inadvisable to depart from a widely ratified instrument such as the Convention.

8. The Drafting Committee had therefore eliminated the word "including" which had been used in paragraph 1 of the former article 14 (Crimes against humanity), as proposed by the Special Rapporteur.[3] The opening words of article II of the Convention ("In the present Convention . . .") had also been eliminated in order to adapt the definition to the requirements of the Code.

9. With regard to paragraph 2 (*c*), the Drafting Committee had discussed whether the definition of genocide should not encompass the deportation of members of a national, ethnic, racial or religious group with the intent of destroying the group. In that connection, the Committee had considered it undesirable to depart from the provisions of the Convention and had preferred to cover that aspect in article 21 (Systematic or mass violations of human rights).

10. Lastly, he indicated that one member had expressed a reservation on article 19, paragraph 2 (*e*), maintaining that its scope should extend to all members of a group and not only to children. It had also been proposed that the words "by another individual" should be deleted from paragraph 1, as had been done in articles 16, 17 and 18.

11. Prince AJIBOLA said that, in paragraph 1, it might be better to refer to "a crime of genocide" rather than to "an act of genocide", in view of the seriousness of that crime.

12. Mr. TOMUSCHAT said that, for the sake of consistency, the words "act of genocide" should be retained, particularly since the words "act of aggression" and "act of intervention" were being used in articles 16 and 17.

13. He also thought that the words "by another individual" should not be deleted because genocide could be committed by one person, unlike aggression or intervention.

14. Mr. RAZAFINDRALAMBO said he agreed with Mr. Tomuschat that it would be preferable to retain the words "act of genocide" in paragraph 1. However, he did not believe that the deletion of the words "by another individual" in that paragraph would give rise to any real problem, since it was understood that individuals could be involved in an act of genocide.

15. In paragraph 2, he suggested that the words "Genocide means any of the following acts" should be replaced by the words "Genocide consists of any of the following acts . . ." in order to bring the text into line with that of other articles, particularly article 20 (Apartheid).

16. Mr. BARSEGOV said he also considered that the deletion of the words "by another individual" would make the text more homogeneous without changing the

[3] *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/419 and Add.1, para. 30.

meaning of the article. Genocide was, of course, committed by a State, but through the intermediary of individuals. It was not because those words had been deleted that those individuals would no longer be responsible.

17. Mr. PAWLAK (Chairman of the Drafting Committee) said that it would be better to bring article 19 into line with articles 16, 17 and 18 by deleting the words "by another individual".

18. As to Prince Ajibola's proposal that the words "an act of genocide" should be replaced by the words "a crime of genocide", he noted that article 2 of the draft Code had already been adopted by the Commission and dealt with the characterization of an act or omission as a crime. If the two articles were taken together, it was only logical that the word "act" in article 19 should be retained; in any case, all the acts mentioned in the Code were crimes. One single exception had been made in that regard, namely in article 20, the words "crime of apartheid" had been retained by reference to the International Convention on the Suppression and Punishment of the Crime of Apartheid. He would have the opportunity to come back to that point during the consideration of article 20.

19. Prince AJIBOLA again noted that, in his view, some acts were basically crimes. That was the case of genocide, which differed, for example, from intervention in that it constituted a crime from the outset, whereas there might well be a peaceful intervention or an intervention decided by common consent.

20. If, for the sake of uniformity, however, the Commission decided to retain the present wording, he would not object to it.

21. Mr. BARSEGOV said that article 19 raised a very important issue of principle, namely, that of deportation as a means of committing genocide. He was thinking, for example, of mass deportations of populations driven from territories which were their ancestral lands. That was obviously a politically delicate issue which was supposed to be covered by paragraph 2 (*c*). The Chairman of the Drafting Committee had indicated, during the discussion of that subparagraph, that that was to be clearly reflected in the commentary. In his own view, it was essential to say so specifically.

22. Mr. NJENGA said he agreed with Prince Ajibola that genocide was essentially a crime in the same way as apartheid. The expression "crime of genocide" was, moreover, commonly used.

23. Mr. EIRIKSSON said he did not think that a substantive debate on paragraph 1 of the articles on genocide and apartheid should be started at the current stage. The Drafting Committee had tried to find introductory wording that could be used for each of the articles of part two of the draft Code. A number of solutions were possible, including the one suggested by Prince Ajibola, but, taking particular account of article 3 of part one, the Committee had decided to use the word "crime" in the title of part two so as to indicate that all the acts referred to in articles 15 to 26 constituted crimes. It had not considered it necessary to repeat it in the articles themselves. In his view, it would be necessary, for the sake of consistency, to use the word "act" instead of the word "crime" in article 20 as well. Moreover, the conventions on which certain articles were based, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, were not always models of uniformity. If distinctions were made between the articles, there would be a danger of creating problems of substance and upsetting the structure of the text.

24. Mr. PELLET said that he agreed with Mr. Eiriksson on the advisability of using the word "act" both in article 19 and in article 20. The use of the word "crime" was not logical. It was under the Code that was being drafted that certain acts would be characterized as crimes against the peace and security of mankind.

25. Unlike Mr. Barsegov, who would like the list in article 19, paragraph 2, to be as full as possible, he believed that the Commission should not try to be exhaustive because there was the risk that it might leave out some particularly unacceptable acts it had not thought of. Article 18, which had just been adopted without any problem, did not contain a list and its wording was entirely satisfactory. He was opposed to any addition to the lists contained in articles 19 and 20, which he thought were already too long; they could be only illustrative in nature, no matter what might be said.

26. Mr. DÍAZ GONZÁLEZ said that he would also prefer the use of the words "crime of genocide" by reference to the Convention on the Prevention and Punishment of the Crime of Genocide. He pointed out that, at the beginning of paragraph 2, the word "Genocide" was used by itself and that it was therefore not consistent with paragraph 1.

27. Mr. CALERO RODRIGUES stressed that, from the standpoint of criminal law, individuals committed acts and the law then characterized those acts as crimes.

28. Mr. PAWLAK (Chairman of the Drafting Committee) said he also considered that, since all the acts referred to in the Code constituted crimes, there was no need for repetition by replacing the word "act" by the word "crime". Those in favour of that change should bear in mind that they were drafting a criminal code and that, if the rights of the defence were to be respected, they must refer a priori to acts and not to crimes. It would also not be appropriate to make any distinction between the acts referred to in the various articles, which were all very serious.

29. With regard to the point which Mr. Barsegov had raised and to which he himself had referred in his introduction to article 19, he pointed out that the question of deportation had been dealt with in article 21 (Systematic or mass violations of human rights). However, it might be useful to mention in the commentary that article 19, paragraph 2 (*c*), was meant to be broad in scope and to cover deportation as well.

30. As to the advisability of drawing up an exhaustive list of acts of genocide, he recalled that it was from the standpoint of criminal law that the Drafting Committee had decided to be specific and to delete the word "in-

cluding", which appeared in the former article 14 proposed by the Special Rapporteur. The Commission could, however, come back to that question during its examination of the draft articles on second reading if that approach was considered unsatisfactory.

31. The CHAIRMAN, speaking as a member of the Commission, said that, paradoxically, Prince Ajibola and Mr. Calero Rodrigues were both right. However, although he agreed with Prince Ajibola, he stressed that genocide had at all times been regarded as a crime under international law, as the Convention on the Prevention and Punishment of the Crime of Genocide had confirmed. In that sense, genocide was different, for example, from apartheid: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid was the first instrument which had made apartheid a crime.

32. Mr. NJENGA said that it would be more correct to refer to the "crime of genocide". He considered that the Commission should not spend any more time on that question and expressed the hope that it would avoid the same debate on article 20.

33. Mr. THIAM (Special Rapporteur) said that the question had been discussed at length in the Drafting Committee, some members favouring the use of the words "crime of genocide" and others, the words "act of genocide". It had finally been decided that the word "act" should be retained for the sake of harmonization. In fact, substance counted more than form. Genocide was, of course, a crime, since it was covered by the Code. To refer to an "act of genocide" did not mean that genocide was not a crime.

34. Prince AJIBOLA recalled that the Commission had held a lengthy discussion of the question whether, in the English version of the title of the draft articles, the word "offences", a generic term covering all breaches of criminal law, should be replaced by the word "crimes". In the end, the term "crimes" had been chosen. There could thus be no question now of referring simply to "acts".

35. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Commission could adopt article 19 as proposed by the Drafting Committee, with the deletion from paragraph 1 of the words "by another individual". It was understood that genocide was a crime, and even a grave crime, but all the other acts characterized as crimes in the draft Code were defined as "acts".

36. In reply to Mr. Díaz González, he said that it was naturally the crime of genocide itself which was defined, not the act.

37. The CHAIRMAN thanked Prince Ajibola for his comments, which seemed to have attracted some support in the Commission. He stressed that the Commission was now considering the draft articles on first reading only and that it would have every opportunity to come back to that question later during the consideration on second reading.

38. If he heard no objection, he would take it that the Commission wished to adopt article 19 as proposed by the Drafting Committee, subject to the deletion of the words "by another individual" from paragraph 1.

Article 19, as amended, was adopted.

ARTICLE 20 (Apartheid)

39. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 20, which read:

Article 20. Apartheid

1. An individual who as leader or organizer commits or orders the commission by another individual of the crime of apartheid shall, on conviction thereof, be sentenced [to . . .].

2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

(*a*) denial to a member or members of a racial group of the right to life and liberty of person;

(*b*) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

(*c*) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

(*d*) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;

(*e*) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;

(*f*) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

40. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 20 (Apartheid) had also been entirely worked out by the Drafting Committee at the present session. It would be recalled that, in his seventh report, the Special Rapporteur had presented two alternative texts for the article;[4] one was a short version consisting of a very general definition and the other, a longer version modelled on article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The Drafting Committee had preferred the second version because it was closer to the definition of apartheid that was generally accepted, namely, discrimination based on race, and also because it was incorporated in an international instrument. The definition of apartheid which the Committee was now proposing was a simplified version of article II of the 1973 Convention, to which two basic changes had been made. First, since the 1973 Convention had been drafted to fit the particular situation which had existed in southern Africa, the Committee had reworded the definition of apartheid so as to look to the future as well. Secondly, the Committee had considered that the definition should be limited to the description of the crime of apartheid only and that the examples should be deleted, since they could not be exhaustive.

[4] Ibid.

41. As in the other articles, paragraph 1 specified that the crime should be linked to individuals—either to leaders or to organizers who committed or ordered the commission of the crime by others. As it had decided in the case of other articles, the Commission might want to delete the words "by another individual".

42. The *chapeau* of paragraph 2 gave a general definition of apartheid, namely, acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing and maintaining domination by one group over any other racial group and systematically oppressing it. It should be stressed that the words "any other racial group" applied to one or more racial groups. In the Drafting Committee's view, there was no reason to refer each time to "group or groups", as the 1973 Convention did, since the commission of a crime against one group was sufficient to be considered a crime under the Code. In conformity with the approach adopted for the other articles, apartheid was defined by reference to acts listed in subparagraphs (*a*) to (*f*), which were simplified versions of subparagraphs (*a*) to (*f*) of article II of the 1973 Convention; the examples had been deleted and only the description of the acts had been retained.

43. The Drafting Committee had decided to retain the title of the article as: "Apartheid".

44. Lastly, in view of the discussion which had taken place on article 19, the Commission should, for the sake of uniformity and logic, consider the possibility of replacing the word "crime" in paragraph 1 by the word "act", without prejudice to the characterization of apartheid as a crime.

45. Mr. NJENGA said that his willingness to agree that the term "act" should be maintained in article 19 did not mean that he agreed that the words "crime of apartheid" should be replaced by the words "act of apartheid" in article 20. He stressed that apartheid was not an act or a succession of acts: it was a system, a systematic policy of racial discrimination based on the oppression of a racial group. It would be absurd to speak of an "act of apartheid" and he could not accept that term.

46. Prince AJIBOLA said that the arguments of uniformity and logic put forward by the Chairman of the Drafting Committee in order to propose, in the light of the discussion on article 19, that the word "crime" used by the Drafting Committee should be replaced by the word "act" were inadmissible. The law did not worry about logic or uniformity. The Commission's concern should be to submit to the General Assembly not so much a word perfect document, but one which reflected the law as perceived by the jurists composing the Commission. Everyone knew that apartheid was a crime. Since that was the case, why not say so clearly?

47. He had no firm opinion on the proposal to delete the words "by another individual".

48. Mr. Sreenivasa RAO said that it was important to retain the word "crime" in the present instance, since apartheid was different from the other crimes in that it was not an act, but a system.

49. Mr. PELLET said that he had strong reservations about article 20 for a number of reasons which could be summed up as one, namely, that the Drafting Committee had tried to follow the wording of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. That was, however, a special-purpose Convention and it was intended exclusively to combat apartheid as practised until quite recently in South Africa. As a result, article 20 failed to take account of the intolerable aspect of systematic policies of racial discrimination, no matter where and against whom, they were practised. That was apparently the only reason why the Drafting Committee had, contrary to the principle it had adopted for other articles, used the words "crime of apartheid", but that was not a valid reason.

50. He also found that paragraph 2 was very poorly drafted. First of all, it defined apartheid as consisting of "acts based on policies and practices of racial segregation and discrimination", when, in reality, apartheid consisted of those very policies and practices, which the article should have condemned and which were a crime. Moreover, the list was inappropriate, inasmuch as it probably did not cover all possible acts of apartheid. The Drafting Committee seemed to be aware of that fact, judging by the use in two places, in subparagraphs (*d*) and (*e*), of the words "in particular", which suggested that the Committee believed that there were probably other such acts without being able to define them. Subparagraphs (*c*) and (*d*) placed emphasis on legislative measures, something that was highly debatable, since the problem was not to know the source of those measures, but rather what they were. In fact, administrative measures of systematic discrimination were just as inadmissible as legislative measures. Reference should also have been made to constitutional apartheid, which was or would be the most serious. His reservations did not, however, amount to opposition.

51. Mr. EIRIKSSON said that the words "act of apartheid" were politically more acceptable and that, for reasons of drafting logic, a definition of the "crime of apartheid" might be included in paragraph 2. Of course, reference could simply be made to "apartheid". In any event, matters could be explained in the commentary.

52. Mr. JACOVIDES, noting that everything had already been said on the question at one point or another, proposed that the Commission should adopt the article as it stood, on the understanding that the commentary would give all the necessary details.

53. Mr. CALERO RODRIGUES said that the proposals that the word "crime" should be replaced by the word "act" or that reference should quite simply be made to "apartheid" would raise more problems than they would solve. In any case, the law was not logical, as Prince Ajibola had pointed out. He was therefore in favour of the adoption of the text as proposed by the Drafting Committee.

54. Mr. PAWLAK (Chairman of the Drafting Committee) said he could agree that the word "crime" should be retained. He nevertheless maintained his proposal that, for the sake of uniformity, the words "by another individual" should be deleted from paragraph 1.

55. Mr. EIRIKSSON referring to, but not insisting on, the model adopted for article 22, proposed that the *chapeau* of paragraph 2 should be amended to read: "The crime of apartheid consists of any of the following acts . . .".

56. Mr. THIAM (Special Rapporteur) said that the Commission could adopt that proposal, which met the concerns of Prince Ajibola and other members of the Commission.

57. Mr. TOMUSCHAT said that, on second reading, the Commission should take another look at the words "the following acts based on", which were inappropriate, since the acts in question were the expression, or the instruments, of policies and practices of racial segregation and discrimination.

58. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was certainly not a political organ and that it worked on the basis of legal elements. As it happened, article I of the International Convention on the Suppression and Punishment of the Crime of Apartheid stated that apartheid was a crime against humanity, whereas, according to article I of the Convention on the Prevention and Punishment of the Crime of Genocide, genocide was "a crime under international law". Moreover, apartheid had been constitutionally established in 1948. Since the Constitution was a legislative act under the system in force in South Africa, apartheid was a legislative measure. After 1948, of course, other measures had been taken to strengthen the system. Lastly, the words "legislative measures and other measures" could also be taken to mean administrative measures.

59. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20, subject to the deletion of the words "by another individual" from paragraph 1.

Article 20, as amended, was adopted.

ARTICLE 21 (Systematic or mass violations of human rights)

60. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 21, which read:

Article 21. Systematic or mass violations of human rights

An individual who commits or orders the commission by another individual of any of the following shall, on conviction thereof, be sentenced [to . . .]:

— violation of human rights in a systematic manner or on a mass scale consisting of any of the following acts:

(*a*) murder;

(*b*) torture;

(*c*) establishing or maintaining over persons a status of slavery, servitude or forced labour;

(*d*) deportation or forcible transfer of population;

(*e*) persecution on social, political, racial, religious or cultural grounds.

61. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the list of crimes against humanity proposed by the Special Rapporteur included slavery, forced labour, expulsion or forcible transfer of populations, persecution and murder. The Drafting Committee had considered that, instead of dealing with those crimes in separate articles, it could bring them all under a single article, which would then deal with crimes other than those referred to in separate articles. The fact that all those crimes had a common feature, namely, that they were all violations of human rights, had made that approach easier. All violations of human rights, whatever their degree, were abhorrent and intolerable, but, in order to be included in the Code as crimes against the peace and security of mankind, they had to be sufficiently serious.

62. Article 21, like other articles, began with a *chapeau* to relate the crime to an individual. As in the case of apartheid, any individual could commit the crime. The indented part of the *chapeau* set out the general principle and the criteria in accordance with which the acts listed should be evaluated. Under the *chapeau*, such acts must first be violations of human rights and, secondly, they must be systematic or on a mass scale. The latter criterion was intended to exclude from the scope of the article single acts which were violations of human rights, such as a murder or a single case of torture. Subparagraphs (*a*) to (*e*) listed the acts to which the *chapeau* applied. He emphasized that the list in the subparagraphs had to be read together with the *chapeau* because the crimes in question had to be committed in a systematic manner or on a large scale.

63. Some of the acts listed in the subparagraphs were already defined in existing human rights conventions. Others did not yet have conventional definitions, but, in the Drafting Committee's view, they were important enough to come under the Code.

64. Subparagraph (*a*) listed murder. The crime was self-explanatory and was defined in national criminal codes. In the Committee's view, systematic and mass murder was a crime against the peace and security of mankind.

65. Subparagraph (*b*) listed torture, which was defined in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. There had been general agreement among the members of the Drafting Committee that torture was of a highly destructive nature and should therefore be included in the Code.

66. Subparagraph (*c*) listed slavery, servitude and forced labour. The crime of slavery was defined in the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. In addition, article 8 of the International Covenant on Civil and Political Rights prohibited slavery, as well as servitude, a concept which included bondage and forced labour. A number of ILO Conventions defined and dealt with forced labour. The Drafting Committee had considered that slavery was a classic case of a crime against the peace and security of mankind and should therefore be listed in the Code.

67. Subparagraph (*d*) dealt with deportation and forcible transfer of population. The Drafting Committee had noted that, in most cases, deportation or forcible transfer of population occurred in time of war. However,

such crimes had been committed and still occurred in peacetime and should therefore be included. The commentary to the article would provide further elaboration and clarification, since there was no conventional definition for it.

68. Subparagraph (*e*) dealt with persecution on social, political, racial, religious or cultural grounds. Persecution had been listed in the 1954 Code and was referred to in the International Convention on the Suppression and Punishment of the Crime of Apartheid, but there was no conventional definition of it. Many members of the Drafting Committee had considered that many human beings had been and were being persecuted on social, political, racial, religious or cultural grounds. Persecution ran counter to the most basic human rights that formed the foundation upon which civilized human beings built their communities and lived peaceably together. It was therefore appropriate that systematic or large-scale persecution should constitute a crime under the Code. There was no conventional definition of persecution and the commentary would therefore explain what it meant and give examples of the forms it could take.

69. A few members of the Drafting Committee, while not disagreeing with the statement that systematic persecution was a very serious crime, had expressed concern because the term "persecution" itself was not legally defined and its content was not entirely clear. In their view, the Code should include only crimes that could be easily defined. For that reason, two members had expressed reservations about subparagraph (*e*).

70. The title of the article had been taken from its *chapeau* and read: "Systematic or mass violations of human rights".

71. Mr. THIAM (Special Rapporteur) pointed out that, in subparagraph (*a*), the word "murder" should be replaced by the words "wilful killing".

72. Mr. JACOVIDES said that the text originally proposed by the Special Rapporteur for paragraph 4 of article 14 read:

> "4. (*a*) Expulsion or forcible transfer of populations from their territory;
>
> "(*b*) Establishment of settlers in an occupied territory;
>
> "(*c*) Changes to the demographic composition of a foreign territory."[5]

He wished to know why the second and third points had not been repeated in subparagraph (*d*) of the text under consideration. If the Commission had good reasons not to retain them, it should at least refer to them in the commentary to article 21. The commentary should also refer to the denial of the right of persons displaced systematically or on a mass scale to return home.

73. Mr. PELLET said that the points raised by Mr. Jacovides came under article 22 (War crimes), in so far as those types of crimes were serious violations of the law applicable in international armed conflict and, in particular, the law governing wartime occupation, rather than violations of human rights.

74. Mr. JACOVIDES said that crimes such as those referred to in paragraph 4 (*b*) and (*c*) of the original article 14 could be committed both in time of war and in time of peace. As it now stood, article 22 was also silent on those acts.

75. Mr. TOMUSCHAT said that the practice of systematic disappearances in certain countries was at present one of the main concerns with regard to human rights. He realized that, at the current stage, it was not possible to add that crime to those listed in article 21, particularly since it might be covered by subparagraph (*e*). He nevertheless suggested that the commentary should mention the question and that the Commission should come back to it on second reading.

76. Prince AJIBOLA said that the word "murder" in subparagraph (*a*) was not very appropriate because it belonged more to the realm of internal law. In the present context, it was the term "pogrom" that came to mind more readily.

77. Mr. THIAM (Special Rapporteur) said that, in order to follow the terminology used in the relevant international instruments, he had proposed that the term "murder", which was too narrow in scope, should be replaced by the term "wilful killing" which covered both murder and manslaughter.

78. Mr. PAWLAK (Chairman of the Drafting Committee) said that the use of the term "murder" had been discussed at length in the Drafting Committee. As he had stressed when introducing article 21, that term had to be read together with the provisions of the *chapeau*. Reference was therefore being made not to an isolated wilful killing, but to wilful killings committed during a pogrom or in connection with other human rights violations.

79. One of the problems involved in the drafting of the Code had been that of choosing the crimes to be covered. Since it was obviously impossible to deal with all those crimes, only the most serious should be listed, if they were committed systematically or on a mass scale.

80. The comments made by Mr. Jacovides could be looked at during the consideration of the Code on second reading, but he believed that subparagraph (*d*) on deportation or forcible transfer of population also covered changes to the demographic composition of a foreign territory. He suggested that the words "of population" in that subparagraph should be replaced by the words "of a population".

81. Mr. PELLET said that he had no objection to the drafting suggestion made by the Chairman of the Drafting Committee, even though he found the French text more satisfactory. The wording proposed by Prince Ajibola was symptomatic of a drafting flaw: since Prince Ajibola had not taken part in the work of the Drafting Committee, he was concerned by the wording of article 21. The Drafting Committee could maintain that that article dealt with systematic or mass violations of human

[5] Ibid.

rights by the practice of murder or torture in a systematic manner or on a mass scale, but that article could also be interpreted as meaning that a murder or an act of torture was in itself a systematic and mass violation of human rights and, in that respect, article 21 was not sufficiently clear.

82. Mr. JACOVIDES said that the Chairman of the Drafting Committee had only partly met his concern. The demographic composition of a territory could be changed both in time of war—and that would be a war crime—and in time of peace, in which case it could be said that there had been a systematic and mass violation of human rights. His comment on the establishment of settlers in an occupied territory had not elicited any response. Those two points should be dealt with in article 21, as should the right of displaced populations to return home. If that was not possible, all those questions should be considered again on second reading and, for the time being, referred to in the commentary.

83. Mr. McCAFFREY, referring to the English text, said that, from the drafting point of view, it was preferable to say "transfer of populations" rather than "transfer of a population", which implied the transfer of an entire population. In the Drafting Committee, he had proposed that the words "violation . . . consisting of any of the following acts" should be replaced by the words "flagrant and systematic or mass violations of human rights by committing any of the following acts:". Although he would not press that proposal, which had not met with the approval of the Drafting Committee, he had wanted to refer to it again so that the members of the Commission could bear it in mind in case the present text continued to give rise to problems.

84. Mr. THIAM (Special Rapporteur) said he did not think that the Commission had to wait until the consideration of the draft on second reading in order to improve its wording. The important thing was to stress that murder and torture had to be practised in a systematic manner and on a mass scale in order to constitute a crime against the peace and security of mankind. He proposed that subparagraphs (*a*) and (*b*) should be replaced by the following:

"(*a*) the systematic and mass practice of murder;

"(*b*) the systematic use of torture;".

85. Mr. PELLET said that, of the two drafting proposals made by Mr. McCaffrey and the Special Rapporteur, the first had the advantage of covering subparagraph (*c*) as well. If it did not meet with any opposition, it would considerably improve the text of article 21.

86. Mr. CALERO RODRIGUES, supported by Mr. GRAEFRATH, suggested that, since the discussion had shown that the wording of article 21 stood in need of improvement, a small working group composed of the Chairman of the Drafting Committee, the Special Rapporteur and Mr. McCaffrey should redraft the text for submission to the Commission.

It was so agreed.

87. Mr. GRAEFRATH said that Mr. McCaffrey's proposal could give rise to a problem by implying that article 21 related to an act committed in a systematic manner, whereas that was not its purpose, since it dealt with systematic and mass violations of human rights, not with the systematic and mass perpetration of the act in question. The working group would have to take that drawback into account.

88. The CHAIRMAN, speaking as a member of the Commission, suggested that the working group should also take account of the following text:

> "Any individual who commits or orders the commission by another individual of the following acts: systematic or mass violations of human rights consisting of murder, torture, the act . . . persecution on social, political, racial, religious or cultural grounds, shall, on conviction thereof, be sentenced [to . . .]."

It would be more logical to list the crimes before referring to the penalty that was applicable to them.

89. Mr. BARSEGOV said that he supported Mr. Jacovides' proposal that a reference to changes to the demographic composition of a foreign territory and to the establishment of settlers in an occupied territory should be added to subparagraph (*d*). In a number of resolutions, the General Assembly and the Security Council had declared that the forcible changing of the demographic composition of a foreign territory was unlawful and a violation of human rights and, in particular, the right of self-determination.

90. Mr. PAWLAK (Chairman of the Drafting Committee) asked Mr. Barsegov which instruments he was referring to. If he was thinking of the Convention on the Prevention and Punishment of the Crime of Genocide, that aspect was covered by article 19, paragraph 2 (*c*), of the Code.

91. Mr. BARSEGOV said that deportations and forcible and arbitrary changes to the demographic composition of a territory, except, of course, for population exchanges pursuant to international agreements, could either form part of the acts declared to be crimes by article 19 (Genocide) or come under article 21 (Systematic or mass violations of human rights). Since the Commission had decided not to refer to them in article 19 and article 21 mentioned deportations and forcible transfers of population as violations of human rights, the Commission would be entirely justified in dealing in that article with changes to the demographic composition of a territory. The resolutions he had had in mind were resolutions adopted in specific cases, such as that of Palestine, for example.

92. Mr. PELLET said that, to his knowledge, the question of changes to the demographic composition of a territory had been mentioned only in the resolutions concerning the occupation of Arab territories by Israel. He was not opposed to the idea of referring to the question in the Code and was even in favour of it, but he took the view that that question had its proper place not in article 21, but in article 22, because it related to a violation of the law of international armed conflict. If only for reasons of simple logic, moreover, he did not see how the Commission could refer in article 21 to the right of populations to return because the crime in question was

deportation or the forcible transfer of population and the denial of the right to return was the consequence.

93. Mr. JACOVIDES said it was clear that the situations which article 21 should cover had nothing to do with those dealt with in agreements between States. He also pointed out that the case of the occupation of Arab territories by Israel was not the only example that could be cited in that regard. He suggested that article 21 (*d*) should be amended in the light of article 14, paragraph 4, which he had read out earlier.

94. Mr. BARSEGOV said that he understood Mr. Jacovides' concern about the denial of the right to return, but that concern created problems for other members of the Commission. He suggested that the starting-point should be the idea that that concern was met by recognition of the unlawful nature of the actual act of population transfer. An act could not be considered unlawful if its consequences were not also considered unlawful. Moreover, the question of return must be discussed in connection with State responsibility.

95. Mr. THIAM (Special Rapporteur) said that, although the General Assembly had placed considerable emphasis on the points he had listed in paragraph 4 of the text to which Mr. Jacovides had referred, the Drafting Committee was of the opinion that the establishment of settlers related more to the question of war crimes and changes to demographic composition than to the crime of genocide. On second reading, the Commission would have to discuss those problems in greater detail.

96. Mr. EIRIKSSON said that the lack of any obvious reasons to explain why the Drafting Committee had not included a particular crime should be reflected in the commentary, which should also indicate why the Drafting Committee had considered it appropriate to refer to a given crime in a particular article of the Code rather than in another. That would be better than trying to fill any possible gaps.

97. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the consideration of article 21 should be suspended until the proposed small working group had completed its work. The idea of referring in the Code to the establishment of settlers had all his sympathy, but, as the Special Rapporteur had already pointed out, it was difficult to commit such a crime in time of peace, so that it had to be made a war crime. Furthermore, the Drafting Committee had endeavoured to be as specific as possible and to prevent crimes from overlapping between one article and another. The commentary could not replace the article, since its role was simply to explain the article.

The meeting rose at 12.55 p.m.

2240th MEETING

Thursday, 11 July 1991, at 3.10 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/435 and Add.1,[2] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 21 (Systematic or mass violations of human rights) (*concluded*)

1. The CHAIRMAN invited the Chairman of the Drafting Committee to report on the results achieved by the small working group of members which had been set up at the previous meeting to attempt to draft a new version of article 21.

2. Mr. PAWLAK (Chairman of the Drafting Committee) read out the text for article 21, as prepared by the small working group of members:

"Article 21. Systematic or mass violations of human rights

"An individual who commits or orders the commission of any of the following violations of human rights in a systematic manner or on a mass scale, shall, on conviction thereof, be sentenced [to . . .]:

"(*a*) murder;

"(*b*) torture;

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

"(*d*) deportation or forcible transfer of population;

"(*e*) persecution on social, political, racial, religious or cultural grounds."

[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 . . . 1991*, vol. II (Part One).