

Document:-
A/CN.4/SR.2240

Summary record of the 2240th 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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(<http://www.un.org/law/ilc/index.htm>)*

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 Mankind¹ (*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).

3. He said that the *chapeau* of the article, which had been awkwardly worded, had been amended, and the words "by another individual" had been deleted, for the sake of consistency with other articles in the draft. The *chapeau* now included the previously indented reference to a violation of human rights in a systematic manner or on a mass scale and was followed, as before, by an enumeration of such violations comprising five different categories of crimes.

4. Mr. BARSEGOV said that the new text was a valuable attempt to achieve a generally acceptable solution. However, there was a certain shift in emphasis, since all the acts listed in subparagraphs (a) to (e) must now be committed in a systematic manner or on a mass scale. The latter concept was now transferred to the acts themselves. He had no objection to that, except with regard to subparagraph (d) "deportation or forcible transfer of population". The new text implied that one act of deportation would not be sufficient.

5. Mr. TOMUSCHAT, recalling the comment by Mr. McCaffrey at the previous meeting, said that the word "population" should appear in the plural. As to subparagraph (d), he agreed with Mr. Barsegov that an act of deportation or forcible transfer of population was itself a systematic and large-scale violation of human rights. Hence, the *chapeau* of the article was not suited to subparagraph (d), but only to murder, torture, slavery and persecution. Subparagraph (d) should therefore be treated separately.

6. Mr. THIAM (Special Rapporteur) said he, too, agreed with Mr. Barsegov. To solve the difficulty, all the acts listed in subparagraphs (a), (b), (c) and (e) should be placed together in one paragraph. A second paragraph should then deal with deportation and forcible transfer of population.

7. Mr. EIRIKSSON said an alternative would be to make it clear that the acts referred to in subparagraph (d) constituted, by their very nature, systematic and mass violations of human rights, and therefore met the requirement stated in the *chapeau*. The point could be brought out in the commentary, without doing harm to the text.

8. Mr. NJENGA said he agreed with that suggestion and also with the point that the word "population" should appear in the plural. However, the wording of the new *chapeau* failed to convey the meaning properly. The words "shall, on conviction thereof, be sentenced [to . . .]" should be placed at the end of the article.

9. Mr. THIAM (Special Rapporteur) said that to single out one of the acts in the commentary as an exception from the clear rule stated in the *chapeau*, as suggested by Mr. Eiriksson, would conflict with the literal meaning of the text. A commentary could elucidate a text, but must not introduce new meanings. The only solution was to place the different categories of acts in two paragraphs; deportation and forcible transfer of population should feature in a separate second paragraph.

10. The CHAIRMAN said that the purpose of Mr. Eiriksson's proposal was simply to dispel doubt, not to alter the text. In his own view, the *chapeau* of the new version was awkwardly worded. The reference to con-

viction and sentencing should be placed at the end of the article.

11. Mr. RAZAFINDRALAMBO concurred with the Special Rapporteur that a commentary could not alter the meaning of articles which were already clear and precise. The intended meaning must be conveyed by the text itself. As the Special Rapporteur had suggested, the crimes should be grouped in separate paragraphs, deportation and forcible transfer of population having a paragraph to itself, to indicate the systematic and mass character of such crimes. The word "population" should be in the singular; in French the plural form would imply that the crime of forcible transfer must be committed against several populations.

12. The CHAIRMAN said that in his view, the objection voiced by Mr. Razafindralambo would apply equally to the English version.

13. Mr. PELLET said it was unclear whether the crime of persecution, referred to in subparagraph (e), was also inherently of a mass character. To solve the difficulty, he suggested transposing subparagraphs (d) and (e) and placing the word "or" before "deportation or forcible transfer of population". With regard to the Special Rapporteur's observation that the commentary could not be used to add meaning to the text, the problem with the present text lay in the choice between two possible meanings, and the commentary could make clear which meaning was intended.

14. Mr. THIAM (Special Rapporteur) said he would not object to the drafting change suggested by Mr. Pellet. A commentary could indicate the existence of a problem in a text; in no circumstances, however, could the commentary alter the meaning.

15. Mr. BARSEGOV said he could agree to Mr. Pellet's suggestion. However, adding the word "or" would imply some kind of choice or contradistinction, thereby creating further confusion. As to the term "population", the concept was a collective one and the singular must be used in Russian to refer to the inhabitants of a country or region, or a nationality. He was concerned that if the plural was used, the meaning would be that the populations of several places had to be deported before the crime constituted a mass violation of human rights.

16. Mr. GRAEFRATH proposed a rewording of article 21, to read:

"An individual who commits or orders the commission of any of the following violations of human rights:

"— murder

"— torture

"— establishing or maintaining over persons a status of slavery, servitude or forced labour

"— persecution on social, political, racial, religious or cultural grounds,

in a systematic manner or on a mass scale; or

"— deportation or forcible transfer of population

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

17. That text would resolve the difficulty by keeping the reference to deportation separate.

18. Mr. EIRIKSSON, replying to the observations by the Special Rapporteur, said he was well aware that the meaning of the text could not be changed by the commentary. His only intention was to separate the acts which, if repeated, would be of a systematic or mass character, from those which, by their very nature, were of such a character. That was already the Commission's own understanding of article 21, and a commentary could clarify it. Splitting the text into two paragraphs might cause difficulty, because the title of the article required the presence of a systematic and large-scale element throughout. Perhaps a working group should be constituted to frame an acceptable version of the article.

19. Mr. TOMUSCHAT said he welcomed Mr. Graefrath's proposal. As the Special Rapporteur had rightly said, the text must be clear in itself. The need for interpretation must be avoided.

20. Mr. PAWLAK (Chairman of the Drafting Committee) said that the text proposed by Mr. Graefrath would be perfectly acceptable. None of the language descriptive of the crimes was lost, and it was certainly a more felicitous version than the previous one. As for the term "population", the plural could indeed denote the transfer of several populations; hence it would be best to retain the singular.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the new version, proposed by Mr. Graefrath.

Article 21, as amended, was adopted.

ARTICLE 22 (Serious war crimes)

22. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 22, which read:

Article 22. Serious war crimes

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

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

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [in particular wilful killing, torture, mutilation, taking of hostages, deportation or transfer of civilian population and collective punishment];

(b) use of unlawful weapons;

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

(d) large-scale destruction of civilian property;

(e) wilful attacks on property of exceptional religious, historical or cultural value.

23. Mr. PAWLAK (Chairman of the Drafting Committee) said that, after some further discussion, the Drafting Committee had decided to make two changes to article 22. The title, "War crimes", had been altered to "Serious war crimes"

in order to bring it more into line with the text of the article itself which referred to "an exceptionally serious war crime". The second change lay in the deletion of the words "by another individual"—a change which had been made already in previous articles.

24. It would be recalled that, in 1989, at the Commission's forty-first session, the Special Rapporteur had introduced in the seventh report³ an article on war crimes to be included among the crimes against peace. The Drafting Committee had discussed the article at the forty-second session in 1990, but had been unable to succeed in drafting a text acceptable to all members. At the present session, the Committee had spent a considerable amount of time in considering the text and had finally been able to propose an article on "Serious war crimes". He mentioned the article's odyssey simply to emphasize its complexity and the extensive discussion and redrafting that had been required in the Committee to reach the compromise formula now proposed.

25. The Drafting Committee had taken the view that an article on war crimes should select from among war crimes only those whose degree of seriousness would rank them as crimes against the peace and security of mankind. Therefore, article 22 was concerned not with the so-called "ordinary" war crimes nor with the so-called "grave breaches" described in the 1949 Geneva Conventions and Additional Protocol I thereto. For the purposes of the Code, the Committee felt that what would more closely approximate to its understanding of the kind of crime in question was "an exceptionally serious violation" of principles and rules of international law applicable in armed conflict, the formulation that appeared in the *chapeau* of paragraph 2.

26. Secondly, the Drafting Committee had considered that it was in the nature of a criminal code, such as the present one, to describe a crime rather than to give examples. Such a method of drafting was consistent with that used in the previous articles. The subparagraphs therefore described the categories of exceptionally serious violations that could constitute crimes under the Code. In selecting the categories of war crimes, the Committee had taken into account the Hague Rules, the four 1949 Geneva Conventions and Additional Protocol I thereto.

27. The article consisted of two paragraphs. Paragraph 1, as in other articles, tied the crime to an individual, and paragraph 2 defined the crime.

28. The *chapeau* of paragraph 2 set out the general rule for war crimes for the purposes of the draft Code, namely an "exceptionally serious violation of principles and rules of international law applicable in armed conflict". Hence, two criteria were identified: first, a violation of principles and rules of international law applicable in armed conflict, and second, a violation that must be exceptionally serious, something which could apply to the degree of violation of the rule or to the consequences of the violation. The words "exceptionally seri-

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

ous", though not entirely precise, conveyed some idea of the degree of gravity of the violation. The expression "principles and rules of international law applicable in armed conflict" was intended to include conventional and customary rules, such rules as might be agreed by the belligerents, as well as those that were universally recognized.

29. The Drafting Committee had also preferred to speak of "armed conflict", a term that was used in article 2 (b), of Additional Protocol I. Some constructive ambiguity was useful, particularly in view of the fact that common article 3 of the 1949 Geneva Conventions applied to non-international armed conflict. In any case, the wording of the *chapeau* did not in any way expand on or affect the scope of principles or rules of international law applicable in armed conflict.

30. Among the exhaustive categories of war crimes, subparagraph (a) included any act of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons. Many members of the Committee had thought that that general description included very many acts, such as wilful killing, torture, unjustifiable delay in repatriation of prisoners of war, and so on. Some members of the Committee, while not denying that understanding, insisted on listing some examples of specific acts and the examples appeared in square brackets in the proposed text. In their view, the listing could help the judge or the decision maker to grasp what the general description of the act was intended to include. Those who disagreed with the listing of examples felt that it was not exhaustive and there was no reason to single out certain acts; besides, non-exhaustive lists were contrary to the methods of drafting so far used in the Code. In their opinion, the list could be included in the commentary to the article. Since the two views could not be reconciled, the examples had been placed in square brackets, so as to leave the decision to the Commission.

31. Subparagraph (b) dealt with the use of unlawful weapons. Like the rest of the subparagraphs it should be read together with the *chapeau* of the paragraph. The Committee was of the opinion that the use of certain unlawful weapons could constitute a war crime if it was an exceptionally serious violation of principles and rules of international law applicable in armed conflict. Subparagraph (c) referred to methods or means of warfare which were either intended, or could be expected, to cause widespread, long-term and severe damage to the natural environment. The words "may be expected to cause" related to situations in which the user knew of the devastating effects on the environment, yet went ahead and used the methods or means in question. The category in subparagraph (d) was large-scale destruction of civilian property, when such destruction was considered an exceptionally serious violation of principles and rules of international law applicable in armed conflict. Subparagraph (e) mentioned wilful attacks on property of special religious, historical or cultural value—again, when they were considered exceptionally serious violations of principles and rules of international law applicable in armed conflict.

32. He wished to emphasize once more that the subparagraphs must all be read together with the *chapeau* of

the article in order to understand the real intention of the article and to avoid misinterpretation. Lastly the title, "Serious war crimes", indicated that the intention of the article was to cover such crimes for the particular purposes of the draft Code.

33. Mr. JACOVIDES suggested inserting two further examples in the passage between square brackets at the end of paragraph 2 (a), namely the establishment of settlers in an occupied territory, and changes to the demographic composition of a foreign territory.

34. Mr. NJENGA said that article 22 as proposed by the Drafting Committee was, on the whole, acceptable.

35. The two concepts of "serious war crimes" and "grave breaches" were very close and it was difficult to distinguish between them. He earnestly hoped that, by making that distinction, the Commission would not be seen as trying to diminish the principle of "grave breaches" as defined in article 147 of the fourth Geneva Convention of 1949. The text of the article under consideration was very similar to article 147, except that some crimes had been omitted, a fact that could give rise to problems of interpretation. Actually, two of the omissions were serious and could be included in paragraph 2 (a), namely biological experiments and compelling protected persons to serve in the armed forces of a hostile Power.

36. It was essential to give examples, which were very important for an understanding of the intention of article 22. They provided guidance for the court on the situations envisaged. Accordingly, he would urge that the examples in paragraph 2 (a) be retained without square brackets.

37. Lastly, the commentary must make it perfectly clear that there was no intention of diminishing in any way the provisions of the four Geneva Conventions of 1949.

38. Mr. PAWLAK (Chairman of the Drafting Committee) said that, personally, he would have preferred to have a full list of examples in paragraph 2, but the discussion in the Committee had led to the adoption of the text now being proposed.

39. The wording "acts of inhumanity, cruelty or barbarity . . .", in subparagraph (a) was very broad. Perhaps the square brackets around the examples in paragraph 2 (a) could be deleted, but it would be for the Commission to decide on that point. In any event, the two examples suggested by Mr. Jacovides, as well as the two mentioned by Mr. Njenga, could usefully be added.

40. On the question of terminology, he urged the Commission not to make any change but to retain the term "serious war crimes". Any attempt to introduce the concept of "grave breach" would complicate the situation by putting the draft Code in the straitjacket of the 1977 Additional Protocol.

41. Mr. EIRIKSSON said he had no objection to article 22, but a clear description was needed of the intention. The contents would be difficult to understand even for experts in the law of armed conflict. Hence it was important for the commentary to include all the explana-

tions given by the Chairman of the Drafting Committee. In particular, the Commission had to be careful not to prejudge in any way the existing body of law on war crimes and the law applicable to armed conflicts, which had so far proved satisfactory.

42. It was advisable to include some further examples in order to complete article 22. It covered most of the grave breaches dealt with in the Geneva Conventions, particularly in the case of paragraph 2 (*a*). The problem, however, was that some of the items listed in the passage in square brackets did not traditionally belong to the law of armed conflict.

43. He hoped that, between the first and second readings of the draft Code, suggestions would be forthcoming from competent outside bodies that would help to improve the text of article 22. A comprehensive commentary was essential.

44. The CHAIRMAN said it was clear that every effort would be made to ensure that the commentary was as comprehensive as possible. The proposed text for article 22 represented a policy decision, in particular with regard to the illustrations. He preferred to call them "illustrations", rather than "examples", since in criminal law it was not appropriate to legislate by analogy. All the offences mentioned in article 22, however, fell under the rubric of armed conflict. Members could, of course, propose additions to the list of illustrations.

45. Mr. THIAM (Special Rapporteur) suggested that the title should be reworded to read: "Extremely serious war crimes". It would thus be more in line with the text of the article. He would point out that the serious war crimes mentioned in article 22 covered less ground than the "grave breaches" of the Geneva Conventions.

46. Mr. PELLET said that the article was very unsatisfactory. He did not wish to call into question the compromise formulation adopted in the Drafting Committee, but did want to place on record the reasons for his strong reservations.

47. His first objection was that the proposed text was inconsistent. The article referred to the violation of principles and rules of international law "applicable in armed conflict". Nevertheless, both the title and the body of the article used the expression "war crimes", a term he himself would have preferred to eliminate, because article 22 covered both more than, and less than, the traditional concept of war crimes. Actually, it covered only some war crimes but also certain offences which fell outside the scope of war crimes.

48. The usual concept of a war crime was any violation of the rules and customs of war. As explained by the Chairman of the Drafting Committee, article 22, for its part, was intended to cover only exceptionally serious violations, and not all violations, of the laws of war. Traditionally, "war" designated a conflict between sovereign States and was only one of the forms of international armed conflict. Article 22, however, was intended to cover not just inter-State war but all forms of international armed conflict, in other words, armed struggle for national liberation as well.

49. Consequently, article 22 seemed illogical and inconsistent with developments in international law over the past 30 years. He was not opposed in substance to the principle that article 22 tried to embody. The most appropriate course would be to avoid using the term "war crimes" at all and to refer simply to exceptionally serious violations of the rules applicable in armed conflict.

50. His second objection concerned the list of examples in paragraph 2. There was, of course, always a danger in including a list, if only because it could never be exhaustive. In the present instance, the non-exhaustive character of the list was clear from the words "in particular". Indeed, the list itself appeared to have been drawn up somewhat haphazardly and without any obvious criterion for distinguishing the items it included from those covered by the concept of "grave breaches" of the Geneva Conventions and Additional Protocol I thereto. In the circumstances, his own suggestion would be to eliminate the whole list figuring in square brackets, and not the square brackets alone. A further reason for objection on that point was that article 22 demanded from a State at war a greater measure of respect for human rights than did article 21 from a State in time of peace. He found that approach quite extraordinary and altogether unacceptable. Both the title and text of article 21 referred clearly not to all violations of human rights but to "systematic or mass violations" of human rights. Article 22, on the other hand, made an isolated act of wilful killing or torture punishable as a war crime and thus covered a much wider area.

51. He was not opposed to the proposal by Mr. Jacovides to include serious violations of the law governing wartime occupation, but a provision on the subject could not possibly be added to the list in paragraph 2 (*a*); if accepted, it should constitute a separate subparagraph. He none the less reiterated his opposition to the inclusion of any list at all.

52. Lastly, he disagreed with the way in which subparagraphs (*c*) and (*d*) of paragraph 1 were taken from Additional Protocol I. The original provisions of the Protocol had to be construed in the light of the necessities of the laws of war in general. It was a very important proviso that had disappeared in the process of copying the provisions for the purposes of article 22. It was important to remember that the rules governing armed conflict formed a whole and were interdependent. Subparagraphs (*c*) and (*d*) repeated two of those rules, taking them out of their proper context. The subparagraphs had been hastily adopted in the Drafting Committee, without much thought as to the consequences.

53. Mr. OGISO said that he had a number of reservations with regard to article 22. The Chairman of the Drafting Committee had proposed adding the word "serious" to the title of the article. However, doing so implied that there were three categories of war crimes: (*a*) ordinary war crimes; (*b*) serious war crimes; and (*c*) exceptionally serious war crimes. He did not see the wisdom in having three categories of war crimes. In particular, the use of the expression "exceptionally serious war crimes" might raise questions as to whether or not a particular act was an exceptionally serious crime. The defi-

tion in paragraph 2 of an exceptionally serious war crime was mere tautology and did not clarify the matter. Furthermore, the descriptions of war crimes contained in paragraph 2 (a) to (e) made no distinction between serious and exceptionally serious war crimes. In all, the word "exceptionally" tended to confuse the issue and should be eliminated from the article, which would then encompass two categories—ordinary and serious war crimes—and would thus correspond to the 1949 Geneva Conventions.

54. He would add to the list in square brackets contained in paragraph 2 (a) an item on the unjustified detention of prisoners of war after the cessation of hostilities, a suggestion that he had already made in the Drafting Committee. He was making that suggestion not to criticize what had happened in the past, but to prevent such a crime from occurring in the future.

55. Paragraph 2 (b), on the use of unlawful weapons, was acceptable, on the understanding that the commentary would clarify the conditions under which weapons were considered unlawful and whether the prohibition would apply between the parties to the same convention forbidding the use of those particular weapons.

56. Mr. THIAM (Special Rapporteur) said that he appreciated the fact that his colleagues wished to make their reservations known on what was clearly a difficult and controversial matter. Mr. Pellet, in particular, had made a number of comments, vehemently at times. In that connection, he wished to point out that some of Mr. Pellet's assertions were not entirely accurate. It was not true that the Drafting Committee had given only hasty consideration to article 22. In fact, it had begun its consideration of that article in 1990 and, in the absence of a satisfactory solution, had returned to it at the present session. Indeed, article 22 was the one on which the Committee had spent the most time.

57. In his report, he had raised the issue of whether the expression "war crimes" should be replaced by the wording "violations of the law applicable in armed conflict". After extensive debate, the Commission had finally decided to keep the term "war crimes" since its usage was well established and it was employed in conventions that were still in force. At the same time, it was understood that reference would be made in the body of the article to serious violations of the law applicable in armed conflict. He agreed fully that article 22 should contain a reference to exceptionally serious violations. From the outset, the Commission had defined crimes against the peace and security of mankind as exceptionally serious crimes and there had been no objections to using that expression. In any case, that wording would demonstrate clearly that the crimes being dealt with in article 22 were not necessarily all the acts classified as "grave breaches" under the Geneva Conventions, but rather, crimes of an exceptionally serious nature.

58. The Commission could have avoided the enumeration of particular examples in paragraph 2 (a), but it had preferred by a large majority to keep that list in spite of the fact that it was not exhaustive.

59. Mr. Pellet had also observed that, by using the words "exceptionally serious", the Code was more se-

vere in regard to the application of article 22 than of article 21. Personally, he saw no real problem in using that expression. The categories of war crimes and crimes against humanity often coincided in practice.

60. Mr. PAWLAK (Chairman of the Drafting Committee) said he wished to remind members that Mr. Pellet had been an active participant in the Drafting Committee's work on article 22 and had contributed and agreed to the final compromise article it had adopted. While he could accept Mr. Pellet's reservations, he could not accept the assertion that article 22 was of no value whatsoever.

61. In response to the observations of Mr. Ogiso, he would point out that article 22 did not refer to three categories of war crimes; it was limited to one category alone, namely, exceptionally serious war crimes. The definition provided under paragraph 2 was not really tautological since it was followed by several subparagraphs specifying the violations covered. Furthermore, the principles and rules of international law applicable in armed conflict were broadly understood and numerous references were made to them in existing conventions and customary international law. The Drafting Committee had considered the possibility of adding a reference to prisoners of war to the list in square brackets. However, it had decided that the matter was implicitly covered by the general description contained in paragraph 2 (a). In any case, he would not object if the Commission decided to add that item to the list.

62. Finally, in paragraph 2 (a), the word "the" should be inserted before the words "civilian population".

63. Mr. GRAEFRATH said that the title of the article should remain as it stood. By adding the word "serious", the Commission would simply be introducing an unnecessary new element, especially since the expression "serious war crimes" did not appear in the body of the text. "War crimes" was indeed the traditional wording. The Drafting Committee had decided to use it despite the fact that the international community now spoke not about rules of war but about rules applicable in armed conflict. He did not object to the use of the term "war crimes", since it was being used in the article to refer exclusively to violations of the rules applicable in armed conflict.

64. At its previous session, the Commission had elaborated a detailed list of war crimes. However, the list had not found its way into article 22. Instead, the Drafting Committee had included in paragraph 2 (a) several examples of specific war crimes. In his view, such a non-exhaustive list simply urged members to suggest supplementary items and did harm to the entire article. He would therefore prefer to eliminate the list in square brackets in paragraph 2 (a) and incorporate the more detailed list from the previous session in the commentary. In paragraph 2, the word "exceptionally" which came before the words "serious war crime" should be eliminated. The references to "serious war crimes" and "exceptionally serious violations" were adequate for the purposes of that paragraph.

65. Mr. CALERO RODRIGUES said that he wished to associate himself with the comments made by the Spe-

cial Rapporteur and the Chairman of the Drafting Committee in response to Mr. Pellet, who had, to all intents and purposes, charged that the Drafting Committee worked in a haphazard and hasty fashion. That was not at all the case: while it made mistakes at times, the Drafting Committee applied itself very seriously to its work.

66. The issue of the three categories of war crimes, mentioned by Mr. Ogiso, probably arose from the fact that the Chairman of the Drafting Committee had proposed changing the title of article 22 to "Serious war crimes". He agreed with Mr. Graefrath that there was no need to add a new formulation. The title should either remain as it stood or be amended to read "Exceptionally serious war crimes".

67. He was not particularly in favour of keeping the list in square brackets under paragraph 2 (a). The list was not comprehensive and was not essential to paragraph 2, which already spelled out in its subparagraphs the parameters for the determination of violations of rules applicable in armed conflict. Nevertheless, if the Commission insisted on keeping the list in square brackets, it was free to add items to that list provided they corresponded to the definition contained in the *chapeau* of paragraph 2 (a), which had been carefully worked out by the Drafting Committee.

68. Mr. BEESLEY said that, in principle, he endorsed views expressed by Mr. Graefrath. He agreed that the article should not refer to three different categories of war crimes. As to paragraph 2, there was no need for the words "exceptionally serious" to be repeated and they could be deleted in the second instance. In general, paragraph 2 might benefit from further consideration. For example, the list of acts in paragraph 2 (a) to (e) was far from exhaustive. One item which might have been included was the forcible use of children in situations of armed conflict. He, too, shared the concerns expressed about the list in square brackets in paragraph 2 (a) and, while he was in favour of eliminating the list entirely, he would not block its inclusion. The wording of subparagraph (c) was also problematic. As it stood, the subparagraph was so restrictive in meaning that it could hardly apply to any real situations.

69. Lastly, article 22 was one of the most difficult in the draft Code and members should not be too concerned about the differences that emerged in the course of the discussion.

70. The CHAIRMAN assured Mr. Beesley that the Drafting Committee had given careful consideration to the wording of paragraph 2 (c).

71. Mr. EIRIKSSON said that the title of article 22 should be "Exceptionally serious war crimes" rather than "Serious war crimes".

72. The logic behind the drafting of paragraph 2 was that the inclusion of detailed descriptions of various acts and exhaustive lists of examples would have meant reproducing an enormous amount of legal material on armed conflict. The paragraph had therefore been elaborated so that, in the case of a particular act, it would first be determined whether the act could be considered a vio-

lation of rules applicable in armed conflict, as defined in paragraph 2 (a) to (e). Once the nature of the act had been established, it remained to determine whether the violation was an exceptionally serious one. For that reason, the wording "exceptionally serious violation" had to remain in paragraph 2.

73. Mr. PELLET said he agreed with Mr. Graefrath and Mr. Calero Rodrigues that it was more logical to refer in the title to "Exceptionally serious war crimes" than to "Serious war crimes". It was not permissible within the same article to treat one concept in two different ways. The article dealt with exceptionally serious crimes, as was clearly indicated in paragraphs 1 and 2, and therefore the title had to be in line with the content of the article. He also agreed with the view that the entire list in square brackets should be eliminated from paragraph 2 (a). If the list was to be incorporated in the commentary, it should be made very clear that the acts in question only constituted crimes against the peace and security of mankind if they were exceptionally serious violations.

74. He had been misunderstood if he had given the impression that he was engaging in overall criticism of the Drafting Committee's work, including its work on article 22. He was not calling into question the compromise solution that had been adopted. On the contrary, he wished to pay tribute to the Committee's conscientious and intensive efforts under the guidance of its Chairman. Nevertheless, he had always had and continued to have enormous reservations with regard to paragraph 2 (c). His doubts might have been allayed had he received a response to the issue he had raised in the Drafting Committee about the way in which paragraph 2 (c) had been taken from Additional Protocol I. He was still waiting for a reply.

75. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to amend the title of the article to read "Exceptionally serious war crimes" and to delete the words "by another individual" from paragraph 1.

It was so agreed.

76. Mr. THIAM (Special Rapporteur), referring to subparagraph 2 (a), suggested that the list of crimes which appeared between square brackets should be deleted and referred to instead in the commentary, along with the crimes mentioned by Mr. Jacovides, Mr. Njenga and Mr. Ogiso.

77. Mr. BARSEGOV said he could not agree to that suggestion. In his view, the list of crimes should remain in the body of the article and it should be left to the Sixth Committee to decide whether such a list was necessary, and also whether it was satisfied with the general concept of barbarity or whether it wished to define that term. In addition, the article should be expanded and made more specific. In particular, it should contain the fullest possible description of the acts that constituted war crimes and the list that appeared between square brackets should include the two crimes mentioned by Mr. Jacovides and Mr. Njenga. He would not object to the inclusion of the unjustified detention of prisoners of war after the cessation of hostilities, but a time limit

should be specified beyond which such detention would become unlawful. A reference in the commentary to the crimes in question would be inappropriate, since the commentary was not binding.

78. Mr. CALERO RODRIGUES said that the list which appeared between square brackets could be deleted and transferred to the commentary. After all, there was nothing unusual, on first reading, about indicating the Commission's disagreement on a particular point. However, inclusion of the list in the body of the article would draw the attention of Governments to the matter. On balance, therefore, it would perhaps be best to follow the line suggested by Mr. Barsegov.

79. Mr. EIRIKSSON said that he would be reluctant to adopt subparagraph 2 (a) in the form in which it was drafted. He therefore proposed that, to cover Mr. Njenga's point, the words "biological experiments" should be added and, to cover Mr. Barsegov's point, the words "unjustifiable delay in the repatriation of prisoners of war" should be added.

80. The CHAIRMAN, appealing to members not to delay the adoption of the report of the Drafting Committee any further, said that members would have an opportunity to comment further on the points raised when the Commission came to consider its report to the General Assembly.

81. Mr. CALERO RODRIGUES suggested that paragraph 2 (a) should be adopted as drafted, on the understanding that a suitable form of wording would be worked out later to take account of the points raised during the discussion.

82. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 22, as amended, on the understanding expressed by Mr. Calero Rodrigues.

Article 22, as amended, was adopted.

ARTICLE 23 (Recruitment, use, financing and training of mercenaries)

ARTICLE 24 (International terrorism)

83. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts proposed by the Drafting Committee for articles 23 and 24, which read:

Article 23. Recruitment, use, financing and training of mercenaries

1. An individual who as an agent or representative of a State commits or orders the commission by another individual of any of the following, shall, on conviction thereof, be sentenced [to . . .]:

— recruitment, use, financing or training of mercenaries for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law.

2. A mercenary is any individual who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in ex-

cess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) is not a member of the armed forces of a party to the conflict; and

(e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any individual who, in any other situation:

(a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) undermining the territorial integrity of a State;

(b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) is neither a national nor a resident of the State against which such an act is directed;

(d) has not been sent by a State on official duty; and

(e) is not a member of the armed forces of the State in whose territory the act is undertaken.

Article 24. International terrorism

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

— undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

84. Mr. PAWLAK (Chairman of the Drafting Committee) said that, as previously adopted, under articles 23 and 24, on mercenaries and on international terrorism, the crimes in question came within the terms of the Code if they were committed by agents or representatives of States. The Drafting Committee was aware that some members of the Commission and even members of the Sixth Committee could make a case for extending the scope *ratione personae* of the two articles to persons or groups unconnected with the State. The Committee had, however, thought that it should not depart from the approach taken by the Commission to the two articles in 1990. He therefore suggested that the articles should be retained as drafted.

85. With regard to article 23, the Committee had inserted the standard opening clause before the definition of the crime as initially adopted. Paragraphs 2 and 3 were unchanged except that the word "person", in the first line of each paragraph, had been replaced by the word "individual", for reasons of consistency. The semicolon at the end of paragraph 2 (e) of the article should be replaced by a full stop.

86. Mr. CALERO RODRIGUES proposed that the words "by another individual", in paragraph 1, should be deleted.

87. Mr. TOMUSCHAT proposed that, to bring the article into line with previous articles, the word "acts" should be added after the words "the following", in paragraph 1.

88. Mr. CALERO RODRIGUES, supported by the Special Rapporteur and Mr. TOMUSCHAT, suggested

that the words “shall, on conviction thereof, be sentenced [to . . .]” should be transferred to the end of paragraph 1.

89. Prince AJIBOLA said that he would prefer a shorter, tidier definition of mercenaries. In particular, paragraph 2 (b) should end at the words “private gain”; otherwise the provision it embodied would be far too long and vague.

90. Mr. PAWLAK (Chairman of the Drafting Committee) said that he, too, would have liked a shorter definition. However, the text had been taken from the International Convention against the Recruitment, Use, Financing and Training of Mercenaries as elaborated by the Sixth Committee and it had been felt that to adopt a different text would be tantamount to criticizing what had been worked out in a lengthy process. Accordingly, he would advise that, for the first reading of the Code, the text of the article should be retained as drafted, with any minor editing changes needed to bring it into line with other provisions of the Code. It could then probably be shortened, and adapted to the special needs of the Code, on second reading.

91. Mr. PELLET said that he wished to enter a general reservation to article 23.

92. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 23 as amended by Mr. Calero Rodrigues, Mr. Thiam and Mr. Tomuschat.

Article 23, as amended, was adopted.

93. Mr. PAWLAK (Chairman of the Drafting Committee) said that the standard opening clause of article 24 had been inserted before the definition of the crime as adopted in 1990. In addition, the Drafting Committee suggested that paragraph 2 of the text as initially adopted should be deleted in the light of article 3, which covered participation and complicity. Once again, the words “by another individual”, in the second line of the article, should be deleted.

94. Mr. TOMUSCHAT proposed that the general structure of the article should follow that of article 23.

95. Prince AJIBOLA said it was gratifying to note that, rather than speak simply of “individuals”, the article referred to an individual “as an agent or representative of a State”, which was the proper language to adopt.

96. Mr. NJENGA asked whether, under the terms of the article, terrorism was confined to State terrorism.

97. Mr. THIAM (Special Rapporteur) said that Mr. Njenga had raised a pertinent question. It would be inadvisable at that stage, however, to alter a text that had already been adopted. Of course, on second reading, a reference to individuals *per se* should be introduced and the whole question of the participation of individuals in terrorism should be considered very carefully, with special reference to the fact that they might, for instance, be members of groups or associations that had an interest in committing acts of terrorism. Nevertheless, it was a difficult issue, since bodies such as political parties and liberation movements might be involved. For the time being, therefore, it would suffice simply to note that there

was a problem, on the understanding that the matter would be dealt with in more detail on second reading.

98. Mr. NJENGA said that a definition of terrorism which was confined to the agents or representatives of States would be very narrow. The attention of the Sixth Committee should be drawn to the matter.

99. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 23 reflected the position taken by the Commission and the Drafting Committee in 1990, though he himself had in fact spoken at that time of the need to cover a broader spectrum of individuals. The Commission could, as had been suggested, always revert to the matter on second reading.

100. Mr. SOLARI TUDELA, agreeing that international terrorism could not be confined to State agents said that was why, in the Drafting Committee, he had entered a reservation to the article. True, the Convention for the Prevention and Punishment of Terrorism and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment both contained such a limitation, but that had been as a result of a policy decision. Such a limitation might be appropriate for a political document but it had no place in a legal code.

101. Prince AJIBOLA said that Mr. Njenga had raised a very serious point but one that could easily be dealt with by simply removing a few words.

102. Mr. PELLET said he, too, had always felt that the limitation in article 24 to agents and representatives of the State was unfortunate. The solution was not as easy as Prince Ajibola had suggested, however, for the removal of a few words might solve the problem with regard to paragraph 1, but not in the case of paragraph 2. In the time that remained to the Commission it would be very difficult to find an appropriate solution, in his view.

103. The CHAIRMAN said that the report of the Commission to the General Assembly would contain an explanation of the reasons why it was considered that the article should not be confined to State terrorism. If he heard no objection, he would take it that the Commission agreed to adopt article 24 with the transposition of the wording suggested by Mr. Calero Rodrigues.

Article 24, as amended, was adopted.

The meeting rose at 6.10 p.m.

2241st MEETING

Friday, 12 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov,