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AND PROTECTION OF MINORITIES

Thirty-eighth session

SUMMARY RECORD OF THE 19th MEETING

Held at the Palais des Nations, Geneva,
on Friday, 16 August 1985, at 4 p.m.

Chairman: Mrs. DAES

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Review of further developments in fields with which the Sub-Commission has been concerned (continued)

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The meeting was called to order at 4.35 p.m.

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED (agenda item 4) (continued) (E/CN.4/Sub.2/1985/3-6; E/CN.4/Sub.2/1984/4 and E/CN.4/Sub.4/1984/40)

1. The CHAIRMAN said that, while all speakers would be permitted freedom of speech and everything would be discussed in fairness and equity, she appealed to them to show respect for one another and particularly for the officers and members of the Sub-Commission.
2. Mr. AL KHASAWNEH, having commended Mr. Whitaker on producing the revised and updated report on the prevention and punishment of the crime of genocide (E/CN.4/Sub.2/1985/6), said that account should have been taken of a number of recent developments in the Sixth Committee of the General Assembly and the International Law Commission which were closely related to the topic under consideration and in some areas covered the same ground.
3. Firstly, Mr. Whitaker's study might usefully have examined the question of State responsibility and might, in particular, have taken account of the draft articles proposed by the two rapporteurs on the subject appointed by the International Law Commission, who had made a considerable effort to delineate the concept of international crimes and determine their consequences.
4. Secondly, the Special Rapporteur did not appear to have kept abreast of recent developments with respect to the draft code of offences against the peace and security of mankind, on which some interesting and pertinent views had been expressed in the Sixth Committee of the General Assembly and the International Law Commission concerning international criminal jurisdiction and the treatment of perpetrators of international crimes. It was unfortunate that those views had not been given the attention they deserved.
5. Thirdly, there were the various conventions based on the principle of "extradite or prosecute", including the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the Tokyo Convention on Offences and certain other acts committed on board aircraft, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the International Convention Against the Taking of Hostages, all of which were designed to deny safe haven to the perpetrators of the crimes to which they related. Those conventions might supply a model for efforts to tighten up the Convention on the Prevention and Punishment of the Crime of Genocide.
6. He noted that the Special Rapporteur had annexed to his report the entire text of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In view of the space constraints referred to in paragraph 13, it would surely have been more economical to cite only those articles dealing with the establishment of jurisdiction over the perpetrators of the crimes enumerated in the Convention.

7. The dichotomy between the work of the Sub-Commission and that of the Sixth Committee of the General Assembly and the International Law Commission, which could be seen in the report, was all the more regrettable in that the conclusions of studies by members of the Sub-Commission must depend upon an analysis of the progress and final outcome of the work of those bodies on closely-related topics. While duplication of work being done elsewhere was to some extent inevitable, the Sub-Commission should exercise caution in calling for studies which had to be constantly revised in order to keep abreast of developments and which might duplicate those of other bodies.

8. The subject matter of paragraph 24 of the report had given rise to considerable controversy and had diverted attention from other areas that were more closely related to the prevention and punishment of the crime of genocide. He referred, in particular, to the qualification of the massacre of Armenians in 1915-1916 as genocide. It had once been remarked that, while it was easy to predict the future, the past was impossible to ascertain. Although that remark would be a negation of history if taken to its logical conclusion, it should nevertheless be kept constantly in mind when passing judgement on historical events, particularly in the case under consideration. The Sub-Commission was not a body of historians and establishment of the crime of genocide - the greatest of all human rights violations - led to extremely grave legal consequences. Attributions of guilt should therefore be made only with extreme caution and on very strong evidence.

9. Furthermore, since the historical references made in the paragraph could not be exhaustive, a selective approach might lead to arguments that other cases were not cases of genocide but merely of massacre, or to the contention that they had not occurred at all. Efforts should be made to establish a clear criterion, taking account of the gravity of genocide and the caution that had to be exercised in attributing it. Although the criminal intent might be difficult to establish, it was crucial to the distinction between a massacre, however serious and whether or not accompanied by official negligence, and the crime of genocide.

10. In view of all those considerations, he took the view that the entire text of paragraph 24 was unnecessary both as concerned the coherence of the report and the concept of genocide. Mr. Martínez Báez had rightly observed that the existence of genocide did not depend on historical references.

11. Mr. DAHAK said that, pursuant to Economic and Social Council resolution 1983/33 and Sub-Commission decision 1983/2, Mr. Whitaker had produced an important document containing much detailed and precise information, to which much attention should be devoted. The comments he was about to make were in no way intended to detract from its value.

12. It was noteworthy that articles II, III and IV of the Convention on the Prevention and Punishment of the Crime of Genocide took account both of the material and moral aspects of the crime. As far as the material aspects were concerned, while article II, subparagraph (a) (Killing members of the group) required no definition, subparagraph (b) of the same article (Causing serious bodily or mental harm to members of the group) was much less clear and might be

interpreted in vastly different ways in different countries. Again, in the case of subparagraph (c) (Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part), it should be made clear precisely what conditions of life were referred to.

13. The acts referred to in subparagraph (d) (Imposing measures intended to prevent births within the group) and subparagraph (e) (Forcibly transferring children of the group to another group) involved no acts of killing or of physical or mental injury. The implication of subparagraph (e) was that the definition would not apply to a case in which an entire family was forcibly removed.

14. From the moral point of view, it was significant that the definition in article II related only to deliberate acts and not to acts of omission. Moreover, it was unclear whether the definition related to four groups (national, ethnical, racial or religious) or to only three such groups (ethnical, racial or religious), each of which had to be a national group, and thus excluded aliens.

15. Article III made it clear that the Convention went beyond the provisions of national legislation, which did not punish acts committed in the stage preceding the crime of genocide, while article IV stated that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." He did not think it necessary for the words "whether de jure or de facto" which the Special Rapporteur had suggested in paragraph 50 of his report, to be added to the text, since anyone who was not a ruler or public official would be regarded as a private person.

16. The Convention did not lay down penalties for the crime of genocide but left them to "a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" (article VI). However, unless there was a change of régime, it was unlikely that a court of the State in the territory of which the act had been committed would punish the Government in power. The Convention might therefore degenerate into an instrument for revenge by one Government on its predecessor. That was a weak point that deserved further study.

17. As to the competent jurisdiction, paragraph 59 of the report mentioned the possibility of an additional protocol extending jurisdiction to courts other than those of the country where the crime of genocide had been committed. However, that was a very sensitive point involving the sovereignty of States, which also required consideration.

18. A further weakness of the Convention was that it provided, in its article VII, that genocide and "the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition". However, States did not usually extradite their own citizens, even when bilateral or multilateral extradition agreements had been concluded. Moreover, since the Convention did not define the other acts enumerated in article III, paragraphs (b) to (e), different interpretations might be made by national courts. The Sub-Commission should therefore establish the minimum and maximum penalties to be handed down by those courts, suggest new penal or criminal laws on genocide for incorporation in the legislation of member States, and standardize the rules applicable in the matter of extradition.

19. Mr. Whitaker's report contained examples of genocide committed in the past, but the list was not exhaustive. It was also important to include a reference to contemporary cases. There were, for instance, some indications that genocide of the Palestinians was being attempted. What was needed was a commission of enquiry to document the crimes that might lead to genocide and concerning which preventive action might be taken.

20. Negligence or inadvertent omission should not be penalized, because failure to act might lead to a result that had not been expected. The Special Rapporteur was right in stating, however, that a conscious act or acts of advertent omission might be as culpable as the act of commission itself, and should therefore be regarded as conduct punishable as genocide.

21. Ethnocide and ecocide were crimes against humanity but not genocide. There were certain actions which resulted in adverse alterations, often irreparable, to the environment such as dumping nuclear waste in the sea-bed. Such actions might well lead to the destruction of the population of an area, through gross violation of the ecology in which they lived. In that connection, ecological groups organized for the protection of the ecology as a human right had on occasion been subjected to vengeful action by those pursuing activities which were harmful to the ecology. It was essential that such groups should be defended.

22. Practical means of implementing the Convention had yet to be found. In particular, the lack of clarity about which groups were, and were not, protected had made the Convention less effective and less well understood than was desirable. It enumerated the groups protected as any "national, ethnical, racial or religious group", without defining those terms. The definitions had thus become a matter for individual judgement and, in view of the varying interpretations, he had misgivings concerning the outlook for the Convention in its current form.

23. Damages and restitution lay within the field of civil rather than criminal responsibility, and liability for such compensation might lie with a group different from the actual perpetrators of the crime. Genocide could be perpetrated by a national group other than the Government. That group would then be criminally responsible but the State could nevertheless be liable to pay compensation because of its overriding obligation to protect its citizens.

24. A number of the proposals in the report were of theoretical rather than practical interest. That was particularly so in the field of extradition. A State would never extradite its own nationals, although it might punish them. There was therefore a need to establish international rules on the issue of extradition for such crimes. A practical step in that connection would be the establishment of a permanent committee of experts which should study the contents of national legislation and seek information on how such laws were applied in practice in their respective countries. What was required was an overall survey of the existing situation together with proposals for future action.

25. Mr. CHOWDHURY said that, in discussing the concept of genocide, the Special Rapporteur had stressed that the abhorrent crime of genocide was a violation of the most valuable of all human rights, namely, the right to life. Anyone who endangered the safety of the person violated the right to life. Even an omission to perform a duty might amount to the commission of such an offence; for example, famine caused by an individual for his personal benefit or for the benefit of a group would be an offence coming within the ambit of the crime of genocide under the Convention.

26. The Special Rapporteur had rightly pointed out that the situation became particularly serious when the offence was committed by a Government. Although the word genocide had come into use relatively recently, the offence itself had frequently been committed throughout human history. The Special Rapporteur had mentioned the word in the contexts of large-scale massacre, religious intolerance and colonialism. He had rightly pointed out that the commission of genocide did not necessarily involve the actual destruction of a whole group but, if that was the intention, the offence would have been committed.

27. He welcomed the Special Rapporteur's recommendation that the definition be extended to include sexual groups. The most positive contribution of the study was however the Special Rapporteur's remarks relating to cultural genocide, ethnocide and ecocide, all of which represented means of doing away with the identity or separate entity of a national group. The omission of such acts from the Convention was regrettable and he therefore supported the Special Rapporteur's request that consideration should be given to the possibility of formulating an optional protocol to cover the issue.

28. The destruction of political groups must be resisted and he wholeheartedly supported the Special Rapporteur's recommendation, in paragraph 37 of the report, that killings of political and other groups should be included in such an optional protocol. Action of that kind was urgently necessary, for there were many countries in which impatience and greed for political power gave rise to the temptation to liquidate political opponents.

29. Apartheid was undoubtedly a form of genocide; for the reasons given in paragraph 45 of his report, however, the Special Rapporteur considered that it was no longer necessary to include a separate provision on the subject in international instruments dealing with genocide.

30. Genocide was a crime against humanity and, as the Special Rapporteur had pointed out, the plea of acting on the orders of a superior authority could not be invoked as a defence. There were numerous cases which supported the need to teach people about the harmful nature of genocide and to create a feeling of abhorrence therefor. He thus agreed with the statement that the United Nations must take positive steps to that end.

31. While there could be no doubt of the Special Rapporteur's dedication to the cause of human rights, the inclusion of paragraph 24 in his report was unnecessary. It distracted attention from the Special Rapporteur's objective. The omissions from the earlier report had resulted not from absent-mindedness on the part of the previous Special Rapporteur but from a deliberate decision taken after the matter had been discussed at length as could be seen from the relevant summary record (E/CN.4/Sub.2/SR.822). Various examples of genocide had been discussed, including the alleged Armenian genocide which, for good reasons, had not been included in the report as approved by the Sub-Commission and the Commission on Human Rights.

32. When the question of the revision and updating of the report on genocide had come up for discussion in the Commission, the representative of the Secretariat had stated, in reply to a question, that "the understanding of the Secretariat was that the Special Rapporteur would revise the study and would update it and in so doing would take into account all developments relating to the question since the study was undertaken". (E/CN.4/1983/SR.48/Add.1, para. 155). That had not been specified in the draft resolution and he himself

had said (para. 158) that he understood that the study on genocide would be updated as from the date of application of the existing version. It was on that understanding, which no one had contested, that he had supported the draft resolution which had been adopted without a vote.

33. Revising a report did not mean correcting it or incorporating new items; but perhaps paragraph 24 had been inserted in the course of the process of updating the report. However that might be, it had diverted the Sub-Commission's attention from the vital issue of how best to ensure that genocide was prevented and was punished when committed. If the Sub-Commission were instrumental in setting up an international court or tribunal, it would have rendered some service to mankind. However, the Special Rapporteur's action in going beyond his terms of reference and including an irrelevant paragraph had led to a long debate on unnecessary aspects of the question instead of a discussion on the prevention and punishment of the crime of genocide. The aim should be to look to the future, not the past, and to seek reconciliation not bitterness.

34. While he agreed that no attempt should be made to interfere with the independence of a special rapporteur or to influence his judgement, he himself would be unable to support transmission of the report if it included paragraph 24. He hoped that the Special Rapporteur would not insist on retaining that paragraph in the face of so much opposition, since the report otherwise deserved both support and commendation.

The meeting rose at 6.10 p.m.