



General Assembly

Distr.
LIMITED

A/CN.4/L.527/Add.9
17 July 1996

ENGLISH
Original: ENGLISH AND FRENCH

INTERNATIONAL LAW COMMISSION
Forty-eighth session
Geneva 6 May-26 July 1996

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS FORTY-EIGHTH SESSION

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CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE
PEACE AND SECURITY OF MANKIND

D. Draft Code of Crimes against the
Peace and Security of Mankind

[Article 18]

Article 18

Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group:

- (a) murder;
- (b) extermination;
- (c) torture;
- (d) enslavement;
- (e) persecution on political, racial, religious or ethnic grounds;
- (f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) arbitrary deportation or forcible transfer of population;
- (h) forced disappearance of persons;
- (i) rape, enforced prostitution and other forms of sexual abuse;
- (j) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Commentary

- (1) Article 18 recognizes certain inhumane acts as constituting crimes against humanity.
- (2) The definition of crimes against humanity contained in article 18 is drawn from the Nürnberg Charter, as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg.
- (3) The opening clause of this definition establishes the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity covered by the present Code. The first condition requires that the act was "committed in a systematic manner or on a large scale". This first condition consists of two alternative requirements. The first alternative requires that the inhumane acts be *committed in a systematic*

manner meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy. The Nürnberg Charter did not include such a requirement. None the less the Nürnberg Tribunal emphasized that the inhumane acts were committed as part of the *policy of terror* and were "in many cases ... organized and systematic" in considering whether such acts constituted crimes against humanity. 1/

(4) The second alternative requires that the inhumane acts be *committed on a large scale* meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Nürnberg Charter did not include this second requirement either. None the less the Nürnberg Tribunal further emphasized that the policy of terror was "certainly carried out on a vast scale" in its consideration of inhumane acts as possible crimes against humanity. 2/ The term "mass scale" was used in the text as adopted on first reading to indicate the requirement of a multiplicity of victims. This term was replaced by the term "large scale" in the present text which is sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude, such as the use of a weapon of mass destruction against members of a particular racial or ethnic group in violation of subparagraph (e). The first condition is formulated in terms of the two alternative requirements. Consequently, an act could constitute a crime against humanity if either of these conditions is met.

(5) The second condition requires that the act was "instigated or directed by a government or by any organization or group". The necessary instigation or direction may come from a government or from an organization or a group. 3/

1/ Nürnberg Judgment, p. 84.

2/ Nürnberg Judgment, p. 84.

3/ The Nürnberg Tribunal declared the criminal character of several organizations which were established for the purpose of and used in connection with the commission of crimes against peace, war crimes or crimes against humanity. The Charter and Judgment of the Nürnberg Tribunal recognized the possibility of criminal responsibility based on the membership of an

This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18. The instigation or direction of a government or any organization or group, which may or may not be affiliated with a government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State. 4/

(6) The definition of crimes against humanity contained in the present article does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes. In contrast, the Nürnberg Charter required that crimes against humanity were committed "in execution of or in connexion with any crime within the jurisdiction of the Tribunal". The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement. The Genocide Convention did not include any such requirement with respect to the second category of crimes against humanity, as discussed in the commentary to article 17. Similarly, the definitions of the first category of crimes against humanity contained in the legal instruments adopted since Nürnberg do not include any requirement of a substantive connection to other crimes relating to a state of war, namely, Control Council Law No. 10 adopted shortly after the Berlin Protocol as well as the more recent Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3). 5/ The absence of any requirement of an

individual in such a criminal organization. Nürnberg Charter, arts. 9 and 10; and Nürnberg Judgment, p. 84. The present Code does not provide for any such collective criminal responsibility as indicated by article 2.

4/ See Nürnberg Judgment regarding the defendants Streicher and von Schirach, pp. 129 and 144.

5/ See Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), document S/1995/134, n. 5. See also Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, p. 81.

international armed conflict as a prerequisite for crimes against humanity was also confirmed by the Yugoslavia Tribunal: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict." 6/

(7) As regards the prohibited acts listed in article 18, the first such act consists of murder which is addressed in subparagraph (a). Murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation. Murder was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(8) The second prohibited act addressed in subparagraph (b) is extermination. The first two categories of prohibited acts consist of distinct and yet closely related criminal conduct which involves taking the lives of innocent human beings. Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared. Extermination was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(9) Another third prohibited act addressed in subparagraph (c) is torture. This prohibited act is defined in the Convention against Torture and Other

6/ The Prosecutor v. Dusko Tadic, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 73.

Cruel, Inhuman or Degrading Treatment or Punishment (article 1, paragraph 1). 7/ Torture was included as a crime against humanity in Control Council Law No. 10 (article II, paragraph c) and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3).

(10) The fourth prohibited act consists of enslavement under subparagraph (d). Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the 1926 Slavery Convention (slavery); the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and the 1957 Convention No. 29, adopted by the General Conference of the International Labour Organisation (forced labour). Enslavement was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(11) The fifth prohibited act consists of persecution on political, racial, religious or ethnic grounds under subparagraph (e). The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual

7/ Article 1 of the Convention contains the following definition:

1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

is entitled without distinction as recognized in the Charter of the United Nations (Articles 1 and 55) and the International Covenant on Civil and Political Rights (article 2). The present provision would apply to acts of persecution which lacked the specific intent required for the crime of genocide under article 17. Persecution on political, racial or religious grounds was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(12) The sixth prohibited act is institutionalized discrimination on racial, ethnic or religious grounds involving the violation of human rights and fundamental freedoms and resulting in seriously disadvantaging a part of the population under subparagraph (f). The fifth and sixth categories of prohibited acts consist of distinct and yet closely related criminal conduct which involves the denial of the human rights and fundamental freedoms of individuals based on an unjustifiable discriminatory criterion. Whereas both categories of prohibited acts must be committed in a systematic manner or on a large scale to constitute a crime against humanity under the present article, the sixth category of prohibited acts further requires that the discriminatory plan or policy has been institutionalized, for example, by the adoption of a series of legislative measures denying individuals who are members of a particular racial, ethnic or religious group of their human rights or freedoms. The prohibited act covered by the present subparagraph consists of three elements: a discriminatory act committed against individuals because of their membership in a racial, ethnic or religious group, which requires a degree of active participation; the denial of their human rights and fundamental freedoms, which requires sufficiently serious discrimination; and a consequential serious disadvantage to members of the group comprising a segment of the population. It is in fact the crime of apartheid under a more general denomination. 8/ Institutionalized discrimination was not included

8/ Article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* defines this crime as follows:

For the purpose of the present Convention, the term 'the crime of *apartheid*', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall

as a crime against humanity in the previous instruments. For this reason, the Commission decided to limit this crime to racial, ethnic or religious

apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

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

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation 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 or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

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

(e) Exploitation of the labour of the members of a racial group or groups, 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*.

discrimination. The Commission noted that such racial discrimination was characterized as a crime against humanity in the Apartheid Convention (article I).

(13) The seventh prohibited act is arbitrary deportation or forcible transfer of population under subparagraph (g). Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State. The term "arbitrary" is used to exclude the acts when committed for legitimate reasons, such as public health or safety, in accordance with international law. Deportation was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(14) The eighth prohibited act is forced disappearance of persons under subparagraph (h). In 1992 the General Assembly expressed its deep concern regarding the enforced disappearance of persons which occurred "in many countries" in adopting the Declaration on the Protection of All Persons from Enforced Disappearance. 9/ The problem of the disappearance of persons was also addressed in the 1994 Inter-American Convention on the Forced Disappearance of Persons. 10/ The term "forced disappearance of persons"

9/ The General Assembly referred to situations in which "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of law." General Assembly resolution 47/133.

10/ Article II of the Convention contains the following definition:

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

is used as a term of art to refer to the type of criminal conduct which is addressed in the Declaration and the Convention. Forced disappearance was not included as a crime against humanity in the previous instruments. Although this type of criminal conduct is a relatively recent phenomenon, the present Code proposes its inclusion as a crime against humanity.

(15) The ninth prohibited act consists of rape, enforced prostitution and other forms of sexual abuse under subparagraph (i). There have been numerous reports of rape committed in a systematic manner or on a large scale in the former Yugoslavia. In this regard, the General Assembly unanimously reaffirmed that rape constitutes a crime against humanity under certain circumstances. ^{11/} Furthermore, the National Commission for Truth and Justice concluded in 1994 that sexual violence committed against women in a systematic manner for political reasons in Haiti constituted a crime against humanity. Rape, enforced prostitution and other forms of sexual abuse are forms of violence that may be specifically directed against women and therefore constitute a violation of the Convention on the Elimination of all Forms of Discrimination against Women. ^{12/} Rape was included as a crime against humanity in Control Council Law No. 10 (article II, paragraph c) and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3). While noting that persecution on gender grounds could also constitute a crime against humanity under subparagraph (e) if the two general criteria were met, the Commission decided to limit the possible grounds for persecution to those contained in existing legal instruments. Similarly, the Commission noted that gender-based discrimination

^{11/} General Assembly resolution 50/192.

^{12/} "The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty...Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention." Report of the Committee on the Elimination of Discrimination against Women, *Official Records of the General Assembly, Forty-seventh session, Supplement No. 38 (A/47/38)*, p. 1.

might also constitute a crime against humanity under subparagraph (f), although not necessarily a crime against the peace and security of mankind. 13/

(16) The tenth and last prohibited act consists of "other inhumane acts" which severely damage the physical or mental integrity, the health or the human dignity of the victim, such as mutilation and severe bodily harm, under subparagraph (j). The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. It should be noted that the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity. The subparagraph provides two examples of the types of acts that would meet these two requirements, namely, mutilation and other types of severe bodily harm. The Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) also included "other inhumane acts".

13/ Gender-based persecution or discrimination entailing the denial of human rights and fundamental freedoms is contrary to the Charter of the United Nations; the International Covenant on Civil and Political Rights; the 1952 Convention on the Political Rights of Women, *United Nations Treaty Series*, vol. 193, p. 135; the 1967 Declaration on the Elimination of Discrimination against Women, General Assembly resolution 2263 (XXII); and the 1979 Convention on the Elimination of All Forms of Discrimination against Women, *United Nations Treaty Series*, vol. 1249, p. 13.