

Document:-
A/CN.4/L.506 [and Corr.1]

Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Drafting Committee on second reading: Parts One (arts. 1, 2, 4, 5, 5 bis, 6, 6 bis, and 8-13) and Two (arts. 15 and 19) - reproduced in document A/CN.4/SR.2408, para.1

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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2408th MEETING

[CHAPTER 2. . .]

Friday, 30 June 1995, at 10.15 a.m.

[Article 2]

[Redrafted and appears as paragraph 2 to article 1.]

Chairman: Mr. Pemmaraju Sreenivasa RAO

Article 3⁴

[Article 4]

[Deleted]

Article 5. *Responsibility of States*

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Article 5 bis.⁵ *Establishment of jurisdiction*

Draft Code of Crimes against the Peace and Security of Mankind (continued)* (A/CN.4/464 and Add.1, sect. B, A/CN.4/466,¹ A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509)

Each State party shall take such measures as may be necessary to establish its jurisdiction over crimes against the peace and security of mankind.

[Agenda item 4]

Article 6. *Obligation to extradite or prosecute*

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
ON SECOND READING²

The State in the territory of which an individual alleged to have committed a crime against the peace and security of mankind is found shall either extradite that individual or refer the case to its competent authorities for the purpose of prosecution.

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles adopted by the Drafting Committee on second reading, which read:

Article 6 bis. *Extradition of alleged offenders*

[Part one

CHAPTER 1. . .]

Article 1.³ *Scope and application of the present Code*

1. To the extent that the crimes set out in articles . . . are not extraditable offences in any extradition treaty existing between States parties, they shall be deemed to be included as such therein. States parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

1. The present Code applies to the crimes against the peace and security of mankind set forth in Part Two.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

2. If a State party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States parties which have established their jurisdiction in accordance with article 5 bis.

* Resumed from the 2387th meeting.

¹ Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

² For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94-97.

³ The Drafting Committee agreed that the question of the characteristics of the crimes under the Code should be examined at a later stage.

⁴ The Drafting Committee agreed to revert to article 3 at a later stage.

⁵ The question of jurisdiction will be reviewed, once the substantive articles on crimes are finalized, with a view to examining the possibility of exclusive international jurisdiction in the case of specific crimes including aggression.

*Article 7⁶**Article 8. Judicial guarantees*

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(a) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried without undue delay;

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Article 9. Non bis in idem

1. No one shall be tried for a crime against the peace and security of mankind for which he has already been finally convicted or acquitted by an international criminal court.

2. Subject to paragraphs 3, 4 and 5, no one shall be tried for a crime against the peace and security of mankind in respect of an act for which he has already been finally convicted or acquitted by a national court.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried by an international criminal court for a crime against the peace and security of mankind if:

(a) The act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in the present Code; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried by a national court of another State for a crime against the peace and security of mankind if:

(a) The act which was the subject of the previous judgement took place in the territory of that State; or

(b) That State has been the main victim of the crime.

5. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10. Non-retroactivity

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

⁶ The Drafting Committee agreed to revert to article 7 at a later stage.

Article 11. Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, [but may be considered in mitigation of punishment if justice so requires].⁷

Article 12. Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

Article 13. Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

Article 14⁸

[Part two

...]⁹

Article 15. Aggression

[1. An individual who, as leader or organizer, commits an act of aggression shall be punished under the present Code.]

2. Aggression is the use of armed force by a State against the territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

...]¹⁰

Article 19. Genocide

[1. An individual who commits an act of genocide shall be punished under the present Code.]¹¹

⁷ The issue addressed in the bracketed phrase will be examined in the context of an article to be drafted on mitigating or aggravating circumstances.

⁸ The Drafting Committee agreed to revert to article 14 at a later stage.

⁹ The Drafting Committee will re-examine paragraph 1 of each of the articles of part two with a view to determining the possibility of adopting uniform language and in the light of the decision it will reach in relation to article 3.

¹⁰ Article 16 (Threat of aggression) was not referred to the Drafting Committee. Articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) were referred to the Drafting Committee on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and, at its discretion, deal with all or part of the elements of articles 17 (Intervention) and 18 (Colonial domination and other forms of alien domination), as well as 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism).

¹¹ See footnote 7 above.

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

3. The following acts shall also be punishable:

- (a) Conspiracy to commit genocide;
- (b) Direct and public incitement to commit genocide;
- (c) Attempt to commit genocide;
- (d) Complicity in genocide.¹²

2. Mr. YANKOV (Chairman of the Drafting Committee) said that, before presenting the Drafting Committee's report (A/CN.4/L.506), he wished to draw attention to the French version of article 12, where the phrase "*ou avaient des raisons de savoir*" was not felicitous and would be replaced by a more appropriate wording.

3. The Drafting Committee had devoted 17 meetings from 3 May to 21 June to the topic. He wished first to express his wholehearted thanks to the members of the Drafting Committee for their hard work and spirit of cooperation, and to the Special Rapporteur, Mr. Thiam, for his support and constructive attitude. He was specially grateful to Mr. Villagrán Kramer for acting as Chairman of the Drafting Committee during his own short absence from Geneva and also wished to convey his appreciation to members of the secretariat for their valuable assistance and exemplary devotion.

4. The topic had a history almost as long as the Commission itself. At its thirty-sixth session, the General Assembly had, in resolution 36/106, invited the Commission to resume its work, which had been initiated 30 years earlier, in 1951. The topic as it stood now had been included in the agenda of the Commission's thirty-fourth session, in 1982, at which time the Commission had appointed Mr. Thiam as Special Rapporteur for the topic. In General Assembly resolution 42/151, the title had been altered to speak of "crimes" rather than "offences" against the peace and security of mankind. In recalling those facts, he wished to emphasize that the exercise on which the Commission was engaged was more than the second reading of a set of draft articles; it was an important stage in a process which had a long-standing presence on the active agenda of the Commission.

5. The Drafting Committee's report was of a tentative character, for the Committee had not had enough time to complete the whole set of draft articles. At the stage of second reading, the Committee's work was normally of a "fine-tuning" character. In the present instance, however, the Committee had been faced with a much more substantive task because of a variety of factors. First, it should be remembered that, when adopting the draft on first reading,¹³ the Commission had deliberately deferred

some important issues to the stage of second reading. As indicated in the Commission's report on its forty-third session,¹⁴ those issues had included the question of applicable penalties and the question of whether attempt should be punishable in the case of all crimes or only some of them. Secondly, the commentaries adopted at the forty-third session indicated that on a number of issues the views of members had been divided; those divergences had, of course, resurfaced at the stage of second reading. Thirdly, the mandate given to the Drafting Committee by the Commission in plenary at the present session had implied major changes in the scope of the draft and the structure of a number of articles. It would be recalled in that connection that at its 2387th meeting, the Commission had decided to refer to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report (A/CN.4/466) and of the comments and proposals made in the debate, on the understanding—and he wished to emphasize the point—that, in formulating those articles, the Drafting Committee would bear in mind, and at its discretion, deal with all or part of the elements of the following articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism). As a result of those three factors, the Drafting Committee had been faced with a burdensome task which could not be completed at the present session. Even those articles which the Committee had adopted and for which it was presenting a text to the plenary might have to be reviewed once the second reading of part two will have been completed. Some of the articles in question, such as the article on apartheid, could be considered under the heading of crimes against humanity. There were, of course, some other questions which remained open, particularly in connection with protection of the environment, but that was a different issue.

6. In the light of all those considerations, the Drafting Committee recommended that the plenary should consider the present report as an "interim document" and should defer adoption of the articles until its next session, when, in accordance with the timetable adopted for the remainder of the quinquennium, the second reading was to be completed and the draft Code finally adopted for submission to the General Assembly with the commentaries attached thereto. In his view, that should be one of the priority tasks of the next session.

7. Going on to introduce the text adopted by the Drafting Committee on article-by-article, he recalled that chapter I of part one of the draft Code as adopted on first reading had been entitled "Definition and characterization" and that it had consisted of articles 1 and 2, respectively entitled "Definition" and "Characterization". In the light of observations made in plenary and of the comments of Governments, and bearing in mind the Special Rapporteur's suggestions in his twelfth report,¹⁵ the Committee had redrafted the two articles and

¹² The Drafting Committee will re-examine paragraph 3 of the article in the light of the decision it will reach in relation to article 3.

¹³ *Yearbook . . . 1991*, vol. II (Part Two), pp. 93 *et seq.*

¹⁴ *Ibid.*, paras. 171-172.

¹⁵ *Yearbook . . . 1994*, vol. II (Part One), document A/CN.4/460.