

Document:-
A/CN.4/R.6

Text Proposed by the Drafting Committee - incorporated in A/CN.4/SR.72, footnote 3

Topic:
Draft code of offences against the peace and security of mankind (Part I)

Extract from the Yearbook of the International Law Commission:-
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Secretary-General had supplied him with the text of that opinion. It was a most important one and came at the right moment. The Court had given a negative opinion; that is to say it had given a negative reply to the third question submitted in General Assembly Resolution 294 (IV): "If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Roumania where that body is obliged to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?" It was not for the Commission to discuss the Court's opinion, but it might note that the opinion showed the rightness of the Commission's decision concerning article 23, paragraph 3, of the General Act of Arbitration which had it been ratified would have made impossible what had just occurred.

1 a. The Court declared in the first phase of the case² that there had been a dispute, that the three States were obligated to appoint their representatives to the Commissions, that, by not doing so, they had committed an international offence within the wide meaning given to the term by Mr. Basdevant and that their responsibility was involved. Later, however, interpreting the Paris Peace Treaties, the Court had stated that it was unable to proceed further since those Treaties did not permit the constitution of two-member Commissions. The Court had delivered its opinion by 11 votes to 2, the dissenting votes being those of Judges Read and Azevedo. Its interpretation of the two articles was based mainly on exegetic reasoning. The Commission must bow to the Court's decision.

1 b. He observed that in the present state of international law a State could evade its obligation to submit to arbitration simply by failing to appoint its arbitrator. The Commission had been well advised to recommend support for article 23, paras. 1, 2 and 3 of the General Act of Arbitration, which put a stop to such evasion. He was distressed at the thought of the effect this opinion would have on the non-legal public. "There has been failure to meet an obligation," said the Court, "but we can do nothing about it". Public opinion would wonder what the Court was for.

2. Mr. HUDSON felt that the views expressed by the Commission on a recent occasion were much in advance of the present legal situation. The Commission's statement that there would be compulsory jurisdiction to determine whether a dispute existed and whether the dispute came within the obligation accepted by a State, was not inconsistent with what was to be found in the Court's opinion on the second question. In its first opinion the Court had declared in the same sense as the Commission, only it had given an advisory opinion whereas the Commission wished the Court to exercise its compulsory jurisdiction in ruling on those points.

3. Mr. el-KHOURY had read the passage concerning

the advisory opinion in the press, but had not received quite the same impression from it as the Chairman. The Court had based its opinion on existing law. In the absence of a rule of international law giving it the necessary authority, it could not have acted otherwise. The Commission was attempting to establish a new convention with a view to its enforcement. That convention would lay an obligation upon States, but at the present moment, in the absence of a rule of law, the Court could not give any opinion different from the one it had already given.

4. The CHAIRMAN thought that Mr. el-Khoury would alter his view when he read the text of the Court's opinion and in particular the dissenting opinion of Judge Read. The Court had pronounced *de lege lata*, interpreting the law in an opinion voted by 11 of its members. The Commission had pronounced *de lege ferenda*.

5. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson that there was no contradiction between the Court's opinion on the first and second questions submitted to it by the General Assembly, and the provision adopted by the Commission at its last meeting. The Court had given an advisory opinion. The Commission had wished the Court to be able to pronounce a decision. In connexion with the third and fourth questions the Court had ruled that when a State refused to appoint an arbitrator nothing could be done. The Commission had adopted article 23 of the General Act of Arbitration under which the present gap could be filled by the President of the International Court of Justice being requested to appoint the arbitrator.

6. The CHAIRMAN read article 23 of the General Act of Arbitration as adopted by the Commission and stated that thenceforward the gap was filled.

Preparation of a draft code of offences against the peace and security of mankind (resumed from the 62nd meeting). Text prepared by the Drafting Committee (A/CN.4/R.6)³

7. Mr. SANDSTRÖM felt that the first question to

³ The text prepared by the Drafting Committee read as follows:

Article I

The following acts are offences against the peace and security of mankind, and are punishable as crimes under international law:

1. The employment or threat of employment of the armed forces of a State against another State for any purpose other than self-defence or execution of a decision by a competent organ of the United Nations.

2. The planning of or preparation for the employment of the armed forces of a State against another State for any purpose other than self-defence or execution of a decision by a competent organ of the United Nations.

3. The incursion into the territory of a State by armed bands coming from the territory of another State and acting for a political purpose.

4. The undertaking, encouragement or toleration by the authorities of a State of organized activities calculated to foment civil strife in the territory of another State.

5. The undertaking, encouragement or toleration by the authorities of a State of organized activities intended or calcu-

² International Court of Justice, Reports of Judgments, advisory opinions and orders, 1950, p. 65.

consider was whether or not the draft was to be included in the general report. If the Commission decided against inclusion it might perhaps be as well not to examine it.

8. The CHAIRMAN did not agree. That question ought not to prevent the Commission from examining the text prepared by the Drafting Committee. He asked whether the Commission wished the draft code prepared by the Drafting Committee to remain simply for the use of the members of the Commission, or whether it wished it to be included in the report submitted to the General Assembly.

9. Mr. HUDSON observed that as the Commission wished to give the Special Rapporteur some guidance for his work the following year, the Drafting Committee had attempted to draft what it believed to be the Commission's provisional conclusions. Its sole object had been to provide guidance for the Special Rapporteur, who remained free to alter what he thought fit. In his opinion the text ought not to be included in the general report. He thought that the discussion should not be resumed. If members of the Commission felt that the document did not precisely reflect the Commission's views, they could say so, and the Rapporteur would bear what they said in mind.

10. The CHAIRMAN agreed with Mr. Hudson. The three members of the Drafting Committee had endeavoured to produce a document faithfully reflecting

lated to create a state of terror in the minds of particular persons or a group of persons or the general public in another State.

6. Acts by the authorities of a State in violation of international treaty obligations designed to assure international peace and security, including but not limited to treaty obligations concerning:

- (a) the character or strength or location of armed forces or armaments;
- (b) the training for service in armed forces;
- (c) the maintenance of fortifications.

7. Acts by authorities of a State resulting in or directed toward the forcible annexation of territory belonging to another State, or of territory under an international regime.

8. Acts committed by the authorities of a State or by individuals with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including:

- (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.

9. Inhuman acts committed by the authorities of a State or by individuals against any civilian population, such as mass murder, or enslavement, or deportation, or persecutions on political, racial or religious grounds, when such acts are committed in execution of or in connection with the offences defined in Nos. 1, 2, 5 and 7.

10. Acts committed in violation of the laws or customs of war.

11. Acts which constitute:

the views expressed in the Commission, but it was customary for the work of a sub-commission to be submitted to the parent Commission.

11. Mr. SPIROPOULOS said that the Drafting Committee had considered whether or not the Commission's conclusions should appear in the general report, but the same question also arose in the case of other reports. What was to happen in their case? The question clearly did not arise in the cases of his own first report and the reports of Mr. Alfaro and Mr. Sandström, which dealt with items on the agenda that the Commission had finished discussing. But the Commission had not yet decided how to deal in the general report with the subjects upon which final conclusions had not yet been reached.

12. The CHAIRMAN gave it as his personal view that the results obtained ought to be mentioned in the general report. The Assembly should be kept informed of the progress of the Commission's work.

13. Mr. KERNO (Assistant Secretary-General) suggested that the Commission might follow the procedure it had adopted the previous year. On certain questions it had reached a final decision, whereas on others it had only done preparatory work, and its report to the General Assembly dealt with both; there had been a final report on the rights and duties of States and an interim report on other matters. By means of the in-

- (a) conspiracy to commit any of the offences defined in Nos. 1-10;
- (b) direct incitement to commit any of the offences defined in Nos. 1-10;
- (c) attempts to commit any of the offences defined in Nos. 1-10;
- (d) complicity in the commission of any of the offences defined in Nos. 1-10.

Article II

The fact that a person acted as Head of State or as responsible Government official does not relieve him from responsibility for committing a crime under international law.

Article III

The fact that a person acted under the orders of a Government or a superior does not relieve him from responsibility for committing a crime under international law, provided a moral choice was in fact possible to him; but this fact may be considered in mitigation of punishment.

Article IV

Pending the establishment of a competent international criminal court, the States adopting this Code undertake to enact the necessary legislation for the trial and punishment of persons accused of committing any of the crimes under international law as defined in the Code.

Article V

The States adopting this Code undertake to refrain from denying extradition for the crimes under international law as defined in the Code on the ground that they are political crimes.

Article VI

Disputes between the States adopting this Code relating to the interpretation or application of the provisions of the Code may be brought before the International Court of Justice by an application by any party to the dispute.