Document:-

A/CN.4/SR.1992

Summary record of the 1992nd 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:-

1987, vol. I

22. The CHAIRMAN said that it was planned to devote the meetings on 8 and 9 July to the consideration of item 9, because the Legal Counsel would be able to be present.

23. If there were no further comments, he would take it that the Commission agreed to adopt the Enlarged Bureau's recommendations concerning the allocation of meetings and the tentative order in which the agenda items would be considered.

It was so agreed.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

24. Mr. DÍAZ GONZÁLEZ (Chairman of the Planning Group) said it was proposed that the Group should consist of the following members: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Reuter, Mr. Roucounas, Mr. Thiam, Mr. Tomuschat and Mr. Yankov. The Planning Group was not restricted and other members of the Commission would be welcome at its meetings.

It was so agreed.

The meeting rose at 1.10 p.m.

1992nd MEETING

Wednesday, 6 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Drafting Committee

1. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said it was proposed that the Drafting Committee should consist of the following members: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi and Mr. Solari Tudela. Mr. Pawlak would be an *ex officio* member, in his capacity as Rapporteur of the Commission.

It was so agreed.

Draft Code of Offences against the Peace and Security of Mankind[1] (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 11

2. The CHAIRMAN recalled that the General Assembly, in paragraph 1 of its resolution 41/75 of 3 December 1986, had invited the Commission to continue its work on the topic

> . . . by elaborating an introduction as well as a list of the offences, taking into account the progress made at its thirty-eighth session, as well as the views expressed during the forty-first session of the General Assembly.

He drew attention to document A/CN.4/407 and Add.1 and 2, containing the views received from Governments pursuant to paragraph 2 of the same resolution.

3. He invited the Special Rapporteur to introduce his fifth report (A/CN.4/404), as well as draft articles 1 to 11 contained therein, which read:

CHAPTER I. INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes under international law defined in the present Code constitute offences against the peace and security of mankind.

Article 2. Characterization

The characterization of an act as an offence against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not prosecuted under internal law does not affect this characterization.

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and penalty

Any individual who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.

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[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 . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

Article 4. **Aut dedere aut punire**

1. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudge the establishment of an international criminal jurisdiction.

Article 5. Non-applicability of statutory limitations

No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature.

Article 6. Jurisdictional guarantees

Any person charged with an offence against the peace and security of mankind shall be entitled to the guarantees extended to all human beings with regard to the law and the facts. In particular:

1. In the determination of any charge against him, he shall be entitled to a fair and public hearing by an independent and impartial tribunal duly established by law or by treaty, in accordance with the general principles of law.

2. He shall have the right to be presumed innocent until proved guilty.

3. In addition, he shall be entitled to the following guarantees:

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

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

(*c*) To be tried without undue delay;

(*d*) 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, in any case where the interests of justice so require, and without payment by him, in any such case if he does not have sufficient means to pay for it;

(*e*) 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;

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

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

Article 7. **Non bis in idem**

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of a State.

Article 8. Non-retroactivity

1. No person may be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 9. Exceptions to the principle of responsibility

The following constitute exceptions to criminal responsibility:

(*a*) self-defence;

(*b*) coercion, state of necessity or *force majeure*;

(*c*) an error of law or of fact, provided, in the circumstances in which it was committed, it was unavoidable for the perpetrator;

(*d*) the order of a Government or of a superior, provided a moral choice was in fact not possible to the perpetrator.

Article 10. Responsibility of the superior

The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.

Article 11. Official position of the perpetrator

The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility.

4. Mr. THIAM (Special Rapporteur) said that his fifth report (A/CN.4/404) was devoted to the provisions constituting the introduction to the code (chap. I), dealing with the definition and characterization of offences against the peace and security of mankind, and with general principles. That part of the topic had long given rise to impassioned debates, and some doubt had been expressed as to whether he should even take up the question of general principles. His own view had been that he could not deal with the general principles with any likelihood of success until the Commission had studied the content of the code *ratione materiae*—which it had now done. But since the question of general principles had already been discussed generally at the previous session during the consideration of his fourth report, he thought no useful purpose would be served by reopening that debate and would simply refer members to his fourth report (A/CN.4/398, paras. 146-259), to the Commission's report on its thirty-eighth session[5] and to the topical summary of the discussion held in the Sixth Committee of the General Assembly at its forty-first session (A/CN.4/L.410, paras. 558-581).

5. He had redrafted most of the articles in chapter I as submitted in his fourth report (A/CN.4/398, part V) to take account of the comments made in the Commission and the Sixth Committee, and had added two new draft articles (arts. 7 and 11). He had also thought it useful to draft a commentary to each article, summing up the discussions to which the texts in question had already given rise.

6. As to the method to be followed in examining the fifth report, he proposed to introduce the whole of chapter I of the draft article by article in order to facilitate discussion, but thought that a separate debate on each article should be avoided; it would be preferable to discuss all the articles together.

7. Draft article 1 dealt with the definition of offences against the peace and security of mankind. In the long discussions on that subject at previous sessions, opinion had been divided between those who favoured a general definition based on a precise criterion, and those who favoured an enumeration. During those discussions, he had become convinced that no single criterion could cover all aspects of the concept of an offence against the peace and security of mankind. He had therefore opted for a definition by enumeration, especially as the topic fell within the sphere of criminal law and hence was

[5] *Yearbook . . . 1986*, vol. II (Part Two), pp. 49 *et seq.*, paras. 133-182.

governed by the principle *nullum crimen sine lege*. Some members of the Commission had wanted the definition also to include the idea of seriousness, but he himself found that idea implicit in it.

8. The question of characterization, which was dealt with in draft article 2, involved the very basis of international criminal law, since the text rested on the principle of the autonomy of international criminal law and on the primacy of international law over internal law. If the idea was not accepted that international law could itself characterize a particular act as a crime independently of internal law, the draft code lost its raison d'être.

9. Draft article 3, which dealt with the perpetrator of the offence, had been amended in the light of the comments made at the Commission's previous four sessions. One question which had always caused some confusion was whether the criminal responsibility in question was that of the individual, that of the State or both. Without ruling out *a priori* the criminal responsibility of the State, it had to be recognized that it was not yet established in positive law and that the responsibility of natural persons was distinct from it, even though there could be a connection, for example when the individual concerned was an agent of the State. The traditional responsibility of the State was perhaps based on the idea of reparation, but in no case on that of sanction, and the Commission, which had not abandoned the study of that aspect of the matter, would have to deal with it later. In those circumstances, he had dealt only with the criminal responsibility of individuals, as stated expressly in draft article 3, the previous text of which had been too vague.

10. The question of the universal offence, dealt with in draft article 4, had led to a rich and thorough discussion. The most logical solution of the problem would be an international criminal jurisdiction; but in the absence of such an institution, and pending a decision on the advisability of establishing it, an alternative solution must be sought. Several choices were open to the Commission: the traditional solution of the territoriality of criminal law, that of the personalization of criminal law and that of universality. Since the offences in question were breaches of the law of nations, the best solution in the present circumstances was still reliance on the principle of universal jurisdiction: hence the new text he had submitted, which took account of the comments evoked by the expression "universal offence".

11. With regard to draft article 5, he observed that statutory limitations were neither absolute nor general, since they were unknown to certain legal systems and, in the systems in which they existed, they did not apply to all crimes. Nor had they ever existed in international law: there was no reference to them in the Charter of the Nürnberg International Military Tribunal.[6] It was only since 1968 that attention had been given to the question, and not all States had become parties to the Convention on the subject adopted that year;[7] moreover, that Convention had given rise to reservations on the part of some of the States which had acceded to it. The question of statutory limitations had recently arisen again in connection with a trial which was due to begin shortly. In his view, any distinction that might be made between war crimes—which would be subject to statutory limitations—and crimes against humanity—which would not—would not be very useful. In his third report, he had stated the principle of the indivisibility of offences against the peace and security of mankind,[8] which made it impossible to apply one legal rule to one category of acts and another rule to another. Thus, as he had indicated, the rule stated in draft article 5 was not yet universally applicable.

12. The discussion in the Sixth Committee had shown that draft article 6 as worded in the fourth report was not sufficiently precise, and that the jurisdictional guarantees referred to should be set out in detail. He had therefore referred to a number of international instruments, which were listed in paragraph (1) of the commentary. He wondered, however, whether the jurisdictional guarantees provided for in the new text of the article might not have become rules of *jus cogens*. The commentary cited a number of cases in which it had been held that certain essential guarantees had to be respected, even if they had not been expressly formulated. Perhaps the best course would be to enumerate the guarantees without drawing up an exhaustive list, so as not to tie the Commission's hands; hence the use of the words "In particular" in the introductory clause of the revised text.

13. Draft article 8, on the principle of non-retroactivity, differed little from the earlier text (former art. 7), and it would be for the Commission to choose between the two. The International Covenant on Civil and Political Rights (art. 15) and the European Convention on Human Rights[9] (art. 7) contained rather different formulations of the principle, but there was little difference in substance. The principle of non-retroactivity in international law had given rise to a number of difficulties in so far as it rested on the observance of written law. The problem was that of determining whether, in the maxim *nullum crimen sine lege*, the term *lex* should be understood in the sense of written law, or rather in the common-law sense of law. Some conventions, such as the European Convention on Human Rights, had dealt with the problem by including the general principles of law among the rules to be observed.

14. In response to criticism of the former negative formulation of draft article 9 (formerly art. 8), he had reworded the text. The first exception to criminal responsibility set out was, of course, self-defence by individuals (subpara. (*a*)): any connection with self-defence as mentioned in Article 51 of the Charter of the United Nations would exist only to the extent that the individuals concerned were agents of the State. As to coercion, state of necessity and *force majeure*, although

[6] Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

[7] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly on 26 November 1968 (*ibid.*, vol. 754, p. 73).

[8] *Yearbook . . . 1985*, vol. II (Part One), pp. 66 *et seq.*, document A/CN.4/387, paras. 20-39.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

those terms were sometimes differentiated in internal law, there was no essential difference between them and they were sometimes merged or used one in place of another; he had accordingly grouped them together in subparagraph (*b*). Moreover, in all three cases the requirements for invoking the exception were the same: the existence of circumstances involving a grave peril which could be avoided only by committing the wrongful act. Judicial precedent also required that there be no great disproportion between the interest sacrificed and the interest safeguarded and that the wrongful act should not reflect, even unconsciously, the intentions of the perpetrator. For example, the exception of coercion could not be upheld in the case of an act having racist connotations. With regard to error (subpara. (*c*)), the traditional rules applied; there again, the permissible limit was set by a crime against humanity. As to superior order (subpara. (*d*)), it was doubtful whether that was a separate exception, since the subordinate concerned could plead that he had carried out the order either under coercion or in error. It would be for the Commission to decide whether that provision should be retained.

15. Responsibility of the superior, which was the subject of draft article 10 (formerly art. 9), might be regarded as coming under the heading of complicity; but, in view of the specificity of the matter, it perhaps merited a separate provision, as in Additional Protocol I[10] (art. 86, para. 2) to the 1949 Geneva Conventions.

16. With regard to the official position of the perpetrator, which was the subject of draft article 11—a new provision reproducing the text of subparagraph (*a*) of former article 8—he drew attention to the commentary, in which he referred to the provisions of the Charter of the Nürnberg Tribunal and the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal),[11] as well as the Nürnberg Principles[12] formulated by the Commission at its second session, in 1950, at the request of the General Assembly.

17. In conclusion, he stressed that codification consisted in the preparation of draft articles. He therefore hoped that the Commission would proceed with that task, since there had already been long general debates at previous sessions on the questions dealt with in the draft articles under consideration.

18. The CHAIRMAN thanked the Special Rapporteur for his lucid introduction of his fifth report and said that it would be preferable for the Commission to concentrate on the draft articles submitted in the report, rather than reopen a general debate on the topic as a whole.

19. Mr. CALERO RODRIGUES agreed that it was desirable to focus on the 11 draft articles submitted in the fifth report (A/CN.4/404) and avoid reopening the general debate. Nevertheless, some of the newly elected members of the Commission might wish to state their views on other parts of the draft, such as the list of offences, and allowing them to do so was more than a matter of courtesy: it would be helpful to the Drafting Committee to learn those views in order to take them into account when working on the draft articles before it. He therefore suggested that, after the debate on the draft articles contained in the fifth report, a separate discussion should be held to permit new members to express their views on other parts of the draft if they so desired.

20. Mr. NJENGA supported that suggestion, but thought it would be more logical to hear the views of the new members before discussing the articles in the report.

21. He also suggested that the relevant parts of the international instruments listed in paragraph (1) of the commentary to draft article 6 should be circulated.

22. The CHAIRMAN said that the Secretariat would attend to that matter.

23. Mr. YANKOV said that Mr. Njenga's comment was very logical, but from a practical point of view it would be better to concentrate from the start on the Commission's main task of discussing the 11 draft articles before it. If, in the course of the discussion, any member wished to speak on other issues relating to the draft code, he should of course be allowed to do so. He suggested that, before starting on a detailed discussion article by article, the Commission should hold a general discussion on the whole set of articles, during which it would be possible for any new member to raise issues not directly relating to the texts of the 11 articles in question.

24. Mr. BEESLEY said that, although he could accept any of the proposed procedures, he would prefer to see the Commission begin as soon as possible on an article-by-article discussion. Many of the new members were already familiar with the work on the draft code, for example as representatives in the Sixth Committee of the General Assembly.

25. Mr. BARSEGOV said that there should be some measure of flexibility. The new members of the Commission should, indeed, be able to express their views on the work already done, but perhaps they did not all have the same views on how to proceed. Some might wish to deal with precise questions relating to the matters dealt with by the Special Rapporteur, whereas others might prefer to speak at greater length on more general questions. With regard to the 11 draft articles, he thought it would be more rational to examine the Special Rapporteur's fifth report (A/CN.4/404) as a whole, but he would not object to consideration of the texts article by article.

26. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to focus its discussion on draft articles 1 to 11 submitted by the Special Rapporteur in his fifth report (A/CN.4/404), without precluding any member from reverting to earlier articles of the draft code.

It was so agreed.

[10] Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (*ibid.*, vol. 1125, p. 3).

[11] *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

[12] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

27. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that new members' comments on earlier draft articles would be particularly useful to the Drafting Committee. The course which had been adopted would serve to avoid objections on their part when the revised articles came back from the Committee.

The meeting rose at 11.40 a.m.

1993rd MEETING

Thursday, 7 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, M. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Organization of work of the session (*concluded*)*

[Agenda item 1]

1. The CHAIRMAN drew attention to document ILC(XXXIX)/Conf.Room Doc.1, which reproduced the schedule of work for the current session adopted by the Commission at its 1991st meeting, on the understanding that it would be applied flexibly as required by the progress made.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 11[5] (*continued*)

2. Mr. THIAM (Special Rapporteur), repairing an omission in his introduction of his fifth report (A/CN.4/404) at the previous meeting, said that draft article 7, which was a new article devoted to the *non bis in idem* rule, seemed more opportune than ever. At the previous session, some members of the Commission had been reluctant to accept the principle of the universality of an offence, arguing that the plurality of courts—or the co-operation or intervention of several courts in trying one and the same offence—might make the offender liable to several penalties, which would violate the *non bis in idem* rule. In view of the long discussion which had then taken place, and after due reflection, he had concluded that the rule could have a place in the draft code, although that would depend on whether the idea of establishing an international criminal court was adopted or not. If it were adopted, it would be difficult to invoke the rule in question, since by virtue of the primacy of international criminal law, the court would be competent, on principle, to try international crimes. In the absence of an international criminal court, however, the inclusion of the rule seemed necessary.

3. He did not think it would be useful to spend any more time on the controversies provoked by the application of that rule in internal law and in international criminal law. In the present instance the rule came not within the framework of internal law or of *droit international pénal*, which dealt with international crimes strictly speaking, but within that of *droit pénal international*, which the legal system familiar to him distinguished from the former branch of international law and which was intended to settle conflicts of criminal law between States.

4. Mr. TOMUSCHAT said that the Special Rapporteur's well-drafted fifth report (A/CN.4/404) and lucid presentation provided a good basis for a fruitful debate. He had already discussed the general issues at the Commission's 1985 and 1986 sessions, so he would confine his remarks to the draft articles submitted in the report.

5. Referring to draft article 1, he noted that it had been suggested that it might be preferable to speak of "crimes" against the peace and security of mankind rather than "offences", in which case the title of the draft code in English would have to be changed. So far as the definition itself was concerned, it would be better if it consisted solely of a reference to the list of offences against the peace and security of mankind to be included in the code. A substantive definition might create the false impression that the category of offences was not closed, whereas what was needed was an exhaustive list of offences that could not be extended by way of judicial interpretation.

6. He fully agreed with the rule stated in the first sentence of draft article 2, but considered that the second sentence would be improved if the word "prosecuted" were replaced by "punishable". That would serve to underline that two legal orders—the international legal order and rules of internal law—coexisted.

7. He welcomed the specific reference to "any individual" which had been introduced into draft article 3. That would make it quite clear that the code dealt with the criminal responsibility of individuals.

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* Resumed from the 1991st meeting.

[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 . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 1992nd meeting, para. 3.