Document:-

A/CN.4/SR.1998

Summary record of the 1998th 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

code of procedure to regulate problems arising from the obligation to try or to deliver?

45. Secondly, he feared that the question whether or not the application of the code should be limited to the responsibility of individuals might give rise to misunderstanding. While he shared the view of those members of the Commission who believed that State crimes should not be left out of account, he would remind them that article 19 of part 1 of the draft articles on State responsibility[16] was in the nature of a blank cheque, in that it established the concept of a State crime without stating the general rules by which that type of crime would be governed. He recognized that the Commission could not do otherwise, and even accepted the idea of having no statutory limitations for crimes of that type or of providing for different periods of limitation applicable to less serious breaches of international law. He also recognized that a crime was of concern to a wider circle of States than an ordinary delict; but the idea of inflicting a penalty on a legal person—in the present case, a State—was very serious and caused him some difficulties. He therefore reserved his position on that point.

46. The position taken by the Special Rapporteur on self-defence seemed to him to be perfectly normal. If a head of State was tried for aggression and if the State of which he was head could invoke self-defence—which was more than a justifying circumstance, since it nullified the crime—it was obvious that he could not be punished for the crime of aggression. For instance, supposing that two States, after having fought a war and suffered heavy losses, ended by making peace; that the individuals who had been the leaders of those States during hostilities took refuge abroad; that neither the Security Council nor the General Assembly, nor even another State, had spoken of aggression; and that each of the former belligerent States nevertheless claimed to have been the victim of aggression and asked that the former commander-in-chief of the other State be delivered to it to be tried for aggression: was it conceivable that an individual could have committed the crime of aggression if it was not established that the State to which he belonged had in fact committed the same crime? In such a case what authority would attach to a decision of the Security Council, a resolution of the General Assembly or a judgment of the ICJ establishing aggression? Would national courts be automatically bound by such a decision?

47. From those considerations he concluded that, if the Commission were to deal only with the crimes of individuals in the draft code, it must still not overlook the fact that most, if not all, of the crimes covered were State crimes in the first place. Those comments might make it easier to understand the question of self-defence, but he recognized that they, in turn, raised new problems. Thus he was not sure that the suggestion he had made at the 1993rd meeting, to the effect that it should be stated that draft article 3 was without prejudice to any decisions the Commission might take on the question of the criminal responsibility of the State, would meet all the concerns he had mentioned.

[16] See 1993rd meeting, footnote 7.

48. Mr. FRANCIS supported Mr. Ogiso's proposal (para. 29 above) to add a new paragraph to draft article 4, specifying that the concept of a political offence could not be invoked as a defence for the crimes included in the draft code. That was a point which he himself had stressed at the previous session,[17] but had omitted to mention in his statement at the present session.

The meeting rose at 1 p.m.

[17] *Yearbook . . . 1986*, vol. I, p. 148, 1965th meeting, para. 44.

1998th MEETING

Friday, 15 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

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

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*)

1. Mr. BOUTROS-GHALI said that, instead of reviewing the draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/404) and the comments made by members of the Commission, he would simply make a few general remarks.

2. In the conclusion to his fourth report (A/CN.4/398, para. 259), the Special Rapporteur had stated: "It will undoubtedly be noted that the texts and judicial decisions analysed are . . . too closely linked to

[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.

the circumstances of the Second World War." Since 1945, however, there had been dozens of conflicts, such as wars of decolonization, localized wars and civil wars, which had broken out in various parts of the world and in which offences against the peace and security of mankind had been committed. Although it might be said that such armed conflicts had not contributed anything new as far as judicial practice was concerned and that the decisions adopted by certain people's courts were based more on politics or morality than on the law of nations, such conflicts did give rise to a new kind of problem that required the adoption of new rules. Offences against the peace and security of mankind were changing not only as a result of technological advances, but also—and more serious still—as a result of the emergence of new ideologies or ideologies that were being revived. The use of defoliants during the Viet Nam war and the mobilization of children in one of the countries at war in the Middle East were only two examples of such changes. Such developments put the offences under consideration in a new light and the Commission should carefully examine the resulting legal consequences.

3. He also noted that, although the draft code involved only two actors, namely the State and the individual, it focused primarily on the individual: the question of State crimes would be dealt with in another convention. There were, however, movements and groups separate from States which represented new forces that were sometimes more powerful than States. While he was aware that that question could be dealt with in draft article 14 as submitted in the fourth report (*ibid.*, part V), which covered "conspiracy", he was of the opinion that a specific provision should be devoted to such new entities.

4. The Commission had not paid sufficient attention to developments which were outside the inter-State system, but influenced it, and vice versa. It seemed to be looking at the present through the eyes of the past without considering new modern-day developments for which legal solutions had to be found. The establishment of a permanent or *ad hoc* international criminal jurisdiction had to be envisaged if the code was to have an infrastructure and be an instrument capable of taking such developments into account.

5. With regard to the various categories of offences dealt with in the articles of chapter II of the draft (*ibid.*), the Commission should refer to certain scientific studies of war and try to be more imaginative and even more daring—although that might not be in keeping with the legal tradition—in order better to understand those new developments. In that connection, he was of the opinion that, just as the economic system had largely become independent of the inter-State system, so some offences against the peace and security of mankind would also increasingly be beyond the reach of State authorities. Transnational realities would prevail in the field of crime as they had done not only in the case of the economy, but also in many other areas at the international level. That was a dimension of the problem on which the Commission should focus its attention.

6. Mr. THIAM (Special Rapporteur) said that he wished to reply, at least in part, to some of the comments made by Mr. Boutros-Ghali, who might already have been called away from the Commission to assume other obligations by the time the discussion was summed up.

7. The question of criminal organizations had been considered at the Nürnberg trial and had been resolved on that occasion. The case of each criminal organization had thus been dealt with separately and, once their criminal nature had been established, it had been their members, not the organizations themselves, who had been prosecuted. He did not think that such organizations could be regarded as subjects of law in the same way as individuals and States, particularly since they differed greatly from one another: a national liberation movement had nothing in common with a group such as the Mafia. The criminal responsibility of legal persons was, moreover, open to question, but the responsibility of each member of an organization could be established.

8. Prince AJIBOLA said the discussion clearly showed that there were certain lacunae in the draft code which would require the Special Rapporteur's close attention. In the first place, there was the question of classification. It had been recognized that certain offences against the peace and security of mankind could be committed by an individual or a group of individuals. There was, however, another category of offences which in effect involved acts by States. That element could no longer be ignored and the Commission should give the matter further thought.

9. Another issue to be resolved was that of jurisdiction. The Special Rapporteur had been at pains to provide a sufficiently flexible mechanism embodying both international criminal jurisdiction and internal criminal jurisdiction; but there was also the possibility of an *ad hoc* international criminal jurisdiction, as illustrated by the Nürnberg Tribunal. That point therefore required clarification. The Commission would also have to consider the admittedly complex issue of extradition if the code was to have teeth.

10. Yet another point which the Special Rapporteur should consider and one to which many members of the Commission had already referred was whether the word "offences" in the English title of the topic should be replaced by "crimes".

11. All those areas had political connotations and were of major importance. Issues such as non-retroactivity, jurisdictional guarantees, complicity, intent, fair trial and double jeopardy were, however, supplementary to the main theme of the draft code. Accordingly, it was necessary first to erect the structure, after which the elements could be defined.

12. He noted from the records of previous sessions of the Commission that, once the Commission had completed its work on a topic, there had been a tendency, if some problem which had a political connotation was involved, to defer a decision on the matter until it eventually died a natural death. History, however, was being made now and it behoved the Commission to produce something that could be successfully implemented. The

informal written proposal submitted by Mr. Eiriksson regarding draft articles 1 to 8 was relevant in that connection and should also be examined.

13. The CHAIRMAN, speaking as a member of the Commission, said that he particularly appreciated the efforts made by the Special Rapporteur to respond to the wishes of members, especially regarding the need for a set of general principles. Many of his comments on the draft code had been covered by other members or raised by himself at previous sessions, and he would therefore not repeat them.

14. He agreed that the English title of the topic should be amended to refer to "crimes" against the peace and security of mankind and considered that the General Assembly could be requested to endorse that change for the reasons already stated, mainly by Prince Ajibola (1997th meeting).

15. The present topic was particularly sensitive and required great care. It had been suggested during the discussion that States should not be allowed to derogate from the provisions of the code. Even if States did not ultimately adhere to the code, however, the unique nature of the Commission's mandate meant that the product of its work—to which courts and foreign ministries often looked for guidance—would, to some extent at least, be viewed as a codification of the law in the area in question, particularly in the light of the precedent set by the Nürnberg Principles.[6]

16. An allied and extremely important question concerned the inseparability of the code, on the one hand, and the means of enforcing it, on the other. In his view, the Commission should make it clear that the provisions governing the implementation of the code were part and parcel of the code itself, for, if the adoption of any instrument resulting from the Commission's work was not universal, there was a danger that States might try to pick and choose, deciding what constituted a crime and how to enforce any penalties as and when they saw fit. That point also underlined the desirability of establishing an international criminal jurisdiction. Although the idea might not be very attractive to all States, it was, as the Special Rapporteur had rightly pointed out, a test of the seriousness of the intentions of States with regard to the code. The Commission should see whether States were willing to meet that test and to agree to the establishment of such a jurisdiction. It should therefore try to obtain a decision from the General Assembly on the point. If it did not obtain such a decision, as was probable, it should not exclude the possibility of attempting to elaborate the statute of an international criminal jurisdiction at an appropriate stage in its work on the topic. In that connection, the proposals by Mr. Beesley (1994th meeting), which provided a possible middle way between an international criminal jurisdiction and the jurisdiction of national courts, deserved serious consideration.

17. He had grave doubts about exclusive reliance on the doctrine of universal jurisdiction, which would, in his view, create more chaos than order and had not proved very successful in the past. Moreover, the extent of universal jurisdiction in the modern world was not at all clear. He was also not sure that the territoriality doctrine, to which one member of the Commission had referred, provided an answer. It was, of course, possible to envisage a reference to courts in the territory in which the act had been committed or in the State of the defendant's nationality; but in the case of *apartheid*, for example, there would be no sense in trying an individual in the territory in which the act had been committed. That again underlined the need to place emphasis on the establishment of an international criminal jurisdiction.

18. He did not in general favour a non-exhaustive list of offences, since different national jurisdictions might then interpret and apply the code in different ways. However, if a tribunal were set up and if it provided the sole means whereby the code would be implemented, a non-exhaustive list might be feasible, for such a list would not be open to varying interpretations and additions. In view of the extreme gravity of the offences to be covered by the code, however, he would prefer it if every effort were made to draw up an exhaustive list. There was nothing to prevent States which adhered to the code from adding a protocol to cater for any offences that might emerge after the code had been adopted. He therefore agreed that paragraph 2 of draft article 8 should be re-examined, since it could have the effect of reopening an otherwise closed list of offences.

19. Draft article 2 made him think of the perennial debate between the monists and the dualists. Was there one system of law which encompassed both international and national law or were there two independent systems? Not all States or scholars agreed with the monists that, in cases of inconsistency, international law prevailed over internal law. That point related to his earlier remark regarding the authoritative nature of the Commission's work on the code, even if the code were not adopted. In that connection, he also agreed with Mr. Graefrath (1995th meeting) and Mr. Arangio-Ruiz (1996th meeting) on the desirability of including a provision in the code requiring States to enact national legislation to implement the code. That would remove any doubts regarding the direct enforceability of the code in national courts.

20. He welcomed the fact that, in draft article 3, the Special Rapporteur had replaced the word "person" by "individual" and also thought that a similar change should be made in other articles, such as article 6. He was inclined to agree with the Special Rapporteur's response concerning the new situations to which Mr. Boutros-Ghali had referred. While he also thought that it would be regrettable if the code was not a forward-looking instrument, he saw no apparent reason why offenders could not be handled as individuals, or possibly under doctrines such as that of complicity.

21. With regard to the exceptions to the principle of responsibility set out in draft article 9, it had rightly been noted that what were really involved were extenuating circumstances. He also agreed that some of the exceptions could more appropriately be taken into account at the penalty stage.

22. Intent, in his view, should be a requirement for a crime under the code, given that the code's main pur-

[6] See 1992nd meeting, footnote 12.

pose was to serve as a deterrent. There would thus be little point in making unintentional conduct criminal. The requirement of intent could perhaps be embodied in draft article 3.

23. He agreed that there was a place in the code for the exception of self-defence, but only in very limited circumstances. As had already been noted, if, for example, a leader of State A ordered an armed attack on State B in the exercise of the right of self-defence under Article 51 of the Charter of the United Nations and in response to an earlier act of aggression by State B against State A, then State A would not be regarded as an aggressor and the leader who had ordered the action carried out in the exercise of the right of self-defence could not be tried under the code on the ground that he had ordered or committed an act of aggression. The question, therefore, was how properly to circumscribe the exception of self-defence. On the other hand, if it were decided to implement the code by means of an international criminal jurisdiction, he would be far readier to leave the question of the application of such defences to that jurisdiction.

24. Speaking as Chairman and referring to the timetable for the consideration of the present item of the agenda, he said that the Special Rapporteur might wish to sum up the discussion on the topic in the course of the following week.

Following a brief procedural discussion, it was so agreed.

The meeting rose at 12.45 p.m.

1999th MEETING

Tuesday, 19 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, M. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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*)

1. Mr. RAZAFINDRALAMBO said that, as he was speaking near the end of the debate, he would confine himself to giving his opinion on certain questions which he found important and making a few drafting suggestions.

2. The first question was that of the nature and legal character of an offence against the peace and security of mankind. While it was difficult to include in a general definition all the characteristic elements of the various categories of offence to be covered, the definition proposed by the Special Rapporteur in draft article 1, which referred to the list of offences to be included in the code, might provoke criticism and be denounced as the easy way out. Many speakers had stressed the disadvantages of referring to a list, since, in view of the principle *nullum crimen sine lege* and the rigorous nature of criminal law, such a list ought to be exhaustive, whereas the development of international criminal law made it impossible to rule out subsequent modification. The Special Rapporteur himself did not exclude the possibility that other offences might be added to the list if they came to be regarded as criminal according to the general principles of law recognized by the community of nations (draft article 8, para. 2). Consequently, if it was recognized that other offences might subsequently be added to the list, they would have to satisfy precise criteria defined in advance in the code, since otherwise legislators would be obliged to resort to the dubious method of proceeding by analogy.

3. Moreover, the meaning and scope of some of the general principles stated in chapter I of the draft, such as the exceptions to the principle of responsibility (draft article 9), depended on the basis of responsibility itself, that was to say the constituent elements of the offence, the sum of which generated that responsibility. He therefore believed that the draft code should contain a provision setting out the constituent elements of an offence against the peace and security of mankind. The Commission already had a definition of an international crime in article 19 of part 1 of the draft articles on State responsibility,[6] which there was all the more reason not to disregard because, in the great majority of cases, the responsibility of the State was perceived behind the responsibility of its agents. That definition had the merit of containing the moral and the material elements of criminal responsibility, and the third, or legal, element could be added without difficulty, since it resulted from a breach of the conventions in force or of the laws and customs of war.

[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.

[6] See 1993rd meeting, footnote 7.