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**Summary record of the 2031st meeting**

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53. Mr. AL-QAYSI, supported by Mr. BEESLEY, said that draft article 5 complemented article 4. If the wording proposed by Mr. Eiriksson for article 5, paragraph 1, were adopted, the wording of article 4, paragraph 3, would also have to be amended. He urged the Commission to adopt article 5 in the form proposed by the Drafting Committee.

54. Mr. McCAFFREY (Special Rapporteur) also urged the Commission to adopt article 5 as proposed by the Drafting Committee.

55. Mr. EIRIKSSON said that his intention had not been to change article 4, paragraph 3. He had simply hoped that his amendments would remedy the inconsistencies between article 4 and article 5.

56. Mr. KOROMA said that he would like his view that article 5 was not in accordance with political reality to be placed on record. He hoped that that provision would be reviewed at a later stage.

57. Mr. REUTER said that he had no objection to the adoption of article 5, but wished to place on record his reservations concerning the incompatibility between paragraphs 1 and 2, and concerning the legal effects of paragraph 1. Those were matters of substance that would have to be discussed more thoroughly at a later stage.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 5 as proposed by the Drafting Committee.

*Article 5 was adopted.*

59. The CHAIRMAN said that the meeting would rise to enable the Planning Group of the Enlarged Bureau to meet.

*The meeting rose at 11.35 a.m.*

## 2031st MEETING

*Friday, 10 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

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

### Tribute to the memory of Mr. Senjin Tsuruoka, former member of the Commission

1. The CHAIRMAN announced with deep regret the death of Mr. Senjin Tsuruoka, a former member of the

Commission, who had made an important and lasting contribution to its work.

*At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Senjin Tsuruoka.*

### Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued)\* (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.412)

[Agenda item 5]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

#### TITLES OF CHAPTER I AND PARTS I AND II OF THE DRAFT *and* ARTICLES 1, 2, 3, 5 AND 6

2. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of chapter I and parts I and II of the draft code and draft articles 1, 2, 3, 5 and 6 as adopted by the Committee (A/CN.4/L.412), which read:

#### CHAPTER I

#### INTRODUCTION

#### PART I. DEFINITION AND CHARACTERIZATION

##### *Article 1. Definition*

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

##### *Article 2. Characterization*

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

#### PART II. GENERAL PRINCIPLES

##### *Article 3. Responsibility and punishment*

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime, irrespective of any motives invoked by the accused that are not covered by the definition of the offence, and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

...

##### *Article 5. Non-applicability of statutory limitations*

No statutory limitation shall apply to crimes against the peace and security of mankind.

\* Resumed from the 2001st meeting.

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>4</sup> *Ibid.*

*Article 6. Judicial guarantees*

Any person charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due 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 a competent, independent and impartial tribunal duly established by law or by treaty.

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 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.

3. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) recalled that draft articles 1 to 11<sup>3</sup> as submitted by the Special Rapporteur in his fifth report (A/CN.4/404) had been referred to the Drafting Committee at the present session (see 2001st meeting, para. 31). The Committee had devoted to them 12 of the 39 meetings it had held during the session and had finally adopted articles 1, 2, 3, 5 and 6 (A/CN.4/L.412) in the light of the discussion on them at the present session.

4. The Drafting Committee had decided to leave aside draft article 4 (*Aut dedere aut punire*) for the time being, and therefore had not discussed the article. On the other hand, it had discussed draft article 7 (*Non bis in idem*) at length. The principle laid down in that article was regarded by some members as essential, but others considered that it would be acceptable only if it were subject to certain conditions designed to prevent abuse. Due to lack of time, however, the Drafting Committee had been unable to agree on a new form of wording.

5. Also due to lack of time, the Committee had been unable to consider draft articles 8 to 11. Consequently, six draft articles would still have to be examined at future sessions of the Commission.

6. The Drafting Committee's first recommendation related to the actual title of the topic. As pointed out during the discussion in plenary, the word "crimes" had been used in some versions and "offences" in others—a difference that derived from General Assembly resolutions adopted towards the end of the 1940s. Having discussed the matter in an endeavour to harmonize all the language versions in substance and in form, the Committee recommended that the term "crimes" should be used in all languages. Accordingly, while the title of the topic would for the time being remain as it

appeared on the Commission's agenda and in General Assembly resolutions on the subject, the word "crimes" would henceforth be used in all languages in the titles and texts of the draft articles. If the Commission accepted that recommendation, it might wish to recommend in its report that the General Assembly approve that decision and amend the title of the topic in English with a view to greater harmonization and equivalence between the various language versions. The Commission therefore had to decide whether it wished to use the word "crimes" in all languages and whether to recommend to the General Assembly that the title of the topic in English should be amended accordingly.

7. Mr. JACOVIDES said that he supported the change proposed by the Drafting Committee, which responded to the wishes expressed in the past both in the General Assembly and in the Commission itself and for which there were cogent reasons. The proposed new title for the topic was more accurate legally and carried greater weight politically. In addition, the use of the term "crimes" in the English text would make for harmonization with the other language versions.

8. Mr. BEESLEY said that he could have accepted the retention of the term "offences" at the beginning of the English text of article 1, provided the word "crimes" was used in the subsequent explanation, namely the expression "crimes against the peace and security of mankind", so as to stress the seriousness of the crimes covered by the draft.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to accept the proposal by the Drafting Committee to replace the term "offences" by "crimes" in the English text of the draft and to recommend to the General Assembly that it amend the title of the topic accordingly.

*It was so agreed.*

TITLES OF CHAPTER I AND PARTS I AND II

10. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Drafting Committee had for the moment accepted the title of chapter I (Introduction) and the titles of parts I and II as proposed by the Special Rapporteur. They were, however, provisional and would probably have to be re-examined. In the mean time, the Committee recommended that the Commission adopt those titles.

11. Mr. CALERO RODRIGUES, supported by Mr. EIRIKSSON, said that, although he did not wish to press the point at the present stage, he still believed that the draft articles should be divided into parts and the parts into chapters, as was the Commission's usual practice. He therefore reserved his position on that question and trusted that, on second reading, the Commission would bring the wording into line with that adopted in most other conventions.

12. Mr. ARANGIO-RUIZ said that, strictly speaking, he had no objections to the Drafting Committee's proposals, but he did have a reservation with regard to the title of part I (Definition and characterization). A

<sup>3</sup> For the texts, see 1992nd meeting, para. 3.

definition was, as it were, a label, whereas characterization related to the substantive treatment of a crime. He therefore accepted the title of part I for the time being, subject however to any changes he might suggest in the light of the texts to be adopted later.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the titles of chapter I and parts I and II of the draft code.

*The titles of chapter I and parts I and II of the draft code were adopted.*

#### ARTICLE 1 (Definition)

14. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 1 was very close to the text submitted by the Special Rapporteur and referred to the Drafting Committee, except for the square brackets around the words "under international law". The construction of the sole sentence that made up the article now followed the English version, which had been taken as a model, and the text started in all languages with the words "The crimes . . .".

15. Some members of the Drafting Committee had considered that the words between square brackets should be retained, while others had taken the view that they should be deleted. The former had argued that those words had appeared in the 1954 draft code and felt they were a logical and necessary means of declaring that the crimes in question were crimes under international law as reflected in numerous conventions and declarations of the organized international community. Other members had feared in particular that the words would be a source of confusion between the present topic and the topic of State responsibility, for States would in any event be bound by the code and the crimes covered existed independently of the code. The Drafting Committee had decided to draw attention to the difference of views by using square brackets, and to revert to the matter later. The word "defined" had also given rise to some reservations, since the draft article did not seem to be a definitional article. The Committee had none the less decided to retain the word, on the understanding that it was taken to mean "indicated" or "determined".

16. The Drafting Committee had also considered the possibility of adding a second paragraph containing a general definition of the crimes covered by the code, together with certain criteria. In that connection, Mr. Pawlak had proposed the following text (A/CN.4/L.419):

"Crimes against the peace and security of mankind are the acts which jeopardize the most vital interests and the very existence of mankind, violate the fundamental principles of international law, and threaten civilization and the basic human right to life."

Some members of the Drafting Committee had taken the view that the question of a general definition should be discussed immediately, but most had considered that it was a complicated matter and that such a course would have been premature. The Committee had de-

cidated to leave the question aside and revert to it later, perhaps after the establishment of the list of crimes, which would probably contain specific criteria for each of the acts.

17. The title of the draft article as proposed by the Special Rapporteur remained unchanged.

18. Mr. BEESLEY said that he had some reservations regarding the use of the term "definition" as the title of article 1 but could wait until the Commission's work had made much more headway before coming to a final decision.

19. As to the text of the article, he was in favour of retaining the words "under international law", provided they were placed between the words "constitute crimes" and the phrase "against the peace and security of mankind". He therefore formally proposed that such a change be made. In particular, the word "defined" should be kept, for he could not possibly agree to an open-ended code, especially if the question whether or not there were grounds for adding other crimes were left to national jurisdictions.

20. He also wished to comment briefly on the revised text of article 1 proposed by Mr. Pawlak in the Drafting Committee, which the Special Rapporteur had read out (para. 16 above). The intention was commendable, but the text read more like a General Assembly resolution than an article for the code. Far from strengthening the definition of crimes against the peace and security of mankind, that text would, if adopted, tend to soften it. It would introduce a great many criteria into the definition and in effect create as many loopholes. He therefore did not favour its adoption.

21. In reply to a question by the CHAIRMAN, Mr. PAWLAK explained that his suggested reformulation of article 1 was not intended to be discussed at the present stage as a concrete proposal and should be taken up at a later stage of the Commission's work on the draft code.

22. Mr. MAHIOU said he thought that the reference to international law was appropriate and therefore favoured deletion of the square brackets around the words "under international law" for the reasons already stated by the Chairman of the Drafting Committee: the Commission was concerned with crimes under international law, not internal law, as was apparent from draft article 2. Moreover, the Commission had already used that expression, more particularly in the Nürnberg Principles.<sup>6</sup> The Drafting Committee had harmonized the wording of all the language versions, but article 1 as formulated by the Special Rapporteur<sup>7</sup> was more logical and apposite.

23. Mr. BARSEGOV said that the presence of the words "under international law" in square brackets raised a very important question of principle and the Commission must resolve it. A code of crimes could not possibly be drafted if there was any doubt about the fact that it dealt with crimes under international law. He had not envisaged any problem in that respect, in view of the

<sup>6</sup> *Ibid.*, footnote 12.

<sup>7</sup> *Ibid.*, para. 3.

numerous existing documents in which such crimes were carefully defined. If the acts covered by the draft code were not regarded as crimes under international law, the very basis for the Commission's consideration of the topic would be undermined. The Commission was examining acts which were considered as crimes under international law in accordance with recognized conventions and the general norms of international law. It was apparent from the title of the topic itself that the Commission was required to codify existing norms. If the reference to international law were excluded from the definition of crimes, the binding legal character of conventions such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid* or the Convention on the Prevention and Punishment of the Crime of Genocide, as well as other relevant norms of international law which defined crimes against humanity, would be called into question. For that reason, he could not fail to endorse Mr. Mahiou's proposal. The General Assembly would inevitably raise questions about the work of the Commission if the reference to international law were retained between brackets. In any event, there was no doubt that the overwhelming majority of members of the Commission considered that the crimes covered by the code were indeed crimes under international law. The other members who were in favour of deleting the reference were free to reserve their position on the matter.

24. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he saw no point, at the present stage in the Commission's work, in repeating statements which had been made to the Commission before the draft articles had been referred to the Drafting Committee and which had then been reiterated before the Drafting Committee. It would suffice if members of the Commission spoke for or against the Drafting Committee's proposals.

25. Mr. CALERO RODRIGUES pointed out that, when the Drafting Committee placed words between square brackets, it did so in the hope that the Commission would be able to settle the matter. It amounted to offering a choice between two alternatives.

26. Mr. ILLUECA said that, during the general discussion, he had spoken in support of the expression "crime under international law"; but in view of the divergence of views that had emerged and the deadlock facing the Commission, the best course would be to retain article 1 in its present formulation and invite the Sixth Committee of the General Assembly to express its views.

27. Mr. GRAEFRATH said that, in the Drafting Committee, he had accepted that article 1 be presented to the Commission as it appeared in document A/CN.4/L.412 because he had expected that the discussion in the Commission would lead to the removal of the square brackets around the words "under international law". Those words represented an important qualification of the kind of crimes covered by the draft code. He therefore strongly supported Mr. Mahiou's proposal to remove the square brackets. Members who preferred them to be retained could of course place their views on record.

28. Mr. ARANGIO-RUIZ said that he was opposed to Mr. Mahiou's proposal to remove the square brackets around the words "under international law". There were good reasons for retaining the text as it stood.

29. Mr. EIRIKSSON said he, too, was in favour of retaining the square brackets around the words "under international law".

30. Mr. JACOVIDES said that he supported Mr. Mahiou's proposal and could also accept Mr. Beesley's proposal regarding the placing of the words "under international law".

31. He had great sympathy with Mr. Pawlak's proposal for the text of article 1 (see para. 16 above), but found it much too ambitious in its present form. He therefore suggested that it should be recast so as to read:

"Crimes against the peace and security of mankind are the acts which jeopardize the most vital interests of mankind and violate the fundamental principles of international law."

That more modest language would prove more acceptable and still adequately underline the gravity and importance of the subject.

32. Mr. FRANCIS said that he agreed with Mr. Beesley regarding the placing of the words "under international law". He would have favoured the removal of the square brackets, but felt that the Commission was not in a position to take a decision on that point at the present stage.

33. Mr. ARANGIO-RUIZ said that the draft code would eventually take the form of an international convention, namely a body of rules of international law setting forth rights and obligations. There was no doubt that the provisions of the code would then form part of international law. The fact that the crimes were defined in an instrument of international law thus rendered any reference to international law superfluous. But for the persons who committed such crimes to be prosecuted, in other words for the code to be implemented—whether implementation was to be entrusted to an international tribunal, was to remain within the competence of States or was to be dealt with under a mixed or transitional system—the crimes covered by the code also had to be characterized as crimes under internal law. Far from limiting the scope of the code, the omission of any reference to international law in article 1 would strengthen the condemnation of the crimes. Only when the code had been incorporated by all States parties into their internal law would it be fully implemented. To dispel any ambiguity in that regard, he would again stress that the effectiveness of the code would depend on its being incorporated into the internal law of States.

34. Mr. CALERO RODRIGUES said that he supported Mr. Mahiou's proposal, as well as Mr. Beesley's useful suggestion.

35. Mr. PAWLAK said that he strongly supported Mr. Mahiou's proposal. The inclusion of the words "under international law" in article 1 was essential. It would be most surprising to omit them, bearing in mind the reference to "a crime under international law" contained in Principle I of the Nürnberg Principles, which the Commission itself had adopted at its second session,

in 1950.<sup>8</sup> Besides, in the 1954 draft code, article 1 stated that offences against the peace and security of mankind were “crimes under international law”.

36. As to his own proposed reformulation of article 1, which would be considered at a future date, he took note of the interesting suggestion made by Mr. Jacovides (para. 31 above).

37. Mr. HAYES said that it was still uncertain whether the draft code would be declaratory of existing crimes or constitutive of crimes against the peace and security of mankind, and thus open to the inclusion of new crimes. The words “under international law” were unnecessary if the code was to be purely declaratory. If, on the other hand, it was intended to cover new crimes, those words would be inappropriate.

38. The proposal by Mr. Beesley raised a different issue. If the words “under international law” were placed between the word “crimes” and the phrase “against the peace and security of mankind”, at the end of the article, they would become unnecessary if the draft code became international law and, of course, inaccurate if it did not.

39. Mr. AL-QAYSI said that, when the Drafting Committee had placed square brackets around the words “under international law”, it had done so in order to express its own intention to revert to the matter at some later stage.

40. A fundamental issue of substance had been raised, namely whether the draft code was to be declaratory of existing crimes or constitutive of new crimes. It was difficult to see how anyone could support both Mr. Mahiou’s proposal and Mr. Beesley’s seemingly innocuous proposal, since the first was based on the declaratory approach and the second on the constitutive approach. It would be remembered that, in the past, there had been considerable division of opinion as to whether or not such crimes as colonialism, mercenarism and *apartheid*, which had not appeared in the Nürnberg Principles, were to be regarded as crimes against the peace and security of mankind.

41. For his part, he would be prepared to support Mr. Mahiou’s proposal in regard to the substance, for those crimes were already crimes under international law, but he considered that the Commission would not be able to settle the matter at the present stage. He was therefore prepared to wait.

42. Mr. MAHIOU said he had certainly not thought that his proposal would give rise to such a heated debate. At the same time, if an article prepared by the Drafting Committee gave rise to differences of view, it was only natural that the point at issue should be discussed in plenary. In the present case, the square brackets in draft article 1 indicated an area of disagreement which should be reflected in the summary records of the Commission, since the Drafting Committee’s work was of an informal nature. The use of square brackets was, moreover, a tradition of the Commission: for instance, in the draft articles on jurisdictional immunities of States and their property, article 6, in par-

ticular, contained a reference between square brackets to the “relevant rules of general international law”. Similarly, a number of draft articles on the status of the diplomatic courier contained expressions between square brackets, and members of the Commission had taken a position on them in plenary. At some point, therefore, the General Assembly would have to be enlightened as to the line of argument members of the Commission had followed with respect to the expressions between square brackets. He would not press for the immediate deletion of the square brackets in article 1, but would suggest that the Commission should adopt that article as it stood, particularly since those members who were in favour of a reference to international law were divided as to its proper place.

43. Mr. BENNOUNA said he did not think that the Commission was yet in a position to resolve the problem it had encountered. Admittedly, the Drafting Committee had pin-pointed the difficulties, but it had not resolved all of them, for it considered that the task would be easier when the work was more advanced. The difficulties of article 1 were evidenced by Mr. Pawlak’s proposal (para. 16 above), which, although certainly very interesting, had come too soon. In addition, the question of the universality of the code, which should command general acceptance, was still outstanding. From that standpoint, the definition of the crimes to be covered was difficult, since they were the most abominable crimes of all, which would entail the application of a rule of *jus cogens*. Article 1 was also criticized for proposing a definition that was not a definition, because it merely introduced the list of crimes that was to appear in the body of the text. In his view, however, it was a convenient solution which dispensed with the need to propose a general definition at the outset.

44. Again, article 1 raised a problem of substance which had been discussed in the Sixth Committee of the General Assembly: did it refer to crimes already recognized under international law? If so, interpretation of the code would involve referral to general international law. If not, it would be necessary to construe the provisions of the code itself.

45. In any event, the reference to international law should be included in the definition. The crimes concerned were obviously crimes under international law and whether or not they were recognized in internal law in no way changed their characterization. In other words, the crimes in question should be recognized irrespective of any convention.

46. The discussion was none the less premature. Only when the list of crimes against the peace and security of mankind had been established would it be possible to proceed on a case-by-case basis, to determine which crimes were recognized in international law, and to lay down a general definition. He therefore considered that the square brackets should be retained and that the views expressed during the session should be reflected in the Commission’s report to the General Assembly. It was to be hoped that the question would give rise to a debate in the Sixth Committee which would be of benefit to the Commission.

<sup>8</sup> *Ibid.*, footnote 12.

47. Mr. SEPÚLVEDA GUTIÉRREZ said that he was in favour of deleting the words "under international law" for the reasons already stated by, among others, Mr. Illueca and Mr. Arangio-Ruiz. Obviously the Commission could not take a final decision for the time being. Also, the expression *crímenes de derecho internacional*, in the Spanish text of article 1, was not, in his view, the best expression to use.

48. Mr. TOMUSCHAT said that he was in favour of retaining the square brackets until such time as the Commission had the list of crimes.

49. Mr. BARSEGOV said that he endorsed the text proposed by Mr. Pawlak for draft article 1 (para. 16 above) and considered that the definition of crimes against the peace and security of mankind proposed by the Drafting Committee should be further refined. The text before the Commission gave only an idea of the direction the definition should take. When the list of the crimes in question was available, their characteristics could be analysed and a definition laid down.

50. None of the legal arguments advanced in the Commission had persuaded him to abandon the idea of defining the subject of the code right from the start, namely in article 1. For instance, the argument that the Commission should wait until the complete list of crimes was available in order to find out whether they all came under international law was not very relevant. Nobody denied that the crimes involved were indeed crimes under international law. Moreover, in the absence of an accurate definition, it was difficult to see how the provisions of the code could be implemented.

51. At its 2029th meeting, the Commission had adopted in connection with international watercourses a provision which, in his view, ran counter to international law. Some members had voiced reservations and it had been decided to reflect them in the commentary. He did not see why the Commission should do otherwise in the case of the topic under consideration.

52. Mr. REUTER said that he endorsed the general intent of article 1. The significance of the square brackets had been considered by several members and he agreed with their arguments. In his view, however, the whole expression "crimes under international law" should be placed between brackets.

53. It would be noted that article 1 and article 2 already spoke of crimes, but it was still not known whether they were crimes by individuals or crimes by States. For his own part, he agreed entirely that State crimes should form the subject of a special régime, even though that would certainly pose problems in terms of criminal law. While it was obvious that the crimes envisaged came under international law, it was not yet known who committed them—States or individuals.

54. Mr. EIRIKSSON said that he still regarded article 1 more as a scope article than as a definitional article, which could create difficulties inasmuch as the content of the articles had yet to be decided. He was not certain what effect the wide range of views that would undoubtedly be expressed in the Sixth Committee of the General Assembly would have on the continuation of the Commission's work. Personally, he found the ex-

pression "crimes under international law" somewhat political and difficult to address in legal terms, either in the Commission or elsewhere. In any event, the debate in the Sixth Committee would, in his view, be unproductive until such time as there was an indication of the actual crimes to be included in the code.

55. He would remind the Commission that the General Assembly had at its last session, in resolution 41/81 of 3 December 1986, requested the Commission to indicate the substantive issues on which the views of Governments would be particularly relevant to the continuation of the Commission's work. Perhaps the subject under consideration was one such issue. If so, the views of members of the Commission should be clearly reflected in the commentary to ensure that the debate in the Sixth Committee was not unduly political.

56. Mr. GRAEFRATH said that the words "under international law" were neither superfluous nor inappropriate, for it was difficult to see how crimes against the peace and security of mankind could be anything other than crimes under international law. Crimes against the peace and security of mankind, moreover, were crimes of the utmost gravity and therefore must necessarily constitute crimes under international law, irrespective of their characterization under internal law. That should be made clear from the outset, in article 1.

57. As for including a list of crimes in the code, régimes like the *apartheid* régime should not be able to argue that *apartheid* was not a crime for which individuals could be punished under international law simply because a particular country had not ratified the *Apartheid* Convention or any future code of crimes against the peace and security of mankind.

58. Mr. SOLARI TUDELA said that, if the code was to include a list of crimes, the square brackets in article 1 should be deleted. It could be assumed, however, that the list would include crimes that were not regarded as such under the internal law of States. The crime of *apartheid*, for instance, was not covered by Peruvian law. Provision for a sanction should therefore be made, something which could be done only at the level of international law. Furthermore, the 1954 draft code had already referred to international law. If that reference were now deleted, the implication would be that there had been an evolution in thinking in the interim and that the new text marked a change of approach.

59. Mr. ROUCOUNAS said that four or five categories of crimes were recognized under international law. The crimes covered by the code obviously fell under international law and the only question to be settled was the place at which the relevant reference should appear. The potential difficulties of the relationship between internal law and international law were skilfully resolved in draft article 2. If draft article 1 were adopted in its present form, it would at least have the merit of indicating the direction for the continuation of the Commission's work and the establishment of the list of crimes, in which task the Commission should be as temperate as possible. He therefore favoured deletion of the square brackets.

60. Mr. BEESLEY, associating himself with the remarks made by Mr. Eiriksson and Mr. Reuter, said that it was necessary to adopt a very frank approach in the case of crimes against the peace and security of mankind. Did the Commission, for instance, have in mind the courageous action taken by the Government of Argentina concerning the crimes committed in the so-called "dirty war", or did it have something different in mind? And what about the question of Chernobyl, in which connection a criminal trial was under way in the country concerned? He could think of no better example of an unintended action that could have jeopardized the most vital interests of mankind and violated the fundamental principles of international law. He was not suggesting that that was what had occurred, nor was he speaking against any particular country. The branch of the law which the Commission was discussing, however, concerned a very serious issue, and great care was needed in examining the implications, over both the short term and the long term, of the Commission's actions. For the time being, he would be content to accept the Commission's decision, but he agreed that there should be a list of crimes and also a definition of specific terms, particularly since no international tribunal had yet been established.
61. Mr. BARSEGOV said that it was inappropriate to place a tragic accident like Chernobyl on the same footing as a régime such as *apartheid*.
62. Mr. BEESLEY said that his remarks had perhaps been misinterpreted. The point he had wished to make was that, if a situation which developed in a particular country was treated as a crime in that country since it threatened human life, the Commission would have to take account of that situation. He had also added that there was no intention on his part to criticize any particular country.
63. Mr. Sreenivasa RAO said that the draft code had been under consideration virtually since the creation of the Commission and a number of crimes against the peace and security of mankind had been identified, including crimes of aggression, war crimes, crimes against humanity and crimes of terrorism. Some of them were far from uncommon and he therefore wondered why there was so much difficulty about deciding whether or not they constituted crimes under international law. Even though the drafting might well be difficult, there was no problem as to content. He could not subscribe to the argument that agreement should first be reached on a list of crimes, since that was mere hair-splitting. It had also been said that the whole question was political; but there was a body of rules of international law that was purely legal. That distinction was difficult to sustain in an international forum such as the Commission, which had to take account of political realities and should not seek to separate law and politics in watertight compartments. He therefore favoured the removal of the square brackets around the words "under international law" in article 1.
64. Mr. AL-KHASAWNEH said that his position was similar to that of Mr. Graefrath, Mr. Sreenivasa Rao and Mr. Roucounas, for the reasons they had given.
65. Mr. DÍAZ GONZÁLEZ said that he endorsed the wording of article 1 as proposed by the Drafting Committee but favoured the deletion of the square brackets for the reasons stated more particularly by Mr. Al-Qaysi. It was necessary to bear in mind those crimes which would not have been foreseen either at Nürnberg or in the United Nations.
66. Mr. OGISO said that it would be advisable to retain the square brackets in article 1, first because members were still divided on the issue, and also because he would prefer the Commission to revert to the question after it had concluded its consideration of the question of a list of crimes.
67. Mr. PAWLAK said that he wished, in the light of Mr. Mahiou's proposal, to record his support for the deletion of the square brackets in article 1.
68. Mr. HAYES, clarifying his position as stated earlier, said that, if the words "under international law" were retained without the square brackets, the effective meaning of article 1 would be that some acts which were already crimes under international law would be classified as crimes against the peace and security of mankind. That would imply that the definition of crimes against the peace and security of mankind did not go beyond the existing crimes under international law. The Commission might, however, wish to go further when it defined crimes against the peace and security of mankind and he was therefore opposed to the retention of the phrase in question, at least at the present stage. If, on the other hand, a final definition or list included only those acts which were generally agreed to be crimes under international law, the opening words of article 1 would not add anything to the status of those acts as crimes under international law; nor, if omitted, would they detract from that status.
69. Mr. YANKOV said that he was in favour of deleting the square brackets in article 1. The Commission was not working in an unknown field. A draft Code of Offences against the Peace and Security of Mankind, including a definition and a list of crimes, had been adopted by the Commission in 1954; moreover, the various reports submitted by the Special Rapporteur provided sufficient support for the conclusion that acts covered by the draft code constituted crimes under international law. It would be regrettable if, more than three decades after the draft code had been adopted for the first time and nearly four decades after the Nürnberg trial, the Commission were to hold that the crimes envisaged by the draft code did not constitute crimes under international law.
70. Mr. THIAM (Special Rapporteur) said that the expression "crimes under international law" did not come from him: he had taken it from earlier texts, including the 1954 draft code. He would, however, like the Commission to make its position clear, since he needed to know exactly which crimes were involved for the continuation of his work. If, for instance, he included the crime of *apartheid* in the list, an objection could be raised that some countries had not ratified the relevant convention. He therefore wondered where the dividing line between internal law and international law was to be drawn.



71. Speaking as a member of the Commission, he said that he believed in the existence of crimes under international law. In his view, the brackets should be deleted.

72. The CHAIRMAN, speaking as a member of the Commission, said that, for the reasons he had already stated, he favoured deletion of the words between square brackets in article 1. As a member of the Drafting Committee, however, he supported the text in its present form, since it would indicate to the General Assembly that there was a divergence of views on the matter.

73. Speaking as Chairman, he suggested, in the light of the discussion, that article 1 should be provisionally adopted as proposed by the Drafting Committee and that the Commission should state in its report to the General Assembly that it had decided to retain the phrase "under international law" between square brackets to indicate that members' views on that point had been sharply divided.

*It was so agreed.*

*Article 1 was adopted.*

*The meeting rose at 1.10 p.m.*

## 2032nd MEETING

*Monday, 13 July 1987, at 11.40 a.m.*

*Chairman: Mr. Stephen C. McCAFFREY*

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Yankov.

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/398,<sup>2</sup> A/CN.4/404,<sup>3</sup> A/CN.4/407 and Add.1 and 2,<sup>4</sup> A/CN.4/L.412)

[Agenda item 5]

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>4</sup> *Ibid.*

## DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

### ARTICLE 2 (Characterization)<sup>5</sup>

1. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the text of draft article 2 was basically the same as that submitted by the Special Rapporteur.<sup>6</sup> It contained two sentences in which the words "an act or omission" were used in order to make it clear what type of conduct could constitute a criminal act. Moreover, for the sake of greater precision, the word "prosecuted" had been replaced by "punishable" in all languages and, in the French text, the words *ne préjuge pas* had been replaced by *est sans effet sur*.

2. The exclusion under "internal law" related only to the question of characterization: internal law would obviously continue to be relevant with regard to other matters. The point of that rule was to prevent accused persons from invoking characterizations under internal law in order to counter characterizations under the future code.

3. Some members of the Drafting Committee had been of the view that it was important to add the phrase "under international law" after the words "crime against the peace and security of mankind", but most members had agreed that it was unnecessary to do so and that the inclusion of that phrase might create confusion or weaken the text. Some members had expressed reservations with regard to the exclusion of the phrase.

4. Several members of the Drafting Committee who had found that the second sentence of the article was superfluous had expressed reservations to that effect, pending an opportunity to review the text of the commentary. In the end, the Committee had agreed to retain the second sentence for the time being.

5. The title of the article remained unchanged.

6. Mr. ARANGIO-RUIZ said that he could agree to the proposed text of article 2, provided it was made clear in the appropriate place in subsequent articles how the code was to be "introduced" or "otherwise implemented" in the internal law of the States parties to the instrument in which the code would be embodied. He recalled that he had already explained (1996th and 2000th meetings) the reasons for that reservation during the discussion of draft article 2.

7. Mr. BEESLEY said that he, too, agreed with the wording proposed by the Drafting Committee, since it was in keeping with the spirit of the Commission's discussions. He took the words "independent of internal law" to mean that the characterization of a crime against the peace and security of mankind was independent of its recognition or qualification in the internal law of States.

8. Mr. KOROMA said that he was not very happy with the title of the article, since the word "characterization" was not commonly used in the legal system with which he was familiar and it did not have

<sup>5</sup> For the text, see 2031st meeting, para. 2.

<sup>6</sup> See 1992nd meeting, para. 3.