

Document:-
A/CN.4/SR.2032

Summary record of the 2032nd 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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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 Mankind¹ (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.412)

[Agenda item 5]

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.*

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 2 (Characterization)⁵

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.⁶ 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

⁵ For the text, see 2031st meeting, para. 2.

⁶ See 1992nd meeting, para. 3.

much bearing on the content of the article. In his view, it would be better to use the title “Determination”.

9. Mr. DÍAZ GONZÁLEZ said that, although he was satisfied with the text, he would prefer the words “The characterization of an offence as a crime against” to the words “The characterization of an act or omission as a crime against”.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 2.

Article 2 was adopted.

ARTICLE 3 (Responsibility and punishment)⁷

11. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 3 consisted of two paragraphs: the first was based on the text submitted by the Special Rapporteur⁸ and the second was new.

12. On the basis of provisions such as article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which referred to “motive”, the Drafting Committee had added the phrase “irrespective of any motives invoked by the accused that are not covered by the definition of the offence” to the former text of paragraph 1. The aim was to rule out the possibility that “motives” might be invoked as a justification for a particular type of conduct, while providing for that possibility when the motives invoked were covered by the definition of a particular crime under the code. One member of the Drafting Committee had reserved his position on the grounds that the question of “motive” belonged more to the sphere of circumstances precluding wrongfulness or exceptions to responsibility.

13. Paragraph 2 catered for the concern expressed by some members of the Commission and was intended to make it clear that, even if an individual was being prosecuted for a crime under the code, a State could not be relieved of any responsibility under international law for an act or omission attributable to it. The inclusion of that new paragraph did not, of course, prejudice the still unsettled question of the criminal responsibility of a State for crimes against the peace and security of mankind.

14. The title had been changed in all languages except French and, in English, it now referred to “punishment” rather than “penalty”.

15. Mr. ARANGIO-RUIZ, noting that the Chairman of the Drafting Committee had referred to the “criminal responsibility” of a State for crimes against the peace and security of mankind, said that the concept of criminal responsibility was not—and, in his own opinion, should not be—referred to in article 3, for it was not possible to prejudge the nature of the responsibility (criminal, civil, international) of which the State could not be relieved.

16. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the new paragraph 2 met the concern of some members of the Commission who had wanted it to be made clear that a State could not be relieved of its responsibility even if an individual was being prosecuted for a crime covered by the code. No attempt was being made to prejudge the nature of such responsibility.

17. Mr. BEESLEY said it seemed to him that the proposed text presupposed that State responsibility would be incurred. The question whether such responsibility would be of a criminal nature had been skilfully resolved by the drafters: article 3 took account of the possibility that State responsibility might exist, but did not say what the nature of such responsibility would be.

18. With regard to paragraph 1, he welcomed the reference to “motives invoked by the accused that are not covered by the definition of the offence”. Any other formulation would have given rise to questions about the difference between “motive” and “intent”. The remainder of the sentence (“and is liable to punishment therefor”) was perhaps less clear and should be reconsidered.

19. Mr. FRANCIS said that he would have worded the last phrase of paragraph 1 (“and is liable to punishment therefor”) differently. It must not be forgotten that the crimes covered by the code were the most serious of all. On the basis of similar provisions contained in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention against the Taking of Hostages,⁹ it might have been stated that the crimes in question would be “punishable by appropriate penalties which take into account their grave nature”.

20. Mr. Sreenivasa RAO said that, although he agreed with the wording of article 3, he would like some clarification concerning the exact meaning of the phrase “irrespective of any motives invoked by the accused that are not covered by the definition of the offence”.

21. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee), referring to the use of the term “motives” in paragraph 1, said that some legal systems made a very clear-cut distinction between motive and intent. The point was thus to rule out the possibility that the accused might invoke motives not covered by the definition of the offence. For example, *apartheid* was a crime, irrespective of the reasons that might be invoked by those who committed it.

22. Mr. THIAM (Special Rapporteur) said that a judge who tried a crime against the peace and security of mankind would have to consider not the justifications invoked by its perpetrator, but rather the extent to which the circumstances of the crime reflected the perpetrator’s intent. In short, it might be said that the motive invoked would have nothing to do with the matter and that only the real motive would be taken into account.

⁷ For the text, see 2031st meeting, para. 2.

⁸ See 1992nd meeting, para. 3.

⁹ See 1995th meeting, footnote 10.

23. Mr. EIRIKSSON said he found that the phrase "irrespective of any motives invoked by the accused that are not covered by the definition of the offence" was clearer in French than in English. He would like the Special Rapporteur to include an in-depth analysis of the question in the commentary. It might be more elegant to use the words "invoked by him", rather than "invoked by the accused".

24. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said he feared that the use of the words "invoked by him", as suggested by Mr. Eiriksson, might make paragraph 1 somewhat obscure, since they would refer to the words "Any individual", which were rather far away in the sentence.

25. Mr. DÍAZ GONZÁLEZ said that he generally supported the wording of article 3. He was nevertheless surprised that the term "offence" was used in paragraph 1, since the code dealt with "crimes against the peace and security of mankind". At the end of paragraph 2, it might also be better to use the words "for a crime attributable to it", rather than "for an act or omission attributable to it".

26. Mr. AL-BAHARNA said that he, too, would prefer to retain the words "by the accused", since the crimes in question were very serious and their perpetrator had to be the "accused" in every sense of the term.

27. Paragraph 2 seemed to consist of a sentence in abeyance. In order to bring out the point of the argument, it might be possible to add, at the end of the sentence, an expression such as "in that regard", which would not be absolutely necessary, but would make for greater clarity. It would also explain to what State responsibility related, even though it was understood that, in the circumstances, what was involved was not criminal responsibility.

28. Mr. THIAM (Special Rapporteur) said that the commentary would deal at length with the distinction between motive, intent and incentive. Once the commentary had been made available, many of the Commission's doubts about article 3 would be dispelled.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 3.

Article 3 was adopted.

ARTICLE 5 (Non-applicability of statutory limitations)¹⁰

30. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in accordance with the general trend of opinion expressed during the debate in plenary and following a suggestion made by the Special Rapporteur, the Drafting Committee had decided to delete the words "because of their nature". Otherwise, the text was the same as that submitted by the Special Rapporteur.¹¹ Some members of the Drafting Committee had reserved their final position on the text until the list of crimes had been drawn up, as they were not sure

that the rule should apply to all the crimes to be included in the list. The title was unchanged.

31. The CHAIRMAN, speaking as a member of the Commission, said that he too would reserve his position until the list of crimes to be covered by the code had been drawn up.

32. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 5.

Article 5 was adopted.

ARTICLE 6 (Judicial guarantees)¹²

33. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in large measure, the Drafting Committee had retained the text submitted by the Special Rapporteur.¹³ In view of the importance of judicial guarantees and the need for specific provisions based on existing conventions, it had decided to retain an indicative list of guarantees rather than attempt to draft a more general provision.

34. The introductory clause had been amended by the insertion of the words "without discrimination" and the word "minimum" before "guarantees". Those additions had been made because similar concepts were to be found in article 14, paragraph 3, of the International Covenant on Civil and Political Rights. In the English text, it had been deemed appropriate to refer to the "guarantees due to all human beings" in order to reflect the same idea of "entitlement" as in the other language versions. The commentary would explain that the words "with regard to the law and the facts" referred to the applicable law and the establishment of the facts.

35. In paragraph 1, the word "competent" had been added before "independent and impartial" in order to bring the text into line with article 14, paragraph 1, of the International Covenant on Civil and Political Rights. The words "in accordance with the general principles of law" had been deleted as being superfluous.

36. With regard to the guarantees listed in paragraph 3, the Drafting Committee had decided, with one exception, to retain the wording of the guarantees provided for in article 14, paragraph 3, of the Covenant. The commentary would explain the meaning of those guarantees and, in particular, of the words "counsel of his own choosing", in paragraph 3 (b), and the words "used in court", in paragraph 3 (f).

37. In paragraph 3 (d), the Committee had decided to delete the words "in any case where the interests of justice so require". It had been of the view that, since the crimes dealt with in the code were of the utmost gravity and would undoubtedly entail serious punishment for those convicted, it was only logical that the interests of justice would require that legal assistance be assigned to the accused if he himself had not provided such assistance. The commentary to paragraph 3 (g) would make it clear that the words "Not to be compelled" related to cases of coercion, torture and threats.

¹⁰ For the text, see 2031st meeting, para. 2.

¹¹ See 1992nd meeting, para. 3.

¹² For the text, see 2031st meeting, para. 2.

¹³ See 1992nd meeting, para. 3.

38. The title of the article had been changed to “Judicial guarantees” so that it would better reflect the content.

39. Mr. THIAM (Special Rapporteur) suggested that paragraphs 1 and 3 should be merged and that paragraph 2 should become paragraph 1. Article 6 would then read:

“Article 6. *Judicial guarantees*

“Any individual 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. He shall have the right to be presumed innocent until proved guilty.

“2. He shall have the right:

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

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

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

“(d) To be tried without undue delay;

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

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

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

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

40. Mr. OGISO said that, since the wording of article 14, paragraph 3, of the International Covenant on Civil and Political Rights was much clearer than that of the introductory clause of article 6, which was based on that provision of the Covenant, the word “following” should be inserted before “minimum guarantees”, and the words “In particular” should be deleted. As it now stood, the first sentence did not make it clear enough that the minimum guarantees in question were those listed in the paragraphs that followed.

41. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, in his view, Mr. Ogiso’s proposal did not add anything to the text proposed by the Drafting Committee, since it was clear that the minimum guarantees in question were those listed in the following paragraphs and, because of the use of the

words “In particular”, that the list was merely an indicative one.

42. Mr. YANKOV said that he agreed with the amendments proposed by the Special Rapporteur and shared Mr. Ogiso’s point of view with regard to the introductory clause. The first phrase of paragraph 1, which had become part of paragraph 2 by virtue of the amendments proposed by the Special Rapporteur, should follow the wording of article 14, paragraph 3, of the Covenant and the word “criminal” should therefore be added before the word “charge”. The rest of paragraph 1 would become subparagraph (a) and the other subparagraphs would be renumbered accordingly. Like Mr. Ogiso, he was of the opinion that the words “In particular” should be deleted, but he would not insist on that point if it would give rise to problems.

43. Mr. EIRIKSSON said that he endorsed the amendments proposed by the Special Rapporteur.

44. Mr. KOROMA said that, while he appreciated the efforts made to harmonize the different language versions, he thought that it might be preferable not to translate certain terms literally, but rather to use the equivalent terms in other legal systems. He had in mind, for example, the expression “right to a fair trial”, which in common law was the equivalent of judicial guarantees. In the introductory clause, it might be advisable to replace the words “without discrimination” by “without exception”. Moreover, the English text of the present paragraph 2 should be brought into line with the French by amending it to read: “He shall be presumed innocent until proved guilty.”

45. The CHAIRMAN said that the English wording which had been used in article 6 and to which Mr. Koroma had just referred had been taken from the International Covenant on Civil and Political Rights. He believed that the Drafting Committee had endeavoured to follow the wording of the Covenant.

46. Mr. Sreenivasa RAO said that he could accept the amendments proposed by the Special Rapporteur, as well as Mr. Ogiso’s proposals, which were designed to make it clear that the guarantees listed were minimum guarantees and that a State could grant the accused additional rights and guarantees. The wording of the present paragraph 3 (d) was not entirely clear, even though it was based on article 14, paragraph 3 (d), of the Covenant. In his own country, the idea of “legal assistance” was different from that of “counsel”, and he therefore suggested that that idea should be incorporated in paragraph 3 (d). For the time being, however, he would not insist on that proposal.

47. Mr. AL-BAHARNA said that he agreed with the text of article 6 as amended by the Special Rapporteur. In the introductory clause, he would nevertheless prefer to use the words “with regard to the application of law and facts”, but he would not press that point. With regard to the present paragraph 1, he was not sure what was meant by the words “established by law or by treaty”. He agreed with Mr. Koroma that, in the present paragraph 2, it would be preferable to use the formula: “He shall be presumed innocent until proved guilty.” In order to simplify the wording of the present

paragraph 3 (d), he suggested that it be divided into two new subparagraphs, which would read:

“(d) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing and to be informed of this right if he does not have legal assistance;

“(e) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;”

In the present paragraph 3 (e), he thought that the words “or have examined” were superfluous.

48. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the introductory clause referred to the applicable law and the facts. The law referred to in paragraph 1 was the *lex fori*, and the words “by treaty” meant any bilateral or multilateral treaty under which the tribunal had been established. The words “or have examined”, in paragraph 3 (e), referred to letters rogatory, in other words to cases where witnesses were examined by a court other than the one trying the case.

49. Mr. THIAM (Special Rapporteur) said that the commentary would answer the questions raised by members of the Commission concerning draft article 6.

50. Mr. BEESLEY said that, in his opinion, the proposals made by the Special Rapporteur, Mr. Ogiso, Mr. Yankov and Mr. Sreenivasa Rao were all logical and useful. If the Commission adopted those amendments, however, he was not sure whether the word “minimum” in the introductory clause should be retained or whether it might not be better to use the words “common to all legal systems”. He was also not certain whether the accused was entitled to be informed of his rights.

51. Mr. BENNOUNA said that he agreed with the changes suggested by the Special Rapporteur in order to make the text clearer and with the proposals by Mr. Ogiso and Mr. Yankov. He did not, however, see why sacrosanct terms should be used if they were ambiguous. The Commission’s role should, rather, be to explain and improve on such terms. It would therefore be preferable, in the introductory clause, to use the words “with regard to the applicable law and the establishment of the facts”. In the present paragraph 3 (f), he suggested that the words “used in court” be replaced by “during the judicial proceedings”.

The meeting rose at 1.05 p.m.

2033rd MEETING

Monday, 13 July 1987, at 3 p.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. 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.

Draft Code of Offences against the Peace and Security of Mankind¹ (concluded) (A/CN.4/398,² A/CN.4/404,³ A/CN.4/407 and Add.1 and 2,⁴ A/CN.4/L.412)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

ARTICLE 6 (Judicial guarantees)⁵ (concluded)

1. The CHAIRMAN invited comments on the reformulated text of article 6 proposed by the Special Rapporteur and on the various amendments to the article suggested at the previous meeting. He also invited comments on the text proposed by Mr. Yankov, which had been submitted in writing since the previous meeting and which read:

“Article 6. Judicial guarantees

“Any person charged with a crime against the peace and security of mankind shall be entitled without discrimination to the following minimum guarantees due to all human beings with regard to the law and the facts.

“1. He shall have the right to be presumed innocent until proved guilty;

“2. In the determination of any criminal charge against him, he shall be entitled:

“(a) To a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

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

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

“(d) To be tried without undue delay;

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

“(f) To examine, or have examined, the witnesses against him and to obtain the attendance and ex-

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 text, see 2031st meeting, para. 2.