Document:-

A/CN.4/SR.2083

Summary record of the 2083rd 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:-

1988, vol. I

read, it seemed to be based on the presumption of the establishment of universal jurisdiction, which was not apparent from articles 1, 2 and 3; an intermediate step would seem to be necessary in order to close the hiatus. By giving further thought to the formulation of paragraph 1, the Commission would safeguard the whole process of drafting the code, which would be hopelessly compromised in the eyes of some Governments by the presumption that universal jurisdiction was to be established. The problem of extradition, too, though not insoluble in itself, would remain impossible to resolve so long as it was not known whether there was to be an international criminal court, universal jurisdiction, or a mixed tribunal.

71. The issue of territoriality did not appear to cause any major difficulty. It might, however, be preferable to use the term "jurisdiction" rather than "territory", so as to cover cases in which there was duality of jurisdiction, such as crimes committed on board ship in the territory of another State. He agreed with previous speakers that it was desirable to harmonize the terminology employed in the draft: the word "crime" should be used throughout the text or not at all. The question of priorities in the case of requests for extradition received from several States could be dealt with in the commentary.

72. He suggested that paragraph 3 be amended slightly to make it clear that the provisions of the preceding paragraphs were without prejudice not only to the establishment and jurisdiction of an international criminal court, but also to the whole question of jurisdiction or competence, including the question of venue.

73. He emphasized that the doubts he had expressed, which also applied to article 7, were not meant to imply any criticism of the Drafting Committee or its Chairman, who had done their best to reconcile deeply divided views.

74. Mr. OGISO said that the points he was about to make were intended mainly for the record; he had no intention of pressing them at the present stage.

75. First, while accepting the formulation of paragraph 2 of article 4 as adopted by the Drafting Committee, he would have preferred the word "due" to be used instead of "special" to qualify "consideration". That wording would, he thought, avoid a situation in which, for instance, a person alleged to have committed the crime of *apartheid* would be extradited to the State where *apartheid* was practised.

76. Secondly, he could accept the proposal made by several speakers that the words "was committed", in paragraph 2, should be replaced by "is alleged to have been committed".

77. Thirdly, he was prepared to accept article 4 in its present form if the Commission's report to the General Assembly included a recommendation that the Commission should be requested to study questions of jurisdiction in general, and the question of an international criminal jurisdiction in particular, at its next session.

78. Mr. PAWLAK said that, although he was a member of the Drafting Committee, he had unfortunately been unable to be present when article 4 had been adopted. He must therefore apologise to the Chairman of the Drafting Committee for the critical remarks he was about to make.

79. The general principles being drafted were intended to provide a basis on which the ideas set out could be developed in the future. Like Mr. Barsegov, Mr. Sreenivasa Rao and some other speakers, he thought the compromise formula adopted in paragraph 2 was very weak and failed to provide an adequate basis for preventing the criminal from finding a safe haven.

80. In considering that issue, it was essential to look back in history and recall that, as a result of inadequate provisions and practices, many war criminals had escaped to safe havens after the Second World War. Fortunately, at the beginning of the process of prosecution of war criminals, a number of them—including the infamous commandant of Auschwitz, Hans Frank—had been sent to the country where they had committed their crimes and had been adequately punished. For the sake of the peace and security of mankind, as well as of the progressive development of international law, the Commission should, at the very least, not depart from the principles accepted at Nürnberg and Tokyo. He therefore suggested that the word "special" in paragraph 2 be replaced by "priority".

The meeting rose at 1.05 p.m.

2083rd MEETING

Thursday, 21 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/404,[2] A/CN.4/411,[3] A/CN.4/L.422)

[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 . . . 1987*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[Agenda item 5]

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

ARTICLE 4 (Obligation to try or extradite)[4] (*concluded*)

1. Mr. ARANGIO-RUIZ said that the present wording of paragraph 3 of article 4 launched into space, so to speak, the idea of establishing an international criminal court. The idea could be brought back down to earth by the following wording:

> "3. The provisions of paragraphs 1 and 2 of this article shall not prejudge the determination of the competence of an international criminal court once it is established."

That would in no way alter the meaning of the article, particularly in regard to the hypothesis of universal jurisdiction, which was implicit in paragraphs 1 and 2.

2. Mr. CALERO RODRIGUES said that he had some reservations regarding the form of paragraph 1, but generally speaking the substance met with his approval. The point had been made that no individual alleged to have committed a crime against the peace and security of mankind should have safe haven from prosecution under the pretext that a country had no jurisdiction in the matter. That principle was correct and deserved to be stated in a provision of the draft. Application of the principle, however, posed various problems, first in terms of jurisdiction, and then in terms of extradition.

3. As far as jurisdiction was concerned, the difficult choice was between an international criminal court and universal jurisdiction. If established, an international criminal court would in a sense operate by delegation of the international community. The question of jurisdiction therefore opened up a very broad range of problems. Presumably, the question would be settled elsewhere in the code and it was perhaps pointless to mention it in article 4.

4. With regard to extradition, an individual alleged to have committed a crime would naturally have to be brought before an international court, in which case the term "extradition" was not suitable, or before the competent national courts. There again, it should be specified which State could exercise jurisdiction, and under which conditions, and what the effects of such jurisdiction would be on that of other States—not forgetting the case of joint jurisdiction—and a system of communication between States should be set up. An extradition régime would also need to be established, by specifying, for example, that in the absence of an express treaty between the States concerned, the code itself would serve as the basis for the procedure. Clearly, the problems of extradition were all too numerous. Other less wide-ranging instruments consisted of 10 to 12 articles on the matter and the code could not be expected to settle all the problems in one single provision.

5. The complexity of the situation was such that it would be wise to follow the direction indicated by Mr. Beesley at the previous meeting. Article 4 should simply lay down the principle of the obligation to try or extradite, on which everyone was agreed and which was aimed essentially at preventing a criminal from escaping from justice. The best course would be to delete paragraph 2, which simply raised problems it did not resolve, and to avoid questions of jurisdiction. The Commission should not, however, believe that it had resolved the problems in passing and therefore feel that it was not bound to elaborate a number of much more precise articles on the matter.

6. Paragraph 3 merely stated a truism: in fact, no provision of the draft code prejudged the establishment of an international criminal court. That did not mean that the other solution, namely universal jurisdiction, was resolved. Even in that case, a State might well be unable to exercise jurisdiction because, quite simply, the person in question was outside its territory.

7. The present discussion also caused some concern in regard to methodology. The Drafting Committee did indeed have to find compromise solutions, but it should not impede the work of the Commission itself. Yet the Committee was spending practically all its time on questions of substance, and the drafting work was being done in plenary, as had been the case at the previous meeting. That explained why the Drafting Committee had arrived at such disappointing results on the present topic.

8. Mr. FRANCIS said that paragraph 2 of article 4 was not sufficiently precise. The crimes in question could, although they had been committed by one and the same person, consist of various acts, perpetrated in various countries. In that case, the system of universal jurisdiction, the essential object of the main article and the instrument of enforcement of the code, would be difficult to put into practice, quite apart from the fact that it would be very costly. It should therefore be kept for exceptional cases.

9. Mr. Beesley (2082nd meeting) had raised an important point with regard to paragraph 1, which said that an individual "alleged to have committed" a crime had to be tried. That was going rather far and overlooked the earlier stages, such as police information and, more particularly, a preliminary enquiry. The authors of a number of conventions had not been mistaken in that regard. For example, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* spoke only of persons "charged" with a crime (art. V), and not individuals "alleged to have committed" a crime. Nor did the words "individual alleged" appear in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, or in the 1977 European Convention on the Suppression of Terrorism.[5] Accordingly, if the phrase "individual alleged to have committed a crime" were maintained, paragraph 1 would have to be amended by replacing the words "shall try" by "shall prosecute".

10. Mr. GRAEFRATH said that some countries did not want the establishment of an international court with jurisdiction for crimes against the peace and secur-

[4] For the text, see 2082nd meeting, para. 36.

[5] See 2057th meeting, footnote 11.

ity of mankind. Moreover, at its thirty-fifth session, in 1983, the Commission had asked the General Assembly to indicate whether it should prepare the statute of a competent international criminal jurisdiction for individuals and had reiterated its request at its thirty-ninth session.[6] Since it had received no reply, the Commission should consider that the question of the jurisdiction of a possible international court and its relations with national criminal jurisdictions remained open.

11. The principle laid down in article 4 was by no means new. It was enunciated not only in the instruments cited by Mr. Francis, but also in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,[7] the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation[8] and the 1937 Convention for the Prevention and Punishment of Terrorism.[9] In other words, its validity did not depend on establishing a hypothetical international court. Unfortunately, however, article 4 was not clear-cut about the ways and means of applying the principle. Various intermediate steps had been proposed in the Drafting Committee, more particularly to ensure custody of the criminal, and the Committee had even discussed the order of priority for those steps. Several members of the Committee had been ready in that regard to expand the provisions of article 4 in the light of existing conventions. However, some difficulties had emerged, for instance with regard to the principle of territoriality in paragraph 2, a principle which, it had been said, could not apply to the crime of *apartheid*.

12. He was none the less ready to endorse article 4 in its present form, on the understanding that it would be amplified by subsequent articles. The text had the twofold merit of providing a basis, however narrow, for pursuing the Commission's work, and of not closing the door on an international criminal court, for those who appeared to want such a court.

13. Mr. BENNOUNA said that paragraph 3 would quite obviously disappear, for it merely indicated that the Commission would later consider the possibility of establishing an international criminal court. The best course would be to place the paragraph in square brackets, as suggested by Mr. Eiriksson (2082nd meeting), with an explanation in the commentary that that did not mean that there had been any difference of opinion among members of the Commission.

14. The Chairman of the Drafting Committee had given a perfect picture of the lively discussion in the Committee. Article 4 was indeed difficult in that it assumed problems were resolved when they were not, for example the problem of jurisdiction. The Drafting Committee had preferred not to settle everything immediately, on the understanding that it would revert to matters that were still pending. That was a wise decision, because on further reflection the new proposals the Special Rapporteur would be making at the next session, and above all a thorough analysis of the various crimes covered, would definitely make it possible to obtain a better grasp of the ins and outs of the principle the article endeavoured to enunciate.

15. It had already been said that the provision on extradition should be less ambiguous, but it would be premature to try to move further at the present time. Article 4 posed basic problems involving the very concept of crimes against mankind, from the standpoint of universality, of the collective interests of States, of international action to punish such crimes, and so on. For those reasons, he shared Mr. Graefrath's view that article 4 should be provisionally adopted as it stood, that all reservations should be recorded, and that the matter should be taken up again at the next session in the light of the replies by the Special Rapporteur.

16. Mr. ARANGIO-RUIZ said that, after hearing the statement by Mr. Calero Rodrigues, he was convinced that it would be better to delete paragraph 2 and to retain paragraph 1, which enunciated the principle of universal jurisdiction, as well as paragraph 3, possibly in an amended form, for it reserved the question of establishing an international criminal court. The problems of jurisdiction and extradition would be settled in detail in another part of the code.

17. As Mr. Graefrath had pointed out, the question whether the preparation of the statute of an international criminal court formed part of the Commission's mandate had twice been put to the General Assembly, which had not answered. Accordingly, the Assembly intended to leave the matter in the Commission's hands. In his opinion, the preparation of such a statute was an essential element in the drafting of the code. For that very reason he had proposed his amendment to paragraph 3 (para. 1 above), which would reserve the question of establishing an international court without prejudice to the code entering into force. The Commission could at least indicate to the General Assembly that it deemed it advisable to take up the question.

18. Mr. Eiriksson's idea (2082nd meeting) of placing paragraph 3 in square brackets would simply give the impression that some members of the Commission were in any event opposed to the establishment of an international court.

19. Mr. KOROMA said he agreed with the arguments adduced in favour of article 4. It was of little import whether, individually, members approved or did not approve of the idea of a draft code, since the Commission had been instructed by the General Assembly to prepare one: everyone must now do his best to produce the best possible text. Plainly, article 4 could not satisfy everyone, since it was the outcome of a compromise. Its inadequacies could at least not be ascribed to any negligence by the Drafting Committee, which had spent nearly two weeks on the article. The Commission, now that all members had been able to state their views and express their reservations, which the Special Rapporteur would take into account in reviewing the text for second reading, should adopt the text proposed by the Drafting Committee, possibly with the drafting change suggested by Mr. McCaffrey (2082nd meeting, para. 51), namely

[6] See *Yearbook . . . 1987*, vol. II (Part Two), p. 17, para. 67 (*c*).

[7] United Nations, *Treaty Series*, vol. 860, p. 105.

[8] *Ibid.*, vol. 974, p. 177.

[9] See 2054th meeting, footnote 7.

to replace the words "shall not" by "do not" in paragraph 3. Other amendments—and he himself intended to make some proposals—could be considered on second reading.

20. Paragraph 3 should not be placed in square brackets, because in the practice of the Commission they were a sign of disagreement among members. It would be better to mark the paragraph with an asterisk and add a footnote by the Special Rapporteur explaining that, for the time being, the Commission was setting aside the question of an international criminal court. Since, as already pointed out, the General Assembly had said nothing in that regard and the Commission was better placed than the Assembly to envisage all the consequences of choosing between an international court and universal jurisdiction, the Commission should, at its next session perhaps, take a decision on the matter and make a recommendation, instead of putting the ball back in the General Assembly's court.

21. Mr. McCAFFREY noted that Mr. Francis's objections to the obligation "to try" were similar to the ideas expressed by Mr. Beesley (2082nd meeting). In that regard, under the terms of a number of conventions, including the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (arts. 6 and 7) and the International Convention against the Taking of Hostages[10] (arts. 6 and 8), the States parties took the necessary steps to ensure the presence of the alleged offender "for the purpose of prosecution or extradition", and if the person was not extradited, they submitted the case to their "competent authorities for the purpose of prosecution, through proceedings in accordance with [internal] laws".

22. He had reserved his position on the whole of draft article 4 and, since it seemed to be agreed that more detailed provisions on jurisdiction and extradition would be prepared later, he would suggest that the words "in accordance with the provisions of the present Code" be added at the end of paragraph 1, with an explanation in the commentary that detailed provisions would figure in another part of the code.

23. Mr. BEESLEY said he supported that proposal. Moreover, the Commission should, in his opinion, fall back on that method whenever necessary, for it would avoid extensive debate.

24. On the other hand, the amendment to paragraph 2 proposed by Mr. McCaffrey (2082nd meeting, para. 51), namely to replace the end of the paragraph by the words "in whose territory the crime is alleged to have been committed" was perhaps not adequate, for such a presumption would relate only to the territory and not to the crime. Even if it involved repetition, it would be better to say "the alleged crime".

25. He was not opposed to the amendment to paragraph 3 proposed by Mr. Arangio-Ruiz, but simply thought that it did not go far enough. The solution he himself advocated was to leave all options open. If that solution was not acceptable, the Commission could inform the General Assembly that, failing instructions to the contrary, the Commission took universal jurisdiction as its working premise.

26. Mr. Sreenivasa RAO said that the Commission was reopening the debate on questions already discussed at length in the Drafting Committee. As Mr. Koroma had said, the Commission should adopt the wording proposed, for at the present stage any amendments would raise insoluble difficulties. The arguments on all sides would be found in the summary records of the Commission's meetings, along with the proposed amendments. The Special Rapporteur would be able to take them into account and, in the commentary, draw the General Assembly's attention to the major problems that arose, particularly the problem of the establishment of an international criminal court.

27. The ultimate criterion for the draft code was still its acceptability to States. Hence the General Assembly should give the Commission the requisite guidelines to continue its work. The greater the number of controversial elements introduced into the draft, the more difficult it would be for the draft to command acceptance by States: some had always been opposed to it. It was from that standpoint that the members of the Drafting Committee had striven, regardless of personal convictions, to reach agreement on a text. The proposed text of article 4, which represented the lowest common denominator of the various opinions, was necessarily imperfect. It was, nevertheless, the best the Commission could produce and it should now be adopted if the Commission wished to discharge the task assigned to it. He was therefore opposed to any change in the text, whether it was to place some provisions in square brackets or to amend paragraph 3, which in no sense prejudged the position of members of the Commission.

28. It had been suggested that the obligation to try or to extradite should be replaced by an obligation to prosecute or to extradite, in view of certain treaties and provisions of municipal law. In that regard, Prince Ajibola's comments (2082nd meeting) should be enough to convince the Commission to keep to the present wording, since States might well choose not to try an individual. He also supported Prince Ajibola's suggestion (*ibid.*, para. 66) to insert the word "either" between the words "shall" and "try" in paragraph 1. The realities of inter-State relations should not be ignored. All too often, nowadays, a State requested to extradite an individual suspected of committing a crime refused to do so. It then took refuge in the fact that it was not obliged to try but simply to prosecute the person in question and the suspect was released on the grounds that it had not been possible to bring sufficient charges against him. The State demanding extradition could then do nothing at all, except pay back in kind when the time came.

29. Clearly, there was no question of compelling States to try an individual without following the usual procedures, but nothing in article 4 prevented those procedures from being observed. If the punishment of persons committing crimes against humanity was not to be an entirely political matter, a text laying down the obligation to try was indispensable. For that reason, article 4, with the amendment proposed by Prince Ajibola, should be adopted.

[10] See 2061st meeting, footnote 6.

30. Cases of more than one request for extradition posed quite thorny problems and, there again, the text proposed by the Drafting Committee for paragraph 2 should be adopted.

31. Mr. AL-BAHARNA said that, in view of the explanations given by the Chairman of the Drafting Committee, he was in favour of article 4 in its present form, as was Mr. Sreenivasa Rao, whose comments he endorsed. The basic principle was obviously that of territorial jurisdiction, but it was essential to make an exception in the case of such odious crimes as those covered by the draft code, and to adopt the system of universal jurisdiction. Paragraph 2 was perhaps not perfect, but it did follow on logically from paragraph 1. In his opinion, it should be adopted on first reading in its present form.

32. He approved of the amendment proposed by Prince Ajibola (2082nd meeting, para. 66), but was against the idea of placing paragraph 3 in square brackets. Indeed, it was to be hoped that the Commission would decide to recommend to the General Assembly the establishment of an international criminal court. He had no objection to Mr. Arangio-Ruiz's proposal for paragraph 3 (para. 1 above), but the time was not right to consider it and the best thing would be for the paragraph to be adopted without change.

33. Having attended the meetings of the Drafting Committee as an observer, he found that members of the Commission took up in detail some arguments they had already advanced at length in the Committee. In such circumstances, would it not be better for the drafting work to be done directly in plenary? The suggestion was not as preposterous as it might seem, if one bore in mind the example of the Third United Nations Conference on the Law of the Sea, at which all the Members of the United Nations had taken part in the drafting of the Convention, which was on a particularly delicate matter.

34. Mr. EIRIKSSON said that he, too, supported Mr. McCaffrey's proposal (para. 22 above) to add the words "in accordance with the provisions of the present Code" at the end of paragraph 1. They seemed essential if the article was to be acceptable.

35. Paragraph 2 would be better placed in another part of the draft.

36. He was anxious to clear up any misunderstanding about his proposal (2082nd meeting, para. 63) to place paragraph 3 in square brackets. He had thought that the commentary could explain that the provision would be maintained only if the Commission failed to agree on the establishment of an international criminal court. If his proposal was not acceptable, there was another possibility, one that Mr. Koroma had brought to mind. Paragraph 3 could be transferred to the commentary, with an indication that the Commission had not yet received clear guidelines on whether to draft provisions on the establishment of an international criminal court, and that, if it had still not elaborated such provisions by the end of its work on the topic, it would incorporate paragraph 3 in article 4 in its present form, but supplemented, in accordance with the proposal made by Mr. Beesley at the previous session,[11] by the words "or other combined court".

37. Mr. FRANCIS withdrew his proposal concerning the word "try" in paragraph 1 (para. 9 above) and said that he supported Mr. McCaffrey's suggestion (para. 22 above). Since article 4 was in the part of the draft entitled "General principles", it would have sufficed to lay down the obligation to prosecute. The obligation to try had no place in that part of the draft, for it was a matter of jurisdiction. The same was true of paragraph 2. The principle of extradition was already enunciated in paragraph 1.

38. Prince AJIBOLA said that, in the absence of clear instructions from the General Assembly, the Commission had three options: it could confine itself solely to territorial jurisdiction and submit an incomplete set of draft articles to the General Assembly; it could recommend the establishment of an international criminal court; or it could propose either territorial jurisdiction or the establishment of an international criminal court, as preferred. The problems posed by the issues of trial and extradition lay in the vagueness of the Commission's mandate. For example, it would be extremely difficult to ask a national court to try crimes against the peace and security of mankind, since they did not have the legal means to do so. Above all else, the Commission should find out which direction its work was to take. Its task would then be made much easier.

39. The CHAIRMAN, speaking as a member of the Commission, said that the discussion made him even more convinced that the Commission should not refer articles to the Drafting Committee without making a clear-cut decision on the substance.

40. Mr. REUTER, emphasizing that the present discussion called in question not the article under consideration or even the validity of the draft as a whole, but the Commission's reputation and its working methods, paid tribute to the Chairman of the Drafting Committee and the Special Rapporteur for the work they had done. Moreover, an inadequate text was better than no text at all. He urged that article 4 be adopted in its present form.

41. The CHAIRMAN, speaking as a member of the Commission, said that, in principle, he accepted article 4 in the form proposed by the Drafting Committee, not because the text as such was satisfactory but because it represented a compromise solution. Admittedly, the article did raise a number of issues. For example, as Mr. Francis had pointed out, would it not be better to replace the word "try", in paragraph 1, by "prosecute", so as to preserve the principle of the presumption of innocence?

42. With regard to the amendment to paragraph 3 proposed by Mr. Arangio-Ruiz (para. 1 above), he would suggest, but not insist, that it might be better to replace the words "once it is established" by "if one is established". The establishment of an international criminal court was still a hypothetical matter, since the General Assembly had not yet answered the Commis-

[11] See 2059th meeting, footnote 13.

sion's request for clarification and the Commission itself had not taken any decision.

Mr. Graefrath (First Vice-Chairman) took the Chair.

43. Mr. THIAM (Special Rapporteur) said that, in his opinion, the Commission should remain true to its tradition and refrain from reopening the debate on texts which were proposed by the Drafting Committee after painstaking work and which the Commission itself had discussed at length beforehand. At the present stage, proposals should be made only on matters of form.

44. The underlying reason for paragraph 1 of article 4 was that the 1954 draft code had simply been a catalogue, an enumeration, of crimes, with no machinery for implementation. Clearly, the Commission's work on the present draft must not be futile: it was essential to be able to implement the code, even in the absence of an international criminal court, although the possibility of such a court was not to be ruled out. Furthermore, a similar provision was found in many instruments, more particularly the 1977 European Convention on the Suppression of Terrorism,[12] the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance,[13] the International Convention against the Taking of Hostages[14] and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Hence paragraph 1 contained nothing new and should be kept as it was. As for adding the phrase "in accordance with the provisions of the present Code", he intended to explain in the commentary that the basic principle laid down in paragraph 1 existed independently of the code, and he would also set out the modalities of implementation in another part of the draft.

45. Mr. Francis's suggestion to replace the word "try", in paragraph 1, by "prosecute" was simply a question of differences between legal systems. In many legal systems it was possible to prosecute (*poursuivre*) without trying (*juger*), but impossible to try without prosecuting. The two concepts were separate. Hence, in the French text at least, the word *juger* would have to be used.

46. As far as paragraph 2 was concerned, originally he had not submitted any such text, but at the request of some members he had later proposed an article containing a list of jurisdictions classed in order of preference. In the absence of agreement on the list or the order, the Drafting Committee had simply indicated that priority should be given to the principle of territoriality, at least in some cases. It was for that reason that paragraph 1 enunciated the *aut dedere aut judicare* principle, and paragraph 2 the principle of territorial jurisdiction. All would be explained in other provisions of the draft. Accordingly, paragraph 2 could be adopted as it stood. The establishment of a list of jurisdictions or an order of preference was a question that could be examined later, if necessary.

47. As to paragraph 3, he too would like an international criminal court to be established, but account must be taken of realities. It was even his intention to submit a draft statute for an international criminal court. Paragraph 3 should not be placed in square brackets, nor should it be altered. The commentary would, if necessary, explain the reasons that warranted the establishment of an international court.

48. Naturally, the commentary would reflect the various proposals made, concerning both form and substance.

49. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said the discussion clearly showed that article 4 was truly a consensus text and that it reconciled various schools of thought. The debate also revealed the need to incorporate in the draft at a later stage a part on implementation of the general principles of the code, particularly with regard to jurisdiction and extradition.

50. The proposal to insert the word "either" before the words "try or extradite" in paragraph 1 was acceptable, since the basic idea was that an individual charged with a crime against the peace and security of mankind should not be in a position to escape justice. Mr. McCaffrey's proposal (para. 22 above), supported by Mr. Beesley and Mr. Eiriksson, to add the words "in accordance with the provisions of the present Code" at the end of the paragraph was also in keeping with the spirit of the provision, but it did not really seem necessary to alter the text. The commentary could say that it was a general principle which would be spelled out in greater detail and thereby made effective elsewhere. Another proposal had been to place the word "try" in square brackets. The meaning of that word should be taken as *sui generis* and not as referring to any legal system in particular. It would therefore be better to retain the word, on the understanding that its meaning was broad and covered the notion of "prosecution" in the case of countries that drew a distinction between "trying" and "prosecuting".

51. With regard to the two proposals concerning paragraph 2, the best course would be to state in the commentary that some members supported the proposal to delete the paragraph, whereas the majority wished to retain the provision at the present stage. The drawback of the other proposal, made by Mr. McCaffrey (2082nd meeting, para. 51), namely to replace the end of the paragraph by the words "in whose territory the crime is alleged to have been committed", was that it emphasized the territorial side of the matter, as Mr. Beesley had pointed out. It would be noted that article 8, paragraph 1, of the International Convention against the Taking of Hostages spoke of the "alleged offender", but went on to say that the "State Party . . . shall . . . be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution". It therefore seemed superfluous to specify in paragraph 2 of draft article 4 that sentence had not been handed down and that the matter was still at the stage where charges were brought.

52. The word "do", instead of "shall", was acceptable in paragraph 3, since the provision was a factual

[12] See 2057th meeting, footnote 11.

[13] OAS, *Treaty Series*, No. 37 (1971), p. 6.

[14] See 2061st meeting, footnote 6.

proposition and not a legal command. On the other hand, the paragraph would be weaker if placed in square brackets, as Mr. Arangio-Ruiz, Mr. Koroma and Mr. Sreenivasa Rao had already said. The proposal to replace the words "shall not prejudge" by "are without prejudice to" could be mentioned in the commentary, without reopening the debate at the present stage. The advantage of the text in its present form was that the question was left pending. Lastly, a proposal had been made to add an asterisk to indicate that the paragraph would be deleted once the question of the establishment of an international criminal court was settled. It would be better to give that explanation in the commentary, since it could be a source of confusion to fall back on unusual methods. In short, paragraph 3 should be retained in its present form, the only change being to replace the word "shall" by "do".

53. Mr. McCAFFREY said that he reserved his position, but was not opposed to the Commission adopting article 4.

54. Mr. EIRIKSSON said that he looked forward with interest to the explanations to be given in the commentary to paragraphs 1 and 3. The Commission had already used footnotes in its report in 1987: paragraph 3 should be accompanied by a footnote stating that the paragraph would not appear in the draft if the Commission prepared the statute of an international criminal court.

55. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he would prefer it if only the commentary was used.

56. The CHAIRMAN suggested that a footnote should be used only if the commentary proved inadequate.

57. Mr. EIRIKSSON said that he would like the reservation he had just expressed recorded in a footnote, which could be deleted if the commentary was adequate.

58. Mr. FRANCIS explained that his objections were not to the substance, but only to the form, of article 4. With regard to the words "try" and "prosecute", the Special Rapporteur had been right to cite article 8 of the International Convention against the Taking of Hostages: at the drafting stage, the Commission should keep closely to the texts of conventions that had been adopted in the United Nations system and were in force. He proposed that draft article 4 should be adopted after making more stringent changes in form to take account of the fundamental reservations expressed.

59. Mr. ARANGIO-RUIZ suggested that the Commission should state in its report to the General Assembly and in the commentary to article 4 that, without prejudice to the principle of universal jurisdiction enunciated in paragraph 1, it would not consider that it was exceeding its mandate by preparing the statute of an international criminal court and that it would not be wrong in placing such an interpretation on the General Assembly's silence regarding the Commission's questions on that point.

60. The CHAIRMAN said that those explanations would be given in the report to the General Assembly and in the summary record of the meeting.

61. Mr. BEESLEY said that, although he did have some reservations regarding article 4, he would not object to it being adopted, in view of the quite broad interpretation placed on the term "try". Moreover, he interpreted the statements by the Special Rapporteur and the Chairman of the Drafting Committee as a guarantee that the principles in question would be applied in the rest of the code, in accordance with the provisions already adopted.

62. The CHAIRMAN proposed that the Commission should provisionally adopt article 4, on the understanding, first, that the words "try or extradite", in paragraph 1, would be replaced by "either try or extradite"; secondly, that the word "shall", in paragraph 3, would be replaced by "do"; thirdly, that the commentary and the summary record of the meeting would record the reservations regarding both substance and form made in the course of the discussion; and fourthly, that paragraph 3 would be accompanied by a footnote along the lines indicated, but that the footnote would be deleted if the commentary were deemed adequate.

It was so agreed.

Article 4 was adopted.

ARTICLE 7 (*Non bis in idem*)

63. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 7,[15] which read:

Article 7. **Non bis in idem**

[1. No one shall be liable to be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.]

2. Subject to paragraphs 3, 4 and 5 of this article, no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished [by an international criminal court or] by a national court for a crime under this Code if the acts which were the subject of a trial and judgment as an ordinary crime correspond to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, a State may try and punish an individual:

(*a*) if the acts which were the subject of the judgment of the foreign court took place in its own territory;

(*b*) if that State has been the main victim of the crime.

5. Where an individual is convicted of a crime under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

[15] For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1987*, vol. II (Part Two), p. 10, footnote 25 and paras. 37-39.

64. Since the *non bis in idem* principle was recognized in practically all legislations for all categories of offences, the Drafting Committee had seen no need in the present context to deal with the implementation of the principle at the national level, particularly as article 14, paragraph 7, of the International Covenant on Civil and Political Rights established a widely accepted international standard in that respect. Accordingly, that aspect was not covered in the text of draft article 7.

65. Paragraph 1 dealt with the effects of the *non bis in idem* principle in relation to judgments rendered at the international level. Under the paragraph, the principle would apply without exception: in other words, a person having been convicted or acquitted by an international court for a crime under the code would not be liable to be tried again by any court for the same crime. The paragraph was, of course, predicated on the existence of international judicial machinery. It had therefore been placed in square brackets to indicate that the Commission would have to revert to it once a decision was reached on that question. It should be noted in that connection that the expression "international criminal court" left open the possibility of a number of such courts, functioning at the regional level or dealing with specific categories of crimes under the code. The word "acquitted" applied only to decisions on the substance of a case: dismissal of a charge on procedural grounds would not qualify as an acquittal under paragraph 1.

66. In drafting paragraphs 2, 3 and 4, the Drafting Committee had been guided chiefly by two considerations. The first was that the reasons underlying the recognition of the *non bis in idem* principle in most internal legal systems militated in favour of introducing it into the international legal system. The second was that, according to the prevailing view both in the Commission and in the General Assembly, general international law did not impose an obligation on States to recognize the validity of a judgment delivered by a foreign State on criminal matters. As a result, the Committee, while making in paragraph 2 an attempt at progressive development of the law, had in subsequent paragraphs identified exceptions to the *non bis in idem* principle that were necessary if article 7, and the code as a whole, were to have any chance of being accepted by States.

67. Paragraph 2 dealt with the operation of the *non bis in idem* principle as between several legal systems. Like the text originally proposed by the Special Rapporteur for paragraph 1, paragraph 2 drew on article 14, paragraph 7, of the International Covenant on Civil and Political Rights, subject to a number of adjustments required by the present context. The opening words indicated the limits within which the principle applied in the framework of the code; the concept of an "offence" had been reformulated for the purposes of the code; and the reference to "the law and penal procedure of a State" had been replaced—again to meet the requirements of the context—by the words "a national court". The concluding proviso explained that the operation of the *non bis in idem* principle as between several legal systems was conditional upon actual enforcement of any punishment imposed.

68. Paragraph 3 dealt with the first kind of exception to the *non bis in idem* principle, namely situations in which an act qualified as an ordinary crime in a given State corresponded to one of the crimes characterized in the code. A classic example was that of acts initially characterized as murder, but later corresponding to the definition of genocide. In such a situation, the individual concerned would be liable to be tried again by a national court or, as the case might be, by an international criminal court. The expression "may be tried" meant that the provision did not involve an obligation. The square brackets around the words "by an international criminal court or" did not reflect any disagreement in the Drafting Committee, but merely indicated the tentative character of that aspect of the text. As the opening words showed, paragraph 3 was intended to apply only within the general limits fixed in paragraph 2. Lastly, paragraph 3 was without prejudice to the principle of non-retroactivity enunciated in draft article 8.

69. Paragraph 4 covered a second type of exception, the idea being that a State in whose territory a crime against the peace and security of mankind was committed or which was the main victim of such a crime had a special interest in the punishment of the perpetrator. The paragraph therefore provided that the *non bis in idem* principle did not prevent the State in which the crime was committed or the victim State from bringing criminal proceedings on the basis of acts which had already been the subject of a judgment by a foreign court.

70. Some members of the Drafting Committee had been of the view that, at the present stage, paragraph 4 should have been placed in square brackets, for the possibility of adding a draft article on priority of jurisdiction among States had not been ruled out. In their opinion, the question might conceivably be settled as part of the treatment of the *non bis in idem* principle, which would necessitate a second look at paragraph 4. However, the majority view in the Committee was that, whatever system the code might establish in the matter of priority of jurisdiction, the principle of territoriality, which was universally recognized, would undoubtedly be one of the essential features.

71. Paragraph 5 embodied a principle which was contained in a number of recent regional conventions and was applied in many legislations in the form of a rule whereby periods spent in confinement awaiting trial were deducted from the sentence ultimately imposed. The rule formulated in the paragraph was intended to apply to judgments by both national and international courts.

72. Further to comments made by Mr. Barboza (2082nd meeting) regarding inconsistencies in terminology, such as the use of the word "crime" in article 4, paragraph 2, and of "act" in various paragraphs of article 7, he explained that the term "act" was an objective concept, namely something a person had done, whereas the term "crime" implied a legal characterization. Until the person concerned was convicted, it was preferable to speak of an "act" so as to leave room for the presumption of innocence. The only inconsistency was that the word "act" was used sometimes in the singular and sometimes in the plural.

73. Mr. THIAM (Special Rapporteur) suggested that, in the French text of paragraph 5, the word *acte* should be replaced by *fait*, which could designate either an act or an omission.

74. Prince AJIBOLA proposed that the expression "liable to be", in paragraph 1, should be deleted, and the word "act", in paragraphs 2 and 3, replaced by "alleged crime". In addition, in paragraph 2, the words "and sentenced" should be inserted after "convicted" and the words "has been enforced or" should be deleted. In paragraph 4, the words "and punish" should be deleted and the word "valid" should be inserted before "judgment". Lastly, the second part of paragraph 5 should be amended to read: "shall deduct any period of detention pending trial . . .". He would explain the reasons for those proposals later.

The meeting rose at 1 p.m.

2084th MEETING

Thursday, 21 July 1988, at 3.05 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/404,[2] A/CN.4/411,[3] A/CN.4/L.422)

[Agenda item 5]

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

ARTICLE 7 (*Non bis in idem*)[4] (*continued*)

1. Mr. McCAFFREY said that he endorsed the principle of article 7, but wished to comment on specific points. The title, *Non bis in idem*, conveyed a legal concept that was widely recognized but would not be readily understood in many countries, including his own, where the term "double jeopardy" was normally used.

2. Paragraph 1 was extremely important, as it provided for an exception to the remainder of the article: if someone had been convicted or acquitted by an international criminal court, he could not be tried again, even under the conditions specified in paragraphs 3 and 4. But paragraph 1 did not specify what constituted an international criminal court. Presumably, therefore, a small group of States could decide to call itself an international criminal court for the purpose of exonerating a particular individual. As the Commission certainly did not intend to allow fake trials, it might wish to specify in the commentary that the international criminal court it had in mind was one that was accepted by the international community or by the parties to the code.

3. He agreed that it was too early to deal with the subject addressed by paragraph 4, namely jurisdiction and priorities. The sort of exception to the *non bis in idem* principle for which it provided might open the door to abuse, especially in the highly volatile circumstances surrounding an alleged crime against the peace and security of mankind. He would therefore reserve his position on paragraph 4, pending further refinement of the draft.

4. Mr. BARBOZA said that he accepted the explanation given by the Chairman of the Drafting Committee (2083rd meeting) for the use of the word "acts" in article 7, paragraph 4 (*a*), and had noted the Special Rapporteur's statement (*ibid.*) that, in the French text of paragraph 5, the word *acte* would be replaced by *fait*. He was still uncomfortable, however, with the wording of paragraph 2. To say that "no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted" made no sense. An individual was convicted or acquitted not in respect of an act, but of an act characterized as a crime under the relevant legislation. Of course, a given act could be characterized differently in different national laws and in the draft code. But the wording of paragraph 2 should be amended in the interests of clarity: he would suggest that, in French, the word *fait* be replaced by *fait réputé un crime*, and that, in English, the word "act" be replaced by "act considered a crime".

5. He could not understand why paragraph 1 of article 7 had been placed in square brackets but paragraph 3 of article 4 had not: he would appreciate an explanation.

6. Mr. TOMUSCHAT (Chairman of the Drafting Committee) explained that the title of article 7 had been chosen on the advice of the English-speaking members of the Drafting Committee, but he saw no reason why it should not be changed if that would make it more easily understandable: he would welcome suggestions. The Spanish title, *Cosa juzgada*, had been chosen precisely because the use of the Latin phrase had been deemed inappropriate.

---

[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 . . . 1987*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[4] For the text, see 2083rd meeting, para. 63.