Document:-

A/CN.4/SR.2084

Summary record of the 2084th 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

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.

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

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

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

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

7. In response to the numerous questions raised by Prince Ajibola (2083rd meeting), he would simply point out that the Drafting Committee had chosen to follow the wording of article 14, paragraph 7, of the International Covenant on Civil and Political Rights in order to keep the number of new formulations to a minimum, and that the rule set out in paragraph 5 of draft article 7 was based on the provisions of several recent treaties.

8. As to Mr. McCaffrey's concern that a number of States might claim to form an international criminal court in order to exonerate a particular individual, it should be explained in the commentary that an international criminal court within the meaning of article 7 was not one that had been constituted in an arbitrary manner.

9. The reason why square brackets had been placed around paragraph 1 was that it *presupposed* the establishment of an international criminal court: paragraph 3 of article 4 merely indicated that other provisions were *without prejudice to* the establishment of such a court.

10. With regard to Mr. Barboza's drafting suggestion for paragraph 2, he really did not see any flaw in the present English text. It was perfectly reasonable for an individual to be tried for an act: the act actually constituted the material object of the prosecution. There might be a problem with the French text, however.

11. A number of drafting inconsistencies could be attributed to the fact that the Commission was working on the basis of a dual hypothesis: the establishment of universal jurisdiction and of an international criminal court. As neither of those issues had yet been resolved, the Commission was bound to have difficulties in merging two working assumptions in a single, readable text.

12. As to the amendment to paragraph 4 submitted informally by Mr. Eiriksson, he did not see that it presented any advantage over the text proposed by the Drafting Committee. He believed that the only drafting change that should be made to article 7 was the replacement of the words "acts which were" by "act which was" in paragraphs 3 and 4 (*a*).

13. The CHAIRMAN, speaking as a member of the Commission, said that he had understood Mr. Eiriksson's amendment to be aimed at concordance between paragraph 4, which said that "a State may try and punish an individual", and paragraph 3, which said that "an individual may be tried and punished".

14. Mr. THIAM (Special Rapporteur) said that that had also been his interpretation of the purpose of Mr. Eiriksson's amendment.

15. As to Mr. Barboza's objection to the use of the term *fait* in paragraph 2, he agreed in principle; but there would be cases—in article 12 on aggression for example—where the term *crime* could not be used and *fait* would be preferable, since it would be for the judge to decide whether the act was a criminal act or not.

16. Mr. AL-BAHARNA suggested that an attempt should be made to provide an alternative title in English, even if only in parentheses.

17. Paragraph 2 could be greatly improved, and made symmetrical with paragraph 1, by deleting the confusing and superfluous phrase "provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced": the preceding phrase, "finally convicted or acquitted", already implied that punishment had been imposed and had been enforced or was in the process of being enforced.

18. Mr. BARBOZA said that he still could not accept the present wording of paragraph 2. To say that a person had been convicted or acquitted "in respect of an act" did not make legal sense: people were convicted of crimes, not acts, and that applied equally to the word *fait* in the French text and the word *hecho* in the Spanish text.

19. Mr. McCAFFREY said that he agreed. As to the title of the article, he had not proposed any amendment, but had only made the point that the expression *non bis in idem* would not be understood in his country. If the title was acceptable to the Drafting Committee, however, he was prepared to accept it.

20. He inquired why the word "again" had been omitted after the words "tried or punished" in paragraph 1, although it appeared in article 14, paragraph 7, of the International Covenant on Civil and Political Rights. He did not think the word was indispensable in the context, but only wondered whether the omission was intentional.

21. The CHAIRMAN explained that the word "again" had indeed appeared in the original text of draft article 7, but had been deleted at the suggestion of the English-speaking members of the Drafting Committee, who had considered it unnecessary.

22. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that Mr. Eiriksson's amendment to paragraph 4, which was intended to bring the language into line with that of paragraph 3, was acceptable subject to the insertion of the words "for a crime under this Code" after the word "punished".

23. Replying to Mr. Al-Baharna's comment concerning the proviso at the end of paragraph 2, he said that the proviso had been included because a formal conviction and sentence without the firm intention to punish were not considered to be enough: a test of seriousness was required, and enforcement provided such a test. The wording of the proviso, as he had explained in his introductory remarks (2083rd meeting), was modelled on a recent convention adopted by the 12 States members of EEC. On the point made by Mr. Barboza and endorsed by Mr. McCaffrey, he personally could see no flaw in the wording of paragraph 2, although he admittedly was not a criminal lawyer.

24. Prince AJIBOLA said that he was opposed to the use of any term other than "crime" in the draft code. The expression "alleged crime" could be employed if necessary, but any other term would weaken the text and cause confusion. He also questioned the references to trial: it would be more logical to speak of prosecution.

25. The CHAIRMAN said that the language used was modelled on that of the International Covenant on Civil

and Political Rights, an instrument which had been ratified by 87 States. An appropriate explanation would be provided in the commentary. The point raised by Mr. Barboza with regard to paragraph 2 would be duly included in the summary record of the meeting and could be taken up again on second reading.

26. Mr. MAHIOU, replying to a point raised by Prince AJIBOLA, suggested that the text of paragraph 5 might be made more explicit by including a reference to the exceptions to the *non bis in idem* principle provided for in paragraphs 3 and 4.

27. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he had some misgivings about that proposal, since the rule laid down in paragraph 5 should apply to an international criminal court as well. Perhaps, therefore, the paragraph should be retained as it stood.

28. Mr. McCAFFREY, referring to paragraph 2, suggested that, to take account of Mr. Barboza's point that a person was convicted or acquitted not of an act, but of a crime, the word "for", in the phrase "for a crime under this Code", should be replaced by "on the basis of", and the words "of a crime" should be added before "by a national court". He would not press for that amendment if it was not acceptable, but would like it to be recorded in the summary record.

29. Mr. THIAM (Special Rapporteur) said that he could not accept that amendment if it was intended to apply to the French text of paragraph 2 as well.

30. Mr. AL-BAHARNA said that he, too, would prefer paragraph 2 to stay as it was. The addition of the words "of a crime", as suggested by Mr. McCaffrey, would be repetitive, since the paragraph already contained the phrase "tried or punished for a crime", and it was implicit in the word "acquitted" that the person acquitted had been acquitted of a crime. Besides, if the amendment were adopted, a similar change would have to be made to paragraph 1, where the same words were used.

31. Prince AJIBOLA said that he would like the Special Rapporteur to re-examine the wording of paragraph 5 and to consider adding the words "paragraphs 3 and 4 of" before "this Code", to establish the necessary link between paragraph 5 and the matters to which it was directed. Paragraph 1 made the unequivocal statement that no one could be tried or punished for a crime under the code for which he had already been finally convicted or acquitted by an international criminal court, and indeed the very essence of the *non bis in idem* principle was that no one could be punished twice for the same crime. Hence paragraph 5, as drafted, did not seem very logical.

32. Mr. THIAM (Special Rapporteur) said the idea behind the text was that the *non bis in idem* rule could not be invoked before an international criminal court, but only before a national court. The former could retry a person if it deemed it necessary or if the case was referred to it. The word "deduct" in paragraph 5 presupposed that there had been another trial. To meet Prince Ajibola's point, therefore, the words "passing judgment for a second time" could perhaps be added after "the court".

33. Mr. MAHIOU said that, although he had said he would not press for his amendment, in the light of the discussion he thought it would meet the objections raised by Prince Ajibola, and would not prevent the international criminal court from passing judgment, since the jurisdiction of such a court was recognized in paragraph 3 of article 7.

34. The CHAIRMAN suggested that the Commission should adjourn briefly to allow informal consultations to take place.

The meeting was adjourned at 4.30 p.m. and resumed at 5 p.m.

35. Mr. THIAM (Special Rapporteur) said that, in the light of the consultations he had held with the Chairman and the Chairman of the Drafting Committee, he suggested that paragraph 5 of draft article 7 should be reworded to read:

> "Where an individual is convicted of a crime against the peace and security of mankind, any court trying such an individual a second time under this Code shall, in passing sentence, deduct any penalty imposed and implemented as a result of a previous conviction for the same act."

36. Mr. RAZAFINDRALAMBO suggested that the words *saisi une deuxième fois*, in the French text, should be replaced by *saisi en deuxième lieu.*

37. Prince AJIBOLA suggested that the words "any court trying such an individual a second time under this Code" in the new text should be replaced by "any court subsequently trying such an individual under this Code".

38. Mr. THIAM (Special Rapporteur) said that, to bring the French text into line with that amendment, and also to take account of Mr. Razafindralambo's proposed amendment, the words *saisi une deuxième fois* could be replaced by *statuant en deuxième lieu.*

39. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he found none of the proposals entirely satisfactory. The best solution, therefore, would be for a new text of paragraph 5 to be drafted for consideration by the Commission at its next meeting.

40. Mr. BARSEGOV appealed to members to agree to article 7 in principle and not to get bogged down in the trivia of drafting.

41. Mr. AL-BAHARNA suggested that, to avoid any further discussion on article 7, the Commission should adopt the article, subject to consideration of a revised text of paragraph 5 at the next meeting.

42. Mr. EIRIKSSON said that he would prefer not to adopt article 7 at the present stage, since his understanding of the effect of paragraph 2 differed from that of the Chairman, the Chairman of the Drafting Committee and the Special Rapporteur, and he would like to revert to the paragraph at the next meeting.

43. The CHAIRMAN suggested that the Commission should adjourn its discussion on article 7, on the understanding that it would have a revised text before it at the next meeting.

It was so agreed.

ARTICLE 8 (Non-retroactivity)

44. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 8,[5] which read:

Article 8. Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

45. Article 8 as proposed by the Special Rapporteur had consisted of two paragraphs. Paragraph 1 had met with general approval, but paragraph 2 had given rise to divergent views in plenary. The Drafting Committee had tried to overcome the difficulty by redrafting paragraph 1 in such a way as to render paragraph 2 unnecessary. It had come to the conclusion, however, that it was preferable to retain the present structure of the article.

46. Paragraph 1 laid down the fundamental principle of criminal law, *nullum crimen sine lege*. The Drafting Committee had decided that, in defining the scope of the paragraph *ratione materiae* as well as *ratione temporis*, the point of reference should be the code itself, rather than crimes against the peace and security of mankind. It had therefore deleted the phrase "which . . . did not constitute an offence against the peace and security of mankind", in the previous text, and inserted instead the words "under this Code". It had also replaced the reference to the time of commission of the crime by a reference to the time of entry into force of the code. The phrase "No person may" had been replaced by "No one shall", which was the expression used in the corresponding provisions of various international instruments, including article 11, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1, of the International Covenant on Civil and Political Rights. The Drafting Committee had replaced, in both paragraph 1 and paragraph 2, the words "act or omission" by the word "act", on the understanding that, at a later stage, a provision would be included to indicate that the word "act" covered both acts and omissions. Should that approach be approved by the Commission, a corresponding change would have to be made in articles 2 and 3, provisionally adopted at the previous session.[6]

47. With regard to paragraph 2, the Drafting Committee had been guided by two essential considerations. On the one hand, it had wished to ensure that article 8 would not operate as a bar to the prosecution of crimes committed prior to the entry into force of the code but punishable at the time of their commission on a basis other than that of the code. On the other hand, the Committee had been concerned that paragraph 2 should not give a free licence for the prosecution of acts whose criminal nature did not rest on a solid legal basis. The Drafting Committee had considered that the phrase "criminal according to the general principles of law recognized by the community of nations", in the previous text, lacked the precision necessary in a penal instrument. It had therefore replaced that phrase by the words "criminal in accordance with international law or domestic law applicable in conformity with international law". The first part of that phrase was self-explanatory; the second part was intended to cover the many instances in which States, prior to the entry into force of the code, had already made one of the acts dealt with therein punishable as a crime against the peace and security of mankind under their national legislation. That possibility was safeguarded under the proposed new text, subject, however, to the national legislation in question being in conformity with international law.

48. Finally, in the English text of paragraph 2, the words "shall prejudice" had been replaced by "shall preclude", which more accurately translated the French *s'oppose*.

49. Mr. AL-BAHARNA said that he would like to have an explanation of the reference in paragraph 1 to acts committed before the "entry into force" of the code. In national legal systems, legislative enactments entered into force as from their publication in the official gazette, or as from a time specified in the legislation itself. The code, however, would become an international convention whose entry into force would depend on a certain number of ratifications being filed with the depositary. Problems could thus arise with regard to crimes committed on the date on which the last required ratification was received, or just before. He would welcome an explanation from the Chairman of the Drafting Committee.

50. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the problem was a complex one and it was easier to ask questions about it than to answer them. It was true that the entry into force of international instruments depended on the depositary receiving the requisite number of ratifications. It had to be remembered, however, that for each State party, the treaty would be binding only as from the date of its acceptance by that State. The fact that the date of entry into force of the instrument would not be the same for all the parties raised very difficult problems. Members of the Commission might have different views on the legal force of the future code with respect to the various States parties. Some would hold that the rule *res inter alios acta* applied. His own view was that, under the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, there would be different dates of entry into force for different States parties. The Commission could not possibly solve those difficult problems at the present juncture.

[5] 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), pp. 10-11, footnote 16 and paras. 40-43.

[6] *Ibid.*, p. 14.

51. It should be remembered, however, that many of the provisions of the code would be translated into national criminal codes, in which case no problem would arise regarding entry into force. States would be free to prosecute for any of the acts covered by the code under their national legal systems.

52. The CHAIRMAN said that the Commission was not dealing at the present stage with the question of the entry into force of the code.

53. Mr. McCAFFREY drew attention to a point regarding article 8, paragraph 1, which was similar to that raised by Mr. Barboza with regard to article 7, paragraph 2. He thought the formula "convicted under this Code for acts committed . . ." should read "convicted under this Code of a crime based on acts committed . . .". He would not propose any change of wording at the present stage, but wished the point to be taken up later.

54. Prince AJIBOLA suggested that the concluding phrase of paragraph 2 of article 8, "or domestic law applicable in conformity with international law", could be conveniently deleted. There was no need for the code to validate the domestic law of a country. The State concerned could prosecute the crime whether that passage was included or not.

55. Mr. THIAM (Special Rapporteur) said that the provisions of article 8 drew attention to the need for a State, in prosecuting an offender, to observe certain principles of international law.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) stressed that most of the crimes included in the draft code were already punishable under national criminal codes. For example, most national codes made provision for the punishment of war crimes. The rule in paragraph 1 of article 8 should not be interpreted as a bar to prosecution in national courts before the code entered into force.

57. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 8.

Article 8 was adopted.

ARTICLE 10 (Responsibility of the superior)

58. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 10,[7] which read:

Article 10. Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

59. Article 10 was modelled on article 86, paragraph 2, of Additional Protocol I[8] to the 1949 Geneva Conventions. Its purpose was to hold a superior responsible for acts by his subordinate. Since it was clear that there was no intention to depart from article 86 of Additional Protocol I, certain linguistic changes had been made to the previous text of article 10 to bring it closer to that article. For example, the word "possessed" before "information" had been changed to "had" and the word "practically" before "feasible" had been deleted.

60. Two points of substance had, however, been discussed in the Drafting Committee. It would be observed that there were two distinct requirements in article 10 for holding a superior responsible. The first was knowledge of a crime being committed, or going to be committed, by a subordinate. That requirement had two elements: the information itself and the fact that it would lead to such a conclusion. The words "if they knew or had information enabling them to conclude" were intended to convey those two aspects of the knowledge requirement. The words "enabling them to conclude" did not exactly correspond to the wording of article 86, paragraph 2, of Additional Protocol I. The reason was that the French and English texts of that paragraph differed slightly: the French text read *leur permettant de conclure*, while the English text read "should have enabled them to conclude". Thus the English text appeared to extend the scope of that indirect kind of responsibility much further than the French. The Drafting Committee had decided to follow the French text, on the understanding that the commentary to article 10 would explain that there had been no intention to depart from the connotation attributed to article 86, paragraph 2, of Additional Protocol I. The commentary would also indicate that the requirement of knowledge meant that the information received by the superior must be sufficient to support the conclusion that the subordinate was committing or was going to commit a crime; there was no need for the superior actually to have drawn such a conclusion. If he had not taken the trouble to read the reports containing the information, or if he had read them but had not drawn the appropriate conclusion although the information contained all the elements necessary to indicate the punishable nature of the act, the superior would not be relieved of criminal responsibility.

61. The second requirement for holding a superior responsible was his power to stop the subordinate committing the crime. The Drafting Committee had again encountered ambiguities relating to that requirement. It was not clear whether the notion of power was limited to physical power, such as practical means or feasible measures to stop the commission of the crime, or also included the legal power or competence of the superior to restrain his subordinate. The Drafting Committee had considered that the article should set out both criteria: the superior must have legal competence to stop the subordinate committing the crime and, in addition, the practical means of doing so. The words "feasible measures within their power" were intended

[7] For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, *ibid.*, p. 12, footnote 36 and paras. 56-57.

[8] See 2054th meeting, footnote 9.

to emphasize that both criteria must be met; those words were also used in article 86, paragraph 2, of Additional Protocol I. The Drafting Committee had considered that it should be explained in the commentary that power had two facets: a factual one and a legal one.

62. The title of article 10 had not been changed.

63. Mr. McCAFFREY congratulated the Special Rapporteur and the Drafting Committee on an excellent article, which dealt felicitously with many difficult points.

64. He noted that the expression "criminal responsibility" was used, although article 10 did not identify the nature of that responsibility. Was it responsibility under the code or under national law? Perhaps it would be better to replace the words "criminal responsibility" by "responsibility under this Code", which would be consistent with article 3, provisionally adopted by the Commission at its thirty-ninth session.[9]

65. Mr. EIRIKSSON supported that suggestion.

66. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the point had not been discussed in the Drafting Committee. There would be no change of substance if the words "criminal responsibility" were replaced by "responsibility under this Code".

67. The CHAIRMAN pointed out that article 10 did not deal with any other kind of responsibility, so that the expression "criminal responsibility" was clear. He suggested that the text should remain as it stood.

It was so agreed.

Article 10 was adopted.

ARTICLE 11 (Official position and criminal responsibility)

68. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 11,[10] which read:

Article 11. Official position and criminal responsibility

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

69. Article 11 was designed to draw attention to the fact that the official position of an individual who committed a crime under the code could not relieve him of criminal responsibility. Even in cases where the individual had the highest official position, such as head of State or Government, he would remain criminally responsible.

70. Article 11 was based on Principle III of the Nürnberg Principles.[11] It would be noted that the word "perpetrator", in the previous text, had been replaced by "individual", in line with the wording of article 3, as provisionally adopted by the Commission.[12] In the French text, the word *auteur* had been maintained, since it corresponded with the French text of article 3 and with the new English wording of article 11. To remove any ambiguity, it would be explained in the commentary that *auteur* was a broad term which included the individual who committed a crime, co-conspirators and accomplices, etc., and was not limited only to the original author of the crime.

71. It would be noted that article 11 was drafted in the present tense, whereas Principle III of the Nürnberg Principles was drafted in the past tense. The Drafting Committee had taken the view that, since article 11 addressed many situations likely to arise in the future —unlike the Nürnberg Principles, which looked essentially to the past—it should be drafted in the present tense.

72. Two principles were expressed in article 11. The first was that the official position of a person accused of a crime under the code did not remove him from the scope of application of the code, even if his position was head of State or Government. Hence there would be no immunity from the application of the code due to the position of the accused. The second principle was that a plea by the accused that he had acted in the performance of his official functions would not exonerate him from criminal responsibility. That was really the very essence of the code: to pierce the veil of the State and prosecute those who were materially responsible for crimes committed on behalf of the State as an abstract entity. The words "the fact that he is a head of State or Government", in the previous text, had been amended to read: "the fact that he acts as head of State or Government", so as to underline that the code focused on the time of commission of a crime.

73. The Drafting Committee had agreed that the commentary should elaborate on the two principles expressed in article 11 and on its purpose, so as to leave no ambiguities that might lead to misinterpretation.

74. The title of the article had been amended so as to correspond more closely to its content.

75. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 11.

Article 11 was adopted.

76. The CHAIRMAN said that it would not be advisable for article 12 to be introduced at that point, since the Commission would not have time to discuss it, and members should have the introduction fresh in their minds when they did so. He suggested that the little time remaining at the present meeting should be used by an

[9] See footnote 6 above.

[10] 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. 12, footnote 38 and paras. 58-61.

[11] See 2053rd meeting, footnote 8.

[12] See footnote 6 above.

informal group to prepare a redraft of paragraph 5 of article 7 for submission to the Commission at the next meeting.

It was so agreed.

The meeting rose at 5.55 p.m.

2085th MEETING

Friday, 22 July 1988, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

later: Mr. Ahmed MAHIOU

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. 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] (*concluded*) (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 (*concluded*)

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

1. Mr. TOMUSCHAT (Chairman of the Drafting Committee) recalled that a decision on paragraph 5 of article 7 had been left over from the previous meeting. An informal working group had redrafted that paragraph in French and, subject to possible stylistic changes, the English text would read:

> "5. In the case of a new conviction under this Code, any court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act."

The main elements of the previous text had been retained, but the emphasis was now placed on the fact that the rule would apply in cases of new convictions.

2. Prince AJIBOLA suggested the alternative wording:

> "5. In the case of a new conviction under paragraphs 3 and 4 of this article, any court, in passing sentence, shall take into consideration any term of imprisonment already served as a result of a previous conviction for the same crime."

He had deliberately used the term "crime" instead of "act" because, once there was a conviction, the word "act" was no longer appropriate. He had also changed the unnecessarily lengthy formula "penalty already imposed and implemented" to "term of imprisonment already served" and introduced a reference to paragraphs 3 and 4 of article 7. Paragraph 5 applied to those paragraphs alone and not to the whole of article 7.

3. Mr. BEESLEY, referring to the amendment proposed earlier for paragraph 4 (*a*), asked whether the new formula "a national court of another State" was intended to be analogous to the expression "foreign court".

4. He would also like to know whether it was clear that the last part of the new text of paragraph 5 (para. 1 above) referred to a previous conviction by a national court and not by a court acting in the capacity of a court applying the code.

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he was opposed to Prince Ajibola's suggestion to introduce in paragraph 5 a reference to paragraphs 3 and 4, because it would make the provision much too narrow. Paragraphs 3 and 4 described the jurisdiction of national courts as an exception to the *non bis in idem* principle and not the possible jurisdiction of an international criminal court—a matter which had been left entirely open.

6. The suggestion to replace the words "shall deduct" by "shall take into consideration" had been discussed at length, but the Drafting Committee had considered that the former were necessary in order to have a strict and rigid rule. The alternative wording proposed by Prince Ajibola (para. 2 above) left too much room for flexibility.

7. The proposal to incorporate a reference to a "term of imprisonment" would involve an important change of substance. The form of language adopted by the Drafting Committee encompassed any kind of penalty, including fines and such sanctions as expulsion from a country, although the main thrust of paragraph 5 did, of course, relate to terms of imprisonment. He himself had an open mind on the matter, but it was for the Commission to decide.

8. With regard to the possible replacement of the word "act" by "crime", it was important to cover situations in which an individual was convicted of some offence which later proved to be an act characterized as a crime against the peace and security of mankind and was prosecuted and convicted a second time. The rule set out in paragraph 5 should apply in all instances in which an individual was being tried a second time. In the draft code, any reference to "crime" would normally mean a crime against the peace and security of mankind. If the word "crime" were used, paragraph 5 would no longer encompass the situation mentioned in paragraph 3.

9. As for the questions raised by Mr. Beesley, the issue as to whether or not a court trying an individual for a crime against the peace and security of mankind was

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

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

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

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