Document:-

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Summary record of the 2189th 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:-

1990, **vol. I**

Pakistan and the 1909 Boundary Waters Treaty between Great Britain and the United States of America. Section D dealt with the work of international organizations in the field of the settlement of watercourse disputes. Section E summarized the wealth of material already prepared by previous Special Rapporteurs and their individual approaches to the question.

79. Section F contained the articles proposed for annex II, together with comments thereon. Part A of the annex contained draft article 1 on fact-finding, which appeared in an annex in accordance with the outline of the topic presented in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7). Draft articles 2 to 5 of part B of the annex covered the settlement of disputes, articles 3 to 5 defining the various methods to be used—consultations and negotiations, conciliation, and arbitration. Under draft article 4, a watercourse State would be bound to submit a dispute for conciliation to a conciliation commission. However, the report of the conciliation commission would not be binding on the States concerned unless they agreed otherwise. Finally, draft article 5 provided for submission of the dispute to binding arbitration by any permanent or *ad hoc* arbitral tribunal accepted by all the parties to the dispute.

80. He looked forward to a full discussion of those proposals at the Commission's next session.

81. The CHAIRMAN, thanking the Special Rapporteur, confirmed that the Commission would discuss the draft articles of annex II on fact-finding and settlement of disputes at its forty-third session.

The meeting rose at 12.55 p.m.

2189th MEETING

Monday, 9 July 1990, at 3 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/429 and Add.1-4,[2] A/CN.4/430 and Add.1,[3] A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

1. The CHAIRMAN recalled that, at the 2158th meeting (para. 71), the Commission had established a Working Group to draw up a draft response by the Commission to the request by the General Assembly in paragraph 1 of its resolution 44/39 of 4 December 1989 that the Commission consider the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which might be covered by the code. The Commission had decided that, once it had considered and adopted the response drafted by the Working Group, it would include it in its report to the General Assembly on the present session.

2. He invited Mr. Thiam, the Chairman-Rapporteur of the Working Group, to introduce the report of the Working Group (A/CN.4/L.454 and Corr.1).

3. Mr. THIAM (Special Rapporteur, Chairman-Rapporteur of the Working Group) said that chapters I and II (paras. 1-22) of the report of the Working Group (A/CN.4/L.454 and Corr.1) related the background to the question and he therefore proposed that paragraph-by-paragraph consideration of the text should start with paragraph 23.

4. After some brief general considerations, chapter III dealt with the question of the type of jurisdiction which might be conferred on the international criminal court. With regard to its jurisdiction *ratione materiae*, there were three possible options (para. 31): (i) the court would exercise jurisdiction over the crimes included in the code; (ii) it would exercise jurisdiction over only some of those crimes; (iii) the court would be established independently of the code and exercise jurisdiction over crimes in respect of which States would attribute competence to it.

5. With regard to jurisdiction *ratione personae*, the report referred to the possibility of extending the court's jurisdiction—which would in principle be confined to individuals—to legal entities other than States, at least for certain crimes.

6. As to the nature of the court's jurisdiction, there were three possibilities (para. 38): (i) the court would have exclusive jurisdiction; (ii) it would exercise jurisdiction concurrently with national courts; (iii) it would have jurisdiction only to hear appeals against decisions by national courts.

7. The various options for submitting cases to the court were listed in paragraph 43 of the report. The Working Group had considered whether access to the court should be confined to States parties to its statute or to States having an interest in the proceedings—for example, because the crime had been committed in their territory, because the victim was one of their

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* Resumed from the 2159th meeting.

[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 ... 1990*, vol. II (Part One).

[3] *Ibid.*

nationals or because the alleged perpetrator had been apprehended in their territory—or whether access should be extended to intergovernmental organizations of a universal or regional character and even to non-governmental organizations and individuals.

8. With regard to the structure of the court, a number of possibilities were considered in paragraphs 46 to 48. The court would be composed of a small number of judges, persons who would have recognized competence in international law—especially international criminal law—and who would be appointed according to one of the following three methods: election in the same manner as Judges of the International Court of Justice; election by a qualified majority of the General Assembly; or election by the parties to the statute of the court.

9. The report then dealt with the following questions: the organs responsible for criminal prosecution (para. 51); pre-trial examination (para. 52); the legal force of judgments (paras. 53-54); and penalties, enforcement of judgments and financing of the court (paras. 55-58). The Working Group concluded by proposing three possible models for an international criminal court which varied mainly in terms of the nature of the jurisdiction to be assigned to the court (paras. 62-65).

10. The CHAIRMAN said he believed that the Commission first wished quickly to consider chapters I and II of the Working Group's report and then to discuss chapter III paragraph by paragraph.

It was so agreed.

CHAPTER I (Terms of reference)

11. Mr. McCAFFREY, supported by Mr. AL-QAYSI, Mr. BARSEGOV and Mr. ARANGIO-RUIZ, said that, in paragraph 3, the wording of the end of the first sentence and the beginning of the second sentence was clumsy. Since it was stated that the question of the establishment of an international criminal jurisdiction had always been foremost among the Commission's concerns, one would expect to find an earlier date than 1983.

12. Mr. TOMUSCHAT, supported by Mr. THIAM (Chairman-Rapporteur of the Working Group), proposed that a new sentence should be added after the first sentence and that the beginning of the original second sentence should be amended. The text would then read:

> "... The Commission pronounced itself in favour of such a trial mechanism for the first time in 1950. When it resumed its work on the topic at its thirty-fifth session, in 1983, it included in its report to the General Assembly on that session the following paragraph: ..."

It was so agreed.

13. Mr. FRANCIS said that paragraph 1 of General Assembly resolution 44/39, which contained the request which had led to the establishment of the Working Group, gave the Commission a mandate to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which might be covered by the code, "including persons engaged in illicit trafficking in narcotic drugs across national frontiers". The Working Group indicated in paragraph 2 of its report that two main reasons had led the Commission to examine the question of an international criminal court. However, the problem of illicit traffic in narcotic drugs was a third reason, especially since two draft articles had been submitted on the subject, one under crimes against peace and the other under crimes against humanity. The Working Group might have considered that question and decided not to refer to it in its report, but, if the report was to comply fully with the terms of paragraph 1 of resolution 44/39, it should reflect recent developments in that regard. Paragraph 2 of the report could therefore be amended slightly and a paragraph on the question of illicit drug trafficking across national frontiers could be added later in the text.

14. Following a discussion in which Mr. THIAM (Chairman-Rapporteur of the Working Group), Mr. GRAEFRATH, Mr. FRANCIS and Mr. CALERO RODRIGUES took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following text as a new paragraph 10 in chapter I:

> "As to the question of 'illicit trafficking in narcotic drugs across national frontiers', mentioned in General Assembly resolution 44/39, it was considered by the Commission in the context of its discussion of the eighth report of the Special Rapporteur. As indicated in paragraph ... above, the Commission provisionally adopted an article to be included in the draft code which defines illicit traffic in narcotic drugs as a crime against humanity."

It was so agreed.

Chapter I, as amended, was adopted.

CHAPTER II (Previous United Nations efforts in the field of an international criminal jurisdiction)

Chapter II was adopted.

CHAPTER III (The Commission's discussion of the question at the present session)

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

15. Mr. ARANGIO-RUIZ said that some passages in the report were open to question, especially the conclusions. For instance, the request made in the second alternative of paragraph 65 was premature. In addition, the statement in paragraph 64 and in the first alternative of paragraph 65 applied not only to the establishment of an international criminal court, but also to the draft code itself. The code and the court were inseparable: the full and effective implementation of the code would depend on the establishment of an international court. He could not agree that it should be claimed or even insinuated that it was more difficult to establish an international criminal court than to draft the code of crimes against the peace and security of mankind.

16. Following a discussion in which Mr. THIAM (Chairman-Rapporteur of the Working Group), Mr. AL-QAYSI, Mr. McCAFFREY, Mr. BARSEGOV, Mr. EIRIKSSON (Rapporteur), Mr. PAWLAK, Mr. BENNOUNA and Mr. TOMUSCHAT took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following text for paragraph 24:

"The Commission has noted that a number of developments in international relations and international law have contributed to making the establishment of an international criminal court more feasible than when the matter was studied earlier, although the Commission is aware that, in the view of some States, the time may not be ripe for the establishment of such a court. It has now emerged that international crime has achieved such wide dimensions that it can endanger the very existence of States and seriously disturb international peaceful relations. There have thus been increased calls for enhanced international co-operation to combat such crime. Of course, the final position of States would depend largely on the form that such a court was to take and therefore the Commission has set out below the various forms in which the court could be conceived."

It was so agreed.

Paragraph 24, as amended, was adopted.

Paragraph 25

17. Mr. BARSEGOV, supported by Mr. GRAEFRATH, said that the second sentence did not reflect the opinion of all members of the Commission. There would be no point in studying the question of establishing a court if the court was going to destroy the existing system. The sentence should be drafted in more cautious terms. He even doubted whether it should be retained.

Paragraph 25 was adopted.

Paragraph 26

18. Mr. PELLET, supported by Mr. BARSEGOV, said that he did not agree with the expression *empiéter sur la souveraineté nationale* ("its possible impact on national sovereignty"; "infringe national sovereignty"), which appeared twice in the French text, or with the expression *impact sur la souveraineté nationale* ("impact on national sovereignty"). The Commission must not give the impression that an international agreement, the establishment of a court or the submission of States to the jurisdiction of a court could in any way detract from their sovereignty. He suggested that the first expression should be replaced by *concurrencer les compétences souveraines* ("that it might compete with sovereign jurisdiction") or even by the expression *limiter les compétences nationales* ("that it might limit national jurisdiction").

19. Mr. TOMUSCHAT said that he did not know who would undertake the efforts referred to in the last sentence. He therefore proposed that that sentence be deleted.

20. Mr. BENNOUNA said that, while he understood Mr. Pellet's concern, he thought it would be better not to speak of "national jurisdiction" in view of the risk of confusion with the idea of "domestic jurisdiction" within the meaning of Article 2, paragraph 7, of the Charter of the United Nations. He would therefore prefer the expression *compétences souveraines des États* ("sovereign jurisdiction of States"). He also supported Mr. Tomuschat's proposal to delete the last sentence, which was not clear.

21. Mr. PELLET said that the expression *limiter les compétences souveraines des États* ("limit the sovereign jurisdiction of States") was acceptable to him. The word "impact" in the English text was certainly less objectionable in legal parlance than the French translation. Even though the English text was less of a problem, however, the same changes should be made to it, since what was at issue was a problem of jurisdiction rather than a problem of sovereignty.

22. Mr. DÍAZ GONZÁLEZ said that the Spanish text should be reworded along the same lines.

23. Mr. GRAEFRATH, referring to Mr. Pellet's comments, said the fact that, in the event of a serious crime, a State could surrender the exercise of its jurisdiction to an international institution certainly did have an impact on its sovereignty. He would have no objection if no reference were made to the matter, but he believed that was why States had thus far not accepted a system of that kind.

24. Mr. PELLET said that he was opposed to retaining the idea of infringement of national sovereignty in the text.

25. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that, while he recognized that, in legal terminology, one "waived jurisdiction" (*renonce à une compétence*), writers also spoke of "abandoning sovereignty" (*abandon de souveraineté*). For instance, when States participating in international organizations waived some of their jurisdiction, jurists spoke of a surrender of sovereignty. He was, however, prepared to meet Mr. Pellet's concern.

26. Mr. PAWLAK proposed that the first sentence of paragraph 26 should be amended to read: "A major concern with respect to the court is its possible limitation on sovereignty in the area of national jurisdiction, although it must be taken into account that existing régimes of universal jurisdiction already also have an impact on national sovereignty."

27. Mr. Sreenivasa RAO said that, in his view, the word "impact" in the English text was used in two different senses in the same sentence: in the first case, it meant a possible limitation of national sovereignty, whereas, in the second, it meant that such national sovereignty was already limited. He therefore proposed the following wording: "A major concern with respect to the court is its possible limitation on national jurisdiction, although it must be taken into account that existing régimes of universal jurisdiction already have such an effect."

28. Prince AJIBOLA said that, in his view, the substitution of the words "limitation of" for the words "impact on" would resolve the problem raised by Mr.

Pellet. It would, moreover, be preferable to use the word "effect" at the end of the first sentence.

29. Mr. EIRIKSSON (Rapporteur) suggested that the first sentence might simply read: "A major concern with respect to the court is that it would be an international institution." Mr. Pellet apparently took the view that, when a State accepted the jurisdiction of an international court, proceedings before that court did not necessarily amount to an infringement of its national sovereignty, since it was a choice made by the State itself. To reflect that idea, the Commission could say that, in that particular case, a major concern with respect to the court was its possible impact on national sovereignty, although, in fact, States had nothing to worry about. As to the last sentence, it was difficult to understand and should be deleted.

30. Mr. BENNOUNA said that, in his opinion, the views of Mr. Pellet and Mr. Graefrath were not so different. As Mr. Pellet saw the matter, it was not national sovereignty that was at issue, but the exercise of such sovereignty. A State which ratified an international convention was not, however, surrendering its sovereignty, but was exercising it. The progress of international law was not necessarily achieved by the surrender of sovereignty, but by its affirmation. There was no fundamental contradiction between jurisdiction and sovereignty in so far as the exercise of sovereignty, and not sovereignty itself, was involved. Mr. Graefrath had rightly argued that, when a people allowed its own rulers to be tried by an international court, it limited the exercise of its national sovereignty considerably.

31. Mr. PELLET said that if, in the first two sentences, the Commission wanted to say that States were worried about something, he would have no objection. He was, however, unable to agree with the Chairman-Rapporteur of the Working Group on the question of surrender of sovereignty, in which connection he referred members to the *S. S. "Wimbledon"* case (1923). The Commission should not give the impression that it was espousing the doctrine of surrender of sovereignty. He therefore proposed the following alternative. First, in order not to misrepresent matters with regard to the effect of acceptance of an international commitment, the first sentence of paragraph 26 should be replaced by the following text: "A major concern with respect to the court is its possible limitation of the sovereign jurisdiction of States, although it must be taken into account that existing régimes of universal jurisdiction have a certain impact on the exercise of the powers of the State." The second sentence would remain unchanged and the third would be deleted. The other solution would be to retain as drafted the first two sentences, which were meant to reflect the concern of States, and to clarify the last sentence by amending it to read: "Considered in this context, in the long term, acceptance of the jurisdiction of an effective international criminal court would certainly not amount to a limitation of sovereignty, but would, on the contrary, be one way in which States could exercise it." The Commission would thus be paraphrasing, as it were, the judgment handed down by the PCIJ in 1923 in the *S. S. "Wimbledon"* case.

32. Mr. EIRIKSSON (Rapporteur), noting that the second solution proposed by Mr. Pellet followed the same lines as his own proposal, suggested that the words "its possible impact on", in the first sentence, should be replaced by "the effect on the exercise of". In the second sentence, the words "As a matter of fact" should be replaced by the word "Indeed".

33. Mr. TOMUSCHAT suggested that, instead of being deleted, the last sentence should be amended to read: "Considered in this context, in the long term, an effective international criminal jurisdiction might indeed serve as a defence of national sovereignty." He also noted that the English and French texts of the first sentence differed. The French text spoke of the "creation" of a court, but not the English: the English text should therefore be brought into line with the French. Moreover, the French phrase *voir celle-ci empiéter sur la souveraineté nationale* was not fortuitous, as it suggested wrongful conduct on the part of the court. Emphasis should be placed on the fact that it was the actual establishment of the court that would have an impact on national sovereignty. In general, he could accept Mr. Pellet's proposals, but he would like to study them in writing.

34. The CHAIRMAN suggested that Mr. Thiam (Chairman-Rapporteur of the Working Group), Mr. Tomuschat, Mr. Eiriksson and Mr. Pellet should draft a text for submission to the Commission.

35. Prince AJIBOLA said that, in his view, the last sentence of paragraph 26, which explained the reason for the suggestion that an international criminal jurisdiction should be established, should be retained in the final text.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to set up a small working group on paragraph 26.

It was so agreed.

Paragraph 27

37. Mr. BENNOUNA said that the second sentence was ambiguous. Moreover, it had no logical link with the first sentence, which reflected an independent line of thought. He therefore proposed that the second sentence be deleted.

38. Mr. THIAM (Chairman-Rapporteur of the Working Group) supported that proposal.

39. Mr. EIRIKSSON (Rapporteur) said the second sentence meant that, if a case was brought against an individual, it became less of an inter-State dispute. It made a valid point and he would like to retain it.

40. Mr. McCAFFREY, agreeing with Mr. Eiriksson, said that he would not only retain the second sentence, but would strengthen its intent by stating that "referring to the court a case against an individual could *even* remove the inter-State aspects . . .".

41. Mr. GRAEFRATH said he also considered that the sentence in question should be retained. It had been seen, in the human rights field, for instance, that States more readily accepted international proceedings brought against individuals. The Commission might

even go further and say that "referring to the court a case against an individual could avoid an inter-State dispute".

42. Mr. MAHIOU said that, if the second sentence was to be retained, it should be couched in less ambiguous terms. Moreover, the word "remove" was too strong and might give rise to doubts. He therefore proposed the following wording: "In some cases, referring to the court a case against an individual could attenuate or wipe out the inter-State aspects of the case."

43. Mr. HAYES said that he, too, would like to retain the second sentence, which made an important point. Perhaps it would be clearer and more acceptable if it were less categorical. He therefore proposed that it be reworded as follows: "In some cases, referring to the court a case against an individual could result in the case not being regarded as relating to an inter-State dispute."

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

44. Mr. MAHIOU, referring to the first sentence, said that "small States" were not the only ones to have "problems in implementing existing systems". That could also happen to large States. It would therefore be better to say: "Some States have problems . . .".

45. Mr. SEPÚLVEDA GUTIÉRREZ said that, in his view, the paragraph as a whole was poorly drafted. There was no proper connection between the two ideas expressed in the two sentences. In addition, the second sentence was not very clear: the impression was that something was missing. He would appreciate some clarifications in that regard.

46. Mr. ARANGIO-RUIZ said that he, too, considered that the second sentence, and particularly the final part, gave the impression of being incomplete.

47. Mr. GRAEFRATH, explaining the meaning of the second sentence, said that, in the case of certain types of crime—drug trafficking being the most recent example—some States did not manage to ensure the administration of justice in their territory. As it might be thought that the establishment of an international court would provide a solution in their case, the purpose of the second sentence was in fact to say that that was not so: the problems encountered in the administration of justice at the internal level would not be solved by the establishment of an international court.

48. Mr. BENNOUNA said that, in that case, the end of the second sentence could be deleted, so that it would read: "It would, however, be illusory to believe that an international prosecuting mechanism would enable those States to overcome all those problems."

49. Mr. AL-QAYSI supported that proposal, which reflected Mr. Graefrath's idea more accurately. For the sake of clarity, however, he would add a reference at the end of the sentence to "problems with regard to prosecution and trial".

50. Prince AJIBOLA said that he would like the terminology to be harmonized and a choice to be made once and for all between the words "court" and "international court". As to the second sentence, if the Commission did not adopt Mr. Bennouna's proposal, the existing wording could be clarified by a reference at the end of the sentence to "problems associated with the implementation of their criminal legal systems".

51. Mr. GRAEFRATH proposed the following text for paragraph 28:

> "Some States often have problems in implementing existing national jurisdiction and the court is seen as a useful alternative. It would, however, be illusory to believe that an international prosecuting mechanism would relieve those States of the problems associated with the national administration of justice."

52. Prince AJIBOLA said that, in his view, the expression "administration of justice" was too broad.

53. The CHAIRMAN suggested the expression "administration of criminal justice".

54. Mr. CALERO RODRIGUES said that the words "implementing . . . national jurisdiction" were not very clear. Moreover, it was difficult to know by whom "the court is seen as a useful alternative". Lastly, the text proposed by Mr. Graefrath seemed to go further than the original text.

55. Mr. AL-QAYSI said that he, too, considered that Mr. Graefrath's proposal differed considerably from the original text. He would also like some examples to be given of "the problems associated with the national administration of justice".

The meeting rose at 6.10 p.m.

2190th MEETING

Tuesday, 10 July 1990, at 10.10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat.

Tributes to the memory of Professor Paul Reuter

1. The CHAIRMAN declared open the special meeting in honour of the memory of Professor Paul Reuter, who had been one of the Commission's most eminent members. He welcomed as guests Madame Reuter, a number of distinguished jurists, including Judges Ago