

Document:-
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Summary record of the 2192nd 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

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the sooner it would be able to complete its report to the General Assembly.

105. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the recommendation by the Enlarged Bureau that the forty-third session should be held from 29 April to 19 July 1991.

It was so agreed.

The meeting rose at 6.10 p.m.

2192nd MEETING

Thursday, 12 July 1990, at 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. Koroma, 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.

Draft Code of Crimes against the Peace and Security of Mankind¹ (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 (continued)

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

Paragraph 28 (concluded)

1. Mr. GRAEFRATH proposed that paragraph 28 should be reworded as follows:

"Some States see the establishment of an international criminal court as a useful alternative to overcome their difficulties in implementing universal jurisdiction. It would, however, be illusory to believe that an international prosecuting mechanism could

relieve States of the problems associated with the national administration of [criminal] justice."

If the Commission did not agree, the paragraph could perhaps be deleted, because it was not really necessary.

2. Mr. SEPÚLVEDA GUTIÉRREZ said that Mr. Graefrath's proposal solved many problems and he would therefore withdraw his own objections to the paragraph.

3. Mr. AL-QAYSI said that Mr. Graefrath's proposal might help to overcome difficulties that had emerged in the discussion, but he wondered whether it was appropriate to speak of the "national administration of criminal justice" and proposed instead the phrase "national administration of justice in relation to criminal matters".

4. Mr. BENNOUNA said that the expression "criminal matters" proposed by Mr. Al-Qaysi was too broad. He would suggest the formula "the prosecution of international crimes".

5. Mr. McCAFFREY said that he agreed with Mr. Bennouna's suggestion, which also read well in English, and proposed replacing the words "relieve States of" by "alleviate" or "eliminate".

6. Mr. RAZAFINDRALAMBO said that he, too, agreed with the suggestion made by Mr. Bennouna and supported by Mr. McCaffrey, because he had reservations about the original paragraph 28 and about Mr. Graefrath's proposed rewording.

7. Mr. KOROMA suggested replacing the word "illusory", which was too negative, by the words "unduly optimistic".

8. Mr. NJENGA said that he supported Mr. Koroma's suggestion. As to Mr. McCaffrey's proposal, the word "eliminate" was preferable to "alleviate".

9. Mr. EIRIKSSON (Rapporteur) endorsed Mr. Koroma's suggestion and proposed that the end of the paragraph should be amended to read: "...could eliminate all problems associated with the prosecution of international crimes".

10. Mr. HAYES said that he had reservations about Mr. Bennouna's proposed amendment. The Commission was not simply attempting to cover the internal prosecution of international crimes, but also the internal prosecution of what technically would be national crimes. The phrase "prosecution of international crimes" was therefore too restrictive. Perhaps it would be better to say: "the national prosecution of similar crimes".

11. Mr. DÍAZ GONZÁLEZ said that he was in favour of deleting paragraph 28, because it was in contradiction with paragraph 29. Its deletion would not detract from the report.

12. Mr. AL-QAYSI said that he had no objection to deleting the paragraph, but if it was to be retained, it was important to bear in mind the context. Some States considered that they would encounter difficulties in implementing universal jurisdiction and they were therefore advocating the alternative of an international criminal court. The second sentence could thus be worded: "It would, however, be unduly optimistic to

* Resumed from the 2189th 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.*

believe that an international prosecuting mechanism could eliminate all those difficulties." That would avoid the need to make reference to the national or international prosecution of international crimes. If that formulation was adopted, States might still ask why the belief referred to would be unduly optimistic, and the Commission would have to explain why, thus making the paragraph more cumbersome. If, however, it was the Commission's view that a special case was at issue, it must elaborate on the text, because then the wording he had proposed would not be sufficient.

13. Mr. PAWLAK said that paragraph 28 was designed for those States wishing to receive the assistance of an international criminal court in overcoming difficulties in implementing obligations associated with the prosecution of certain crimes. One example was drug trafficking in Central and South America. The second sentence of the paragraph could be deleted.

14. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that it would be best simply to delete paragraph 28. Obviously, the establishment of an international criminal court did not mean that States would not have problems associated with the implementation of their legal systems.

15. Mr. GRAEFRATH said that he was in favour of deleting paragraph 28 and moving on to more important paragraphs awaiting discussion.

16. Mr. FRANCIS said that paragraph 28 raised an important issue of direct concern to countries such as his own. He was strongly against deleting the paragraph and thought that it should be included in the form suggested earlier by Mr. Graefrath. Countries not currently affected by the problem might be at some later date.

17. Prince AJIBOLA said that he agreed with Mr. Pawlak: certain States wanted to receive assistance from an international criminal court and paragraph 28 should therefore be retained. Indeed, some States did not even know what to do about nationals of other States who had committed offences in their territory.

18. Mr. AL-QAYSI said that he supported the suggestion to replace the word "illusory" by the words "unduly optimistic". The phrase "relieve States of the problems associated with the national administration of [criminal] justice", in the text proposed by Mr. Graefrath (para. 1 above), could be replaced by "eliminate all those difficulties".

19. Mr. SEPÚLVEDA GUTIÉRREZ, supported by Mr. THIAM (Chairman-Rapporteur of the Working Group), said that, as the Commission was unable to agree on a text, paragraph 28 should be deleted.

20. Mr. BENNOUNA, speaking on a point of order, suggested that the Chairman should establish a small working group to make a last attempt to produce a draft for paragraph 28, failing which the paragraph should be deleted.

21. Mr. JACOVIDES, speaking on a point of order, asked the Chairman to rule on Mr. Bennouna's proposal.

22. The CHAIRMAN suggested that an informal working group, composed of Mr. Bennouna, Mr. Francis, Mr. Graefrath and Mr. Thiam (Chairman-Rapporteur of the Working Group), should be established with a view to agreeing on a compromise text.

It was so agreed.

23. Following a brief suspension of the meeting, the CHAIRMAN announced that the informal working group established to find a compromise text recommended the deletion of paragraph 28.

24. Prince AJIBOLA objected that it was no part of that group's mandate to propose the deletion of paragraph 28. The group had been set up for the purpose of endeavouring to find a text for the paragraph that would be acceptable to all. If more time was needed to arrive at that result, the Commission should consider requesting it to continue its work. Perhaps paragraph 28 could be referred to the Chairman-Rapporteur of the Working Group. In any case, it was for the Commission itself to decide whether or not to delete a paragraph.

25. Mr. THIAM (Chairman-Rapporteur of the Working Group) pointed out that the members of the informal working group had been unable to arrive at an agreed text and had accordingly recommended the deletion of paragraph 28. As far as he was concerned, he could do no more.

26. Mr. FRANCIS said that he shared the concern about the proposal to delete paragraph 28. The paragraph referred to the problems of small States in trying to implement existing systems of universal jurisdiction—a matter of great interest to such States.

27. The CHAIRMAN said that the objection raised by Prince Ajibola would be reflected in the summary record of the meeting. If there were no objections, he would take it that the Commission agreed to delete paragraph 28.

It was so agreed.

Paragraph 29

28. Mr. HAYES said that the word "for" should be inserted before the words "the protection" in the second sentence.

It was so agreed.

29. Mr. KOROMA said that he was not happy about the opening phrase, "Although the possibility of abusing an international court for political purposes cannot be excluded . . .", as it was in the nature of a value judgment. The first sentence should therefore be replaced by the following text: "In order to safeguard the integrity of the international criminal court as well as to protect the rights of accused persons, it will be necessary to devise an adequate structure for the court."

30. Prince AJIBOLA said that the first sentence should be deleted. It referred to a hypothetical situation and was not in keeping with the line of thought expressed in the next sentence.

31. Mr. EIRIKSSON (Rapporteur) said that the first sentence reflected a concern expressed in many circles.

To place that concern in the proper context, however, he would suggest that the sentence be reworded as follows: "Some concern has been expressed that an international court may be abused for political purposes, but the Commission is convinced that this could be avoided by devising an adequate structure for the court."

32. Mr. BEESLEY said that he had himself had some similar wording in mind. On reflection, however, he would prefer Mr. Koroma's proposal, as it addressed the central issue more appropriately by referring to the integrity of the court and to protection of the rights of the individual. He therefore urged the Commission to adopt that proposal.

33. Mr. NJENGA said that he, too, endorsed Mr. Koroma's proposal.

34. Mr. TOMUSCHAT proposed that the first sentence should be amended to read: "Although concerns have been expressed that an international court could not be totally insulated from political currents, the Commission is convinced that the court's independence and integrity may be safeguarded by devising an adequate structure." The second sentence would remain in its present form.

35. Mr. KOROMA said that he could accept that proposal, subject to deletion of the word "human" in the second sentence.

36. Mr. Sreenivasa RAO proposed that the words "safeguarded by devising an adequate structure", in Mr. Tomuschat's proposed amendment, should be replaced by "guaranteed by devising a structure with adequate safeguards".

37. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Tomuschat's amendment, as modified by Mr. Sreenivasa Rao, and to delete the word "human" in the second sentence as proposed by Mr. Koroma.

It was so agreed.

Paragraph 29, as amended, was adopted.

38. Prince AJIBOLA noted that at some points the report of the Working Group referred to an "international criminal court" and at others simply to a "court". For the sake of consistency, he would prefer to use the latter term throughout the report.

39. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that the corresponding word in the French text was *jurisdiction*, which had the advantage of being much broader. He had no preference in the matter, however.

40. Mr. PELLET, agreeing with the Chairman-Rapporteur of the Working Group, said that *jurisdiction* was also more suitable, as it was a neutral term. Moreover, the words "tribunal" or "court" would not be in conformity with the language used in the existing instruments on genocide and *apartheid*.

41. Mr. NJENGA, supported by Mr. PAWLAK, said that, in English, the word "jurisdiction" was not synonymous with "court". Prince Ajibola's unease could be allayed by adding the words "hereinafter referred to

as 'the court'" after the words "international criminal court" in paragraph 23.

42. Mr. MAHIU suggested that it be left to the Chairman-Rapporteur of the Working Group to find the most appropriate form of words.

43. Mr. HAYES said that, since the matter was purely one of editing, the text should remain as drafted.

It was so agreed.

Paragraph 30

44. Mr. KOROMA said that the words "more in" should be replaced by "in more".

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraph 31

45. Mr. CALERO RODRIGUES said that paragraph 31 set out three options for the exercise of jurisdiction, as an indication of which law should be applied by the court. The third option introduced an additional, and to his mind extraneous, element in that it said not simply that the court would exercise jurisdiction over any crimes in respect of which States would attribute competence to it, but that the court could be established independently of the code. That had nothing whatsoever to do with the question of the attribution of competence for certain crimes. The court could very well be established independently of the code yet have competence only for crimes included in the code. In his view, therefore, the element in question should be deleted.

46. Mr. McCAFFREY said that he agreed with Mr. Calero Rodrigues. He also proposed that the word "envisaged", in subparagraph (ii), should be replaced by "included", which was the word used in subparagraph (i). He further proposed that the phrase "attribute competence to it", in subparagraph (iii), should be replaced by "confer competence on it".

47. Mr. BARSEGOV pointed out that the authors of the report appeared to have overlooked in paragraph 31 the fact that there were international conventions in force which punished certain crimes and provided for the establishment of an international criminal court for the purpose. The problem was to some extent referred to in subparagraph (iii), which spoke of jurisdiction over the crimes "in respect of which States would attribute competence" to the court. He accordingly urged that specific reference be made to crimes which had already been defined by the international community and for which the need for an international criminal court was recognized.

48. He could be satisfied with the present text if he were assured that it covered all the crimes mentioned in existing international conventions and those that would be made punishable under future conventions. Otherwise, he would suggest that the matter be made clear by inserting, at the end of subparagraph (iii), an additional phrase along the following lines: "... in accordance with international conventions or other instruments".

49. Mr. KOROMA said that he agreed with Mr. McCaffrey's proposal to replace the words "attribute competence to" by "confer competence on". As to the point raised by Mr. Barsegov, the phrase "crimes in respect of which States would confer competence" should cover such crimes as genocide, in which connection the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contained provisions on jurisdiction.

50. Mr. THIAM (Chairman-Rapporteur of the Working Group) urged that the text of subparagraph (iii) be kept as it stood. In the case of crimes punishable under existing international conventions, the provisions regarding the competent court would be covered by the words "jurisdiction over crimes in respect of which States would confer competence". Consequently, the States parties conferred the competence in question under the terms of the convention itself.

51. Mr. PAWLAK said that, as a member of the Working Group, he supported the Chairman-Rapporteur in urging that the text remain unchanged, except for the useful drafting changes proposed by Mr. McCaffrey.

52. Mr. PELLET said that Mr. Barsegov's point, which was a valid one, could be met by inserting at the end of subparagraph (iii) an additional phrase along the following lines: "... and in particular under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*". He stressed the significance in that context of the words "and in particular".

53. Mr. BEESLEY said that he agreed with Mr. Barsegov. As to the drafting proposals made by Mr. McCaffrey, he agreed that the words "attribute competence to" should be replaced by "confer competence on", but he for one preferred the word "envisaged" for subparagraph (ii) and also for subparagraph (i). Not all the offences "included" in the code constituted crimes.

54. Mr. AL-QAYSI, referring to the point raised by Mr. Barsegov, said that he endorsed the idea of introducing wording which would cover the exercise of jurisdiction for other crimes, namely those under international conventions other than the code.

55. Prince AJIBOLA suggested that, in subparagraph (i), the word "all" should be inserted before "the crimes included in the code". In the interests of consistency, he agreed with Mr. Beesley's suggestion to replace the word "included" by "envisaged".

56. Mr. JACOVIDES said that he agreed with the suggestion to use the same term in both subparagraphs (i) and (ii), but felt that the appropriate term was "included", not "envisaged".

57. Mr. BEESLEY proposed that the term "defined" should be used in both subparagraphs.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed: (a) to insert the word "all" before the words "the crimes" in subparagraph (i); (b) to replace the words "included" in subparagraph (i) and "envisaged" in subparagraph (ii) by "defined"; (c) to amend the last part of subparagraph (iii) to read: "... would confer

competence on it"; (d) to insert at the end of subparagraph (iii) an additional phrase along the following lines: "... in particular under existing international conventions".

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

Paragraph 34

59. Mr. FRANCIS suggested that the word "practicality", in the first sentence, should be replaced by "practicability".

It was so agreed.

60. Mr. CALERO RODRIGUES said that the expression "crimes falling under the code", in the first sentence, was unsatisfactory, and the French and Spanish equivalents were no better. The best course would be to speak of crimes "defined in the code".

It was so agreed.

61. Mr. PELLET suggested that allowance should be made for a third approach by States. The simplest solution would be to add, at the end of paragraph 34, the phrase "a third group of States adopting an intermediate attitude".

62. Mr. BENNOUNA said that he failed to see how the two options envisaged in the paragraph for the prosecution of certain crimes would allow for a third group of States.

63. Mr. GRAEFRATH said that he agreed with Mr. Bennouna. Unlike paragraph 38, paragraph 34 did not refer to a possible concurrent jurisdiction between an international criminal court and national courts. Its subject was the scope of the crimes covered by the court's jurisdiction.

64. Mr. PELLET said that the question was slightly more complicated. Paragraph 34 did not specify whether, under the second option, States would be obliged to resort to the court for certain crimes, or would remain free either to do so or to continue to prosecute those crimes through their national courts. In the latter hypothesis, there could well be a third category of States. However, he would not press his proposal.

65. Mr. BENNOUNA suggested that, for the sake of precision, the words "from the jurisdiction of the court" should be added at the end of the second sentence.

66. Mr. EIRIKSSON (Rapporteur), pointing out that such an amendment would require a longer phrase in the English text, suggested that the end of the second sentence be amended to read: "... or through the provision of clauses allowing States to opt out of the court's jurisdiction". He agreed with Mr. Pellet that some States might continue to use their own courts, as well as the international court, for certain crimes.

67. Mr. TOMUSCHAT proposed that the words "opting-out clauses" should be replaced by "optional clauses". In the last sentence, he suggested that the

words “these States would resort to the international criminal court” should be replaced by “these States will resort to . . .”.

Mr. Bennouna's amendment was adopted for the French text.

The Rapporteur's amendment was adopted for the English text, on the understanding that the other languages would be amended accordingly.

68. Mr. KOROMA said that the word “attribute”, in the last sentence, should be replaced by “confer”.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

69. Mr. CALERO RODRIGUES pointed out that, in paragraph 35, unlike paragraph 32, there was no mention of the advantages of the course proposed, except the avoidance of delay. The reasoning behind paragraph 35 was flawed, and the matter was wholly unrelated to the court's jurisdiction.

70. Mr. TOMUSCHAT said that the word “eventual” was a mistranslation and should be replaced by “possible”.

It was so agreed.

Paragraph 35, as amended, was adopted.

Paragraph 36

Paragraph 36 was adopted.

Paragraph 37

71. Mr. BENNOUNA said that paragraph 37 should make it plain that the Commission, and not merely its Working Group, had discussed the possibility of extending jurisdiction to legal entities other than States.

72. Mr. MAHIOU said that, if the Commission adopted the report of the Working Group, the views expressed in it were the Commission's.

73. Mr. KOROMA said that it had been decided not to emphasize the possibility mentioned in paragraph 37, which had been discussed only by certain members. The report should not give the impression that the Commission had itself discussed the matter.

74. Mr. CALERO RODRIGUES, supported by Mr. PELLET, said that he would prefer to delete paragraph 37. For the purposes of the General Assembly, there was no merit in mentioning a discussion without indicating what arguments had been advanced.

75. Mr. MAHIOU recalled that no final decision had been taken on the matter. It had merely been suggested, during the initial stage of the discussion of the question of an international criminal court, that groups of individuals such as terrorists and organized drug traffickers might be brought within the court's jurisdiction.

76. Mr. TOMUSCHAT said that paragraph 37 could be deleted, since it gave the General Assembly no indication of the Commission's own preference. Indeed, the whole of the report of the Working Group was no more than a review of the various options.

77. Mr. KOROMA said that he found some merit in the argument advanced by Mr. Calero Rodrigues. It

should be made clear, however, that the report on the question of establishing an international criminal jurisdiction was being submitted to the General Assembly in a very preliminary form and that the Commission had had no time for an exhaustive discussion of the various options.

78. Mr. FRANCIS suggested that the objection could be met by adding, at the end of paragraph 37, a sentence reading: “The general view was that jurisdiction should be so extended.”

79. Mr. PELLET suggested deleting paragraph 37 and amending the second sentence of paragraph 36 to read: “The question of extending the scope of the code to States or to other legal entities, although discussed, was left open for consideration at a later stage.”

80. Mr. FRANCIS said that it had been the strongly held view of some members of the Working Group that entities other than States and individuals could commit crimes covered by the code. That view should be reflected in the report, in accordance with the Commission's established practice.

The meeting rose at 12.50 p.m.

2193rd MEETING

Thursday, 12 July 1990, at 3.30 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. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (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 (continued)

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² Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

³ *Ibid.*