

Document:-
A/CN.4/SR.2374

Summary record of the 2374th 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:-
1994, vol. I

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

35. Mr. THIAM (Special Rapporteur) said it would also be desirable, in the last sentence of the French version, for the words *sans exclure la création éventuelle* to be replaced by *sans exclure l'hypothèse où une cour criminelle internationale serait ultérieurement créée*.

Paragraph 110, as amended, was adopted.

Paragraph 111

36. Mr. THIAM (Special Rapporteur) said that the last sentence should read: "Serious as they might be, it was difficult to see why there should be no statutory limitation for such crimes".

Paragraph 111, as amended, was adopted.

Paragraphs 112 to 120

Paragraphs 112 to 120 were adopted.

Section B.2, as a whole, as amended, was adopted.

CHAPTER III. *The law of the non-navigational uses of international watercourses (A/CN.4/L.500)*

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Paragraph 10

37. Mr. ELARABY said that he wished to be placed on record as joining in the tribute to the Special Rapporteur in paragraph 11, but not in the recommendation set out in paragraph 10, as it was formulated.

38. After an exchange of views, in which Mr. ROSENSTOCK (Special Rapporteur), Mr. TOMUSCHAT and Mr. CALERO RODRIGUES took part, the CHAIRMAN suggested that the text of paragraph 10 should be recast to read:

"10. The Commission decided to recommend the draft articles on the law of the non-navigational uses of international watercourses and the resolution on transboundary confined groundwater to the General Assembly. The Commission recommends the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles."

Paragraph 10, as amended, was adopted.

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

39. Mr. CRAWFORD proposed that the word "seizes" should be replaced by "takes".

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Chapter III, as a whole, as amended, was adopted.

The meeting rose at 5.50 p.m.

2374th MEETING

Thursday, 21 July 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued)* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-7,² A/CN.4/460 and Corr.1,³ A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (continued)*

1. The CHAIRMAN invited the Chairman of the Working Group on the draft statute for an international criminal court, to introduce the Working Group's revised report (A/CN.4/L.491/Rev.2 and Corr.1 and Add.1-3).

2. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the document presently before the Commission contained a substantially revised version of the report the Commission had originally considered in plenary (A/CN.4/L.491). The Group had considered two formal drafts of the statute and had also approved the commentaries as revised in the light of comments made in plenary. The draft statute and the commentaries together represented the collective view of the Working Group and, on that basis, were recommended for adoption by the Commission. Any comments made by members in plenary which had not been reflected in the draft statute for an international criminal court—because they had not been adopted by the Working Group—were reflected in the commentaries. The draft statute should be regarded as a negotiating text to be submitted to the General Assembly and, if the Assembly so decided, to a possible diplomatic conference. It was not an attempt to codify the law, as there was no law in that area. Nor had the Working Group attempted to draft the opening and final

* Resumed from the 2361st meeting.

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

² Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

³ *Ibid.*

clauses of any treaty that might accompany the statute. Instead, it had amended the note on possible clauses of a treaty to accompany the draft statute. Issues such as reservations and settlement of disputes would be dealt with by an eventual conference. The draft statute also provided the basic structure to give effect to ideas concerning such matters as the court's jurisdiction over genocide, the capacity of the Security Council to refer matters to the court, and the necessary limitations on the operations of the court.

3. He thanked all the members of the Working Group for their cooperation and also the members of the secretariat for their invaluable assistance in a difficult exercise.

PREAMBLE AND PART ONE (Establishment of the court)

4. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the wording of the third preambular paragraph had been amended in response to comments made by Mr. Robinson (2357th meeting); the second part of article 2, had been transferred to the commentaries; and paragraph 3, which had originally been placed elsewhere in the draft statute, had been moved to article 3. There were no changes of substance.

5. Mr. TOMUSCHAT proposed that the word "only", in the second preambular paragraph, should be deleted, since it would diminish the value of the articles.

6. Mr. ROSENSTOCK said he would prefer to retain that word as it would enable Governments to adopt a positive approach to the provision and it could also have some slight influence on their reasoning if a case arose which fell under article 35.

7. After a discussion in which Mr. AL-BAHARNA, Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court), Mr. HE and Mr. KABATSI took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to retain the word "only" in the second preambular paragraph of the draft statute.

It was so agreed.

8. Mr. PAMBOU-TCHIVOUNDA proposed that the references to the suppression and prosecution of crime, in the first preambular paragraph, should be reversed.

It was so agreed.

9. Mr. PELLET said that he maintained his reservations in general and doubted whether the Commission was embarking on the right path. He would like that view to be reflected not only in the summary records but also in the Commission's report. He was unable to accept article 2, but would not stand in the way of its adoption if that was the wish of the majority.

10. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said he agreed entirely that Mr. Pellet's important views should be fully reflected in the commentary.

11. Mr. PAMBOU-TCHIVOUNDA said that he would have preferred the emphasis in the second preambular paragraph to be placed on the object and purpose of the court rather than on its jurisdiction, which was a purely technical matter. However, he would not stand in the way of a consensus.

The preamble and part one, as amended, were adopted.

PART TWO (Composition and administration of the court)

12. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that comparatively few changes of substance had been made to part two. In article 6, the reference to the lists of judges had been deleted but the idea of the need for a balance between the two kinds of possible qualification, for which there had been strong support, had been retained. The wording of article 19, paragraphs 3 and 4, had been changed, and the principle of control by States parties with respect to the formulation of the rules of the court, on which a number of delegations to the Sixth Committee of the General Assembly at its forty-eighth session in 1993 had insisted, had been reinforced. Such control could be exercised either by States parties giving their approval at a conference or through a system of communication with States parties to ascertain whether they objected. The other changes to part two were all of a drafting nature.

13. Mr. MAHIOU said article 6, paragraph 3, stipulated that there should be 10 judges with criminal trial experience but only 8 with recognized competence in international law. The arguments advanced in defence of that difference had not been convincing. There should be a true balance, with nine judges from each of the two specialties.

14. Mr. PELLET said he saw no reason for the words "due" or *bonne* in the English and French versions respectively, but would not press the point. The phrase "on the basis that they will be available to serve as required", in article 12, paragraph 4, remained ambiguous despite the explanation in the commentary. The meaning might be made clearer if the phrase were replaced by some wording along the lines of: "who will perform their duties when a case is referred to the court".

15. Article 12, paragraph 7, and article 13, paragraph 4, both contained an error of law, since the staff of the procuracy and the registry of the proposed court were not to be equated with that of the United Nations and could not therefore be subject to staff regulations that were more or less in conformity with those of the United Nations.

16. THE CHAIRMAN said he took it that the Commission agreed to delete that phrase, both in article 12, paragraph 7, and in article 13, paragraph 4.

It was so agreed.

17. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said the meaning of article 12, paragraph 4, was clear: the prosecutor and deputy prosecutors would serve

as required—in other words, not more and not less than was required.

18. After a discussion in which Mr. ROBINSON, Mr. CRAWFORD (Chairman of the Working Group) and Mr. ROSENSTOCK took part, Mr. PELLET suggested that a written draft of a proposed reformulation of paragraph 4 should be circulated for consideration.

It was so agreed.

19. Mr. PELLET said that he continued to maintain his reservation with regard to article 17, paragraph 1, about the provision of an annual allowance to the president. As for article 19, paragraph 4, it was quite unacceptable to introduce provisional rules in penal matters. It was inconceivable to permit a situation in which an accused was subjected to a regime in which the rules were subsequently changed. The paragraph should be deleted.

20. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that he was opposed to the deletion of paragraph 4 of article 19. The article was a compromise between the position taken in the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,⁴ in which the judges made the rules and there was no provision for those rules to be approved or disapproved, and a situation in which States parties, not the judges, made the rules. Under the terms of paragraph 1, the judges made the rules, and under the terms of paragraph 2, those rules were then approved by States parties. Paragraph 4 was a concession to the needs of effective operation and efficiency of the court, in a situation where a case was pending and the rules had been made but not yet approved. A change in the rules might even work to the advantage of an accused.

21. Mr. PELLET said that the explanation only served to increase his hostility to paragraph 4. It was quite unacceptable that rules should be provisionally applied, and then lapse after having failed to be approved by States. Such provisional application was extremely dangerous.

22. After a show of hands, the CHAIRMAN declared that article 19, paragraph 4, would be retained.

23. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said he thought that Mr. Pellet had made a legitimate point, albeit one with which he himself disagreed. That point should be reflected in the commentary.

24. Mr. ROBINSON said that, while he appreciated that time was short, he none the less regretted that an indicative vote had been taken so hastily. There was some merit in the contention that paragraph 4 could totally negate the system established in paragraph 2. He hoped that in future sufficient time would be allowed for such important matters to be aired.

25. Mr. MAHIOU said he shared other members' reservations concerning paragraph 4. The creation of a provisional phase could give rise to serious concern on the part of States. In criminal law matters, it should be made absolutely clear whether the rules did or did not apply.

26. The CHAIRMAN said that he had decided to take an indicative vote on paragraph 4 in the belief that article 19 represented a compromise between the various views that had already been expressed at length in plenary and in the Working Group. If he heard no further objection, he would take it that, on the understanding dissenting views would be fully reflected in the commentary, the Commission agreed to adopt all the articles of part two, other than paragraph 4 of article 12, which had been left pending.

It was so agreed.

Part two, as amended, was adopted, on that understanding.

PART THREE (Jurisdiction of the court)

27. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that part three, was obviously the most problematical part of the draft statute. Once again, the text represented a compromise between maximalist and minimalist positions on various issues. However, as compared with the draft previously discussed by the Commission, relatively few changes had been made. Article 20, subparagraph (c), had been reworded so as to avoid confusion with the technical term "grave breaches" in the Geneva Conventions of 12 August 1949 and Additional Protocol I of 1977, and a reference to "customs" had been inserted. The express reference to crimes under customary international law had been deleted from article 20 as part of a delicate compromise on the question whether apartheid should be separately listed under that article. There were many ways in which such a difficult exercise could have been undertaken, but the package proposed by Mr. Robinson (2358th meeting) had eventually been unanimously accepted by the Working Group, for the reasons explained in the commentary.

28. On the question of preconditions to the exercise of jurisdiction, the view had been held that genocide should not be subject to special rules. By a substantial majority, the Working Group had preferred to provide for special treatment in a case of genocide—the solution also preferred by many members of the Commission who were not members of the Working Group. Paragraph 3 of article 21 had been moved, and was now article 54. Article 22 was in principle unchanged, as was article 23, although the wording of paragraph 1 however had been altered, in order to make it clearer that what the Security Council referred was the matter or situation to which Chapter VII of the Charter of the United Nations applied, leaving it up to the court's prosecutor to distinguish the crime and the accused. The Working Group had decided by a significant majority to retain paragraph 3 of article 23, which had been redrafted to make it plain that the Council must actually be taking action under Chapter VII of the Charter, and that it was not enough for the Council to stigmatize a particular situation as one

⁴ Document S/25704, annex.

to which Chapter VII applied. Paragraph 3 had also been changed, so that only the commencement of prosecution was affected by paragraph 3 in its more limited form. There had never been any opposition to article 24; indeed, some held that it should be the only article in part three.

29. Mr. PAMBOU-TCHIVOUNDA said he wished to reiterate his reservations concerning article 20. Article 20, subparagraph (d), referred to crimes against humanity. There was certainly such a category of crimes under domestic law, and the Convention on the Prevention and Punishment of the Crime of Genocide defined genocide as a crime against humanity. He was not sure, however, that a global category of "crimes against humanity" existed in international law. What was article 20, subparagraph (d), intended to cover? He was also concerned at the retention of the crime of aggression, particularly in the light of article 23, paragraph 2, which required the Security Council first to determine that a State had committed an act of aggression. Did article 20, subparagraph (b), refer to individuals or to States? He would welcome clarification of those two points.

30. Mr. PELLET said article 21 was both too restrictive and too broad. It should have allowed for an exception to the requirement that complaints could be brought only in cases of systematic or mass violations of human rights. It should also have applied the same general system to all the crimes referred to in article 20, rather than make the crime of genocide a special case. He also objected to the phrase "the State which has custody of the suspect", in article 21, paragraph 1 (b) (i). In international law, the customary language in such a case was "the State on whose territory the person is to be found". Moreover the French version of paragraph 1 (b) (ii) did not correspond to the English.

31. He was entirely opposed to article 22 and would not join any consensus on adopting it. The article would, in a manner of speaking, allow States to have their cake and eat it too: States could become party to the statute and participate in several aspects of the court's functioning without any obligations, save a financial obligation. If the article had to be adopted, he would propose that the words "in article 20", in paragraph 1, should be replaced by "article 20, subparagraphs (b), (c) and (d)". That change would eliminate any reference to the crime of genocide in paragraph 1, thus reflecting the fact that genocide was an exception to the general set of rules regarding the exercise of jurisdiction.

32. Mr. THIAM (Special Rapporteur) said the Working Group had decided that the crimes over which the court had jurisdiction would be set out in article 20 and the definitions of those crimes would be provided in the Code of Crimes against the Peace and Security of Mankind. Like Mr. Pellet, he had strong reservations about article 22. The procedure for State acceptance of the court's jurisdiction seemed highly complex and might hinder the efficient functioning of the court. Once a State became party to the statute, it should then be presumed to have accepted the jurisdiction of the court.

33. Mr. MAHIU said that he endorsed the remarks of the Special Rapporteur on article 22. He also had reservations about article 23, paragraph 3. The Security

Council should not have the possibility of preventing the court from acting.

34. Mr. HE said the question of whether any matter referred by the Security Council to the court could automatically impose an obligation on the court was debatable. Accordingly, the word "Notwithstanding" in article 23, paragraph 1, should be replaced by "Subject to". Furthermore, article 42 was not consistent with the *non bis in idem* principle.

35. Mr. CALERO RODRIGUES said that he endorsed the views of the Special Rapporteur on article 22. He also had reservations about paragraph 3 of article 23: the fact that the Security Council was dealing with a matter should not prevent the court from exercising its jurisdiction.

36. Mr. ARANGIO-RUIZ said that he had the same reservations as Mr. Calero Rodrigues. Furthermore, the existence of an international criminal court was a *sine qua non* for the adoption of the Code of Crimes against the Peace and Security of Mankind. Accordingly, acceptance of the court's jurisdiction should be compulsory for any State becoming a party to the statute and to the Code.

37. Mr. GÜNEY said that he shared the objections to article 22 expressed by Mr. Mahiou and Mr. Calero Rodrigues.

38. Mr. ROBINSON wondered whether it was necessary for members to confirm reservations that they had already made during the debate. If so, he wished simply to confirm all the reservations that he had expressed earlier.

39. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the Working Group shared the concerns about the definition of crimes against humanity and hoped that the matter could be resolved in the context of the draft Code of Crimes against the Peace and Security of Mankind. The term "custodial State", in paragraph 1 (b) (i) of article 21, had replaced the language used in an earlier draft, namely "the State on whose territory the person is to be found". The new text was an improvement because the original wording would have given rise to difficulties in a number of contexts, among them cases involving persons temporarily on the territory of a State, visiting forces, or individuals with personal immunity. He agreed that the French text of the subparagraph needed to be reviewed.

40. While it had been true under previous versions of the draft statute, it was no longer the case that States parties to the statute had no obligations other than financial. Article 54, in tandem with article 53, did impose obligations on States parties, which were independent of acceptance of the jurisdiction of the court under article 22. Paragraph 1 (b) of article 22 referred to article 20 as a whole, rather than to specific subparagraphs, in order to allow a State which was not a party to the Convention on the Prevention and Punishment of the Crime of Genocide to accept the court's jurisdiction over the crime of genocide and to bring a complaint. However, he

was not opposed to the idea of replacing the reference to article 20 with a list of subparagraphs (b) to (e).

41. Members' reservations with regard to article 23 were reflected in the commentary.

42. The CHAIRMAN said that he took it that the Commission agreed to adopt part three, it being understood that all members' reservations were adequately reflected in the summary records and in the commentary.

Part three, as amended, was adopted on that understanding.

PART FOUR (Investigation and prosecution)

43. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said a number of editing changes had been made in article 26, paragraphs 1, 4 and 5, and article 27, paragraph 1, in order to meet the procedural points rightly raised by Mr. Robinson (2361st meeting).

44. Mr. PAMBOU-TCHIVOUNDA, referring to article 31, paragraph 3, said that he would like clarification as to who would pay the costs of the persons designated to assist in a prosecution.

45. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the costs might be paid by the court or a contribution might be made by the State. The Working Group had felt that maximum flexibility was needed on that point.

46. Mr. PELLET said that he had a strong reservation about the system provided for in article 31, an article which should be deleted.

47. After a discussion in which Mr. CRAWFORD (Chairman of the Working Group), Mr. ROBINSON, Mr. TOMUSCHAT, Mr. PELLET and the CHAIRMAN took part, Mr. CRAWFORD (Chairman of the Working Group) suggested the following new wording for article 31, paragraph 1: "The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2". Consequently, in paragraph 3 "designated" should be replaced by "made available"; the title of the article would also have to be altered.

48. The CHAIRMAN said that he would take it that, subject to the reservations stated by members, the Commission agreed to adopt part four as amended.

It was so agreed.

Part four, as amended, was adopted on that understanding.

PART FIVE (The trial)

49. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that in article 35 the notion of admissibility had been introduced in place of the notion of the discre-

tion of the court. In article 38, paragraph 1, the powers of the trial chamber were now stated without reference to other bodies, and minor consequential changes had been made to the rest of the article. He wished to stress that article 42 was based on a strong majority view in the Working Group. A number of minor drafting changes had been made in article 45.

50. Mr. PELLET said article 33, subparagraph (c), should be deleted, as should article 35, subparagraph (a), for the commentary was ambiguous, and the paragraph appeared to overlap with article 26. He also maintained his strong reservation about the trust fund referred to in article 47, paragraph 3 (c).

51. After a discussion in which Mr. BOWETT, Mr. PELLET, Mr. ROBINSON, Mr. ROSENSTOCK and Mr. CRAWFORD (Chairman of the Working Group) took part, Mr. PELLET withdrew his proposal to delete article 33, subparagraph (c).

52. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that, if article 35, subparagraph (a) was deleted, then subparagraph (b) would have to be deleted as well. The purpose of article 35 was to avoid unnecessary prosecutions and it did not overlap with article 25 or article 26.

53. After a show of hands, the CHAIRMAN said that the Commission appeared to be opposed to the proposal to delete article 35, subparagraph (a). He would take it that, subject to the reservations stated by members, the Commission agreed to adopt part five.

Part five, was adopted on that understanding.

The meeting rose at 1.05 p.m.

2375th MEETING

Thursday, 21 July 1994, at 3.05 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.
