Document:-
A/CN.4/SR.2380

Summary record of the 2380th 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:-
1995, vol. I

Mr. Barboza, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Lukashuk, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely and Mr. Yamada.

55. For the topic of "International liability for injurious consequences arising out of acts not prohibited by international law", the Drafting Committee would be composed of Mr. Al-Baharna, Mr. Bowett, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Lukashuk, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely and Mr. Villagrán Kramer.

56. For practical reasons and bearing in mind the schedule of work drawn up by the Commission for the period until the conclusion of its current term of office, the Drafting Committee would assign priority to the draft Code of crimes against the peace and security of mankind and to State responsibility, devoting a maximum of 14 meetings to each of those two topics, while not neglecting the topic of international liability for injurious consequences arising out of acts not prohibited by international law, to which it would devote 6 meetings at most. The members of the Commission who were not members of the Drafting Committee would be able to attend the meetings of the latter and would be authorized to take the floor on those occasions, on the understanding that they would speak in moderation.

57. The Drafting Committee would submit to the plenary Commission its report on each of the topics it was considering, if possible, by the first week of July and, at the latest, by the second week of July.

58. Mr. PAMBOU-TCHIVOUNDA (Chairman of the Planning Group) proposed, following the consultations he had held, that the Planning Group should be composed of Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Razafindralambo, Mr. Rosenstock, Mr. Vargas Carreño and, in an *ex officio* capacity, former chairmen of the Commission.

It was so agreed.

59. Mr. ROSENSTOCK asked whether an additional meeting could be devoted to general observations on the draft Code before it was considered article by article or by clusters of articles. That method, which had been adopted at the forty-sixth session, had proved extremely valuable. It should also facilitate the work of the Drafting Committee.

60. Mr. YANKOV (Chairman of the Drafting Committee) found the proposal by Mr. Rosenstock very pragmatic, and he invited the other members of the Commission to accept it, for such a way of proceeding should indeed facilitate the smooth running of the Drafting Committee's work.

61. The CHAIRMAN said that it would be best for those members of the Commission wishing to speak on that topic to begin by making general observations on the draft Code. They could then take the floor whenever they so wished in order to make more detailed comments on particular articles. If he heard no objection, he would take it that the Commission accepted that suggestion.

It was so agreed.

The meeting rose at 1 p.m.

2380th MEETING

Thursday, 4 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,[2] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited members to resume consideration of the thirteenth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466). As far as was possible, the Commission should conclude its comments on the articles as a whole before taking up specific articles, which could then be dealt with in turn.

2. Mr. BENNOUNA said that it was high time that the Commission concluded its work on a topic that had occupied it for much of its history. In the present troubled times, some more unified approach to the question than the current unsatisfactory system of ad hoc tribunals was called for. Formulation of a Code, in as succinct a form as possible, would thus give the international community a very important instrument with which to address highly politicized issues.

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[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 . . . 1995*, vol. II (Part One).

3. The Special Rapporteur had adopted a realistic and pragmatic approach, proposing, on the basis of Governments' positions, a hard core of common denominators likely to command general consensus, and eliminating those crimes that might jeopardize acceptance of the draft Code as a whole. He supported that approach, and also the Special Rapporteur's proposals to abandon, if only provisionally, the threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18), which, it was to be hoped, could be regarded as a thing of the past; and wilful and severe damage to the environment (art. 26), which could perhaps be considered in the context of another agenda item, such as international liability for injurious consequences arising out of acts not prohibited by international law (agenda item 5).

4. He believed, however, it was essential to retain the crime of apartheid, even if it were designated "institutionalized racial discrimination" or "institutionalization of racial discrimination". Unfortunately, apartheid was not a thing of the past, and there were various instances of attempts being made to create "Bantustans" and confine populations to reservations. The crime of apartheid should thus be retained—perhaps with some changes as regards the name—particularly since an existing international convention, the International Convention on the Suppression and Punishment of the Crime of Apartheid, defined apartheid as a crime, a fact that established some certainty on the question at the level of international law.

5. He also agreed with the Special Rapporteur's proposal to eliminate provisionally the crime of recruitment of mercenaries (art. 23), which could perhaps be subsumed under the crime of aggression. On the other hand, the crime of illicit traffic in narcotic drugs (art. 25), on a transboundary or large-scale basis, should be retained. That scourge was so serious as to affect the sovereignty of small States. It might be recalled that in one case a group of drug traffickers had proposed to write off a country's entire foreign debt in exchange for certain privileges. Furthermore, trafficking in narcotic drugs also fed other forms of crime, such as terrorism and subversion. It should thus be kept in the draft Code.

6. The crime of aggression had given rise to lively debate at the previous meeting, probably because it posed the central problem of the separation of the powers and functions of the executive and judicial branches, and of relations between the Security Council and ICJ or any other court. In the observations, reproduced in the thirteenth report, the Governments of Australia, Belarus, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Switzerland had all expressed the view that those powers should be kept separate. He agreed with the Special Rapporteur that General Assembly resolution 3314 (XXIX) could not serve as a point of reference for a judicial body, and that the political and judicial functions must be kept separate. The Commission had taken the line of least resistance in that regard, and must now give the matter more careful consideration.

7. As to the three options referred to by the Special Rapporteur in his report, the middle way favoured in the new text of draft article 15, paragraph 2, had a disadvantage, one to which Mr. Rosenstock (2379th meeting) had already drawn attention. It was well known that Article 2, paragraph 4, of the Charter of the United Nations covered a wide range of situations not sufficiently serious to constitute acts of aggression as such. Consequently, a simple reference to Article 2, paragraph 4, of the Charter, would not solve the problem of a definition of aggression. In his view, the Commission must merely refer to international law and jurisprudence. The Vienna Convention on the Law of Treaties, for instance, referred to *jus cogens*, yet did not define it—an approach subsequently adopted by jurisprudence. Two possibilities the Drafting Committee might consider would be: either to make a reference to general international law, without further qualification; or else to qualify the reference to "armed force" in the new text proposed for draft article 15, paragraph 2, with wording such as "of a level of seriousness which constitutes an act of aggression under international law". The Security Council should confine itself to a political role, leaving it to the courts to perform their legal role unswayed by political considerations until, at some point in the infinitely remote future, the interests of the two eventually converged.

8. Mr. TOMUSCHAT said that the Special Rapporteur's commendably brief report took due account of the political climate in which the Commission had to work. That did not mean that the Special Rapporteur had bowed to prevailing fashion and ephemeral trends: it was the Commission's task to remain faithful to the fundamental principles of the world order established after 1945 with the birth of the United Nations, whose Charter now constituted a world constitution. However, in its work the Commission still needed the full support of the international community—a community of States themselves represented by their Governments. So far, international law was made only with the approval of States; the Commission could not impose utopian rules on Governments reluctant to accept them.

9. The fact of the matter was that the Commission seemed to be suffering from a loss of contact with political circles. In his 10 years in the Commission, he had spent much time in the drafting of texts, not one of which had yet become an international treaty ready for signature and ratification. That regrettable state of affairs could of course be attributed to a number of causes. What the Commission needed was realism, accompanied by a keen awareness of its responsibility.

10. It was against that background that he commended the Special Rapporteur for having reduced the list of crimes to a hard core. The very extended catalogue of crimes adopted on first reading in 1991 had threatened to doom the whole enterprise to failure. Henceforth, however, Governments could no longer take refuge in the argument that the Commission had shown excessive zeal. A serious debate must now begin. The crimes selected by the Special Rapporteur were those that had many times been characterized as international crimes of the utmost gravity by the spokesmen of States of all regions, ideologies and political tendencies. He endorsed the remarks made by Mr. Pellet (ibid.). The Commission was a codifier of the political will of States. It would be futile for it to attempt to force the pace of development of in-

ternational law by pushing too vigorously. Excessive zeal could only lead to yet another draft being consigned to the archives at Headquarters.

11. Consequently, he supported the decision taken by the Special Rapporteur to eliminate from his draft the threat of aggression, intervention, colonial domination and recruitment of mercenaries, as well as apartheid and wilful and severe damage to the environment. Even if one had a hierarchical perception of internationally wrongful acts according to which crimes against the peace and security of mankind were, so to say, the most pernicious and dangerous crimes, it was not absolutely clear, even from the observations of Governments, what conclusions should be drawn. Apartheid had been questionable as a crime for three reasons. First, the matter had related only to South Africa and no consideration had been given to the question whether similar practices were to be found in other States. Secondly, complicity had been used to extend the circle of persons to others far beyond the frontiers of South Africa. Thirdly, even in the case of South Africa itself, the rules had been so imprecise that no white Afrikaner could have escaped the criminal laws. The question now arose whether the establishment of "institutionalization of racial discrimination" as a crime against the peace and security of mankind would command the support of the international community. Actually, States other than South Africa continued to operate systems of institutionalized apartheid under another name. He supported Mr. Bennouna's remarks in that regard that the Commission should devote careful consideration to the matter.

12. Although he agreed that article 26 (Wilful and severe damage to the environment) might have to be more limited in scope than was now the case, there was no question whatsoever that certain kinds of damage to the environment should be characterized as a threat to international peace and security. Deliberate detonation of nuclear explosives or pollution of entire rivers, for example, would certainly qualify as crimes against humanity, and any individual or State that committed such a crime should be subject to appropriate penalties to be applied by the international community.

13. He found it difficult to envisage not making the list of crimes exhaustive, as that would leave the situation far too ambiguous. An act must be defined either as being or as not being a crime against humanity, and it must be made clear that the resulting penalties would be applied by the entire international community.

14. An abstract definition of crimes against the peace and security of mankind, such as the one proposed in draft article 1, should not be part of the Code. Such a definition might be exploited by States to make the Code cover many acts that had been deliberately excluded from it. A better course would be to describe clearly in article 1 the common denominator of the crimes that were to be enumerated later in the Code. Nothing would prevent the international community from subsequently revising or adding to the list of crimes.

15. The provisions on perpetrators of and accomplices in crimes against humanity needed further clarification, as they varied from article to article. In article 15 (Aggression), only a leader or organizer of the act was punishable; a soldier who was merely following orders could not be found guilty of aggression. Under the new proposed text of article 19 (Genocide), paragraph 3, however, an individual who was guilty of incitement to the crime of genocide was punishable. Finally, the rules on complicity set out in article 3 (Responsibility and punishment) resembled those used in domestic criminal legislation. The most important thing was for the Code to lay down rules whereby perpetrators of crimes against humanity could be severely punished. It was of somewhat lesser importance to envisage punishment for those who abetted such crimes.

16. As a general comment on the language of the draft, he would point out that it was unnecessary to repeat, for each crime, that "on conviction thereof", an individual would be sentenced to punishment. If sentence had been passed, it went without saying that an individual had been found guilty of a crime.

17. No light had yet been shed on the specific penalties to be applied for each crime. In his view, it would prove impossible to establish rigid maximum and minimum sentences, because war crimes and crimes against humanity could take so many and varied forms. One criterion that must be retained, however, was that of imposing exemplary punishments, including life imprisonment, for such serious crimes. A single provision to that effect in the chapter on general principles would suffice; perhaps the Commission could use the statute of the International Tribunal[3] as a model.

18. He welcomed the new version for article 15 and particularly the specific reference to the use of armed force. There were already texts in which certain types of conduct, referred to as "wars of aggression", were characterized as crimes against the peace and security of mankind—General Assembly resolutions 2625 (XXV) and 3314 (XXIX) and the Charter of the Nürnberg Tribunal.[4] Such acts of aggression had to incorporate an element of massive scale, and as they generally involved inter-State conflicts, the Security Council was responsible for dealing with them. The Commission's task, on the other hand, was to establish rules for the individual responsibility of leaders of States—a completely different enterprise.

19. Lastly, he failed to understand the need for the phrase "or in any other manner inconsistent with the Charter of the United Nations" in article 15, paragraph 2. Though it was perfectly defensible in a text governing relations between States, in matters of criminal responsibility the phrase added nothing and simply created ambiguity. He would propose an alternative formulation such as: "For the purposes of the present Code, the massive use of armed force by a State against the sovereignty, territorial integrity or political independence of another State is deemed to constitute a war of aggression." The Commission's objective was not to draft yet another general definition of aggression, but to list specific acts for which individuals bore criminal responsibility.

[3] See 2379th meeting, footnote 5.

[4] Ibid., footnote 12.

20. Mr. HE said he welcomed the fact that the scope of part two had been narrowed to only the most serious crimes. That position conformed to the views on the draft Code expressed by States. The divergences of opinion still remaining on which crimes should be retained in the draft Code could be discussed further during the present session. The task now confronting the Commission was to continue to improve part two, which occupied a key position in the whole draft, so that it met the requirements of precision and rigour of criminal law.

21. The new text proposed for article 15 transplanted Article 2, paragraph 4, of the Charter as a definition of aggression. While the provision on non-use of force embodied in the Charter was a basic principle intended to regulate inter-State relations, it was too broad and vague to serve in the present context as a definition of aggression. Yet the prospects for achieving consensus on any definition of such an important term were meagre. Terrorism, too, was a key term that lacked a universally accepted definition.

22. The new text for article 21 (Systematic or mass violations of human rights) was an improvement, except that it spoke only of the "systematic" commission of specific acts, while the original text had referred to both systematic and "mass" violations of human rights. If the acts enumerated in the article were not committed on a massive scale, they might be said to constitute common crimes, not crimes threatening international peace and security. The wording of the new text should therefore be reconsidered.

23. Mr. MAHIOU said that, in the discussion of article 1 at the forty-sixth session, the Commission had already addressed many of the issues now before it, such as whether a general definition and/or a restrictive list of crimes against humanity should be incorporated in the Code. It would seem that both were needed. Due regard should be paid to making sure that the definition was broad enough not to confine the Code's application to a specific set of circumstances, yet it was also necessary to preserve the tradition in criminal law whereby crimes and their punishments were exhaustively enumerated. He favoured incorporating a general definition in article 1 that would specify the nature of the crimes to be envisaged in the Code.

24. During the first reading of the draft Code, the Commission had used an inductive method of reasoning, seeking to identify crimes against the peace and security of mankind and their individual characteristics. Perhaps now, on second reading, it should turn to the deductive method. Using the list of serious crimes already set out in articles 15 to 26, it might try to develop criteria for distinguishing such crimes from common crimes. Some distinguishing factors included the gravity and scope of the act and whether the act had been designated a crime by the international community.

25. With regard to the second factor, how could one know whether a crime had been designated as such by the international community? The relevant texts often referred to "the international community as a whole", which usually meant consensus had been achieved. Yet there was an element of ambiguity built into the very concept of consensus: it might apply very well in political, commercial or economic matters, but not in legal matters and especially not in criminal matters.

26. The gravity could apply to the crime itself or to its consequences or to both at once. Some crimes, aggression and genocide for example, were serious in themselves, regardless of their consequences and should be placed at the top of the list of crimes. In contrast, war crimes, violations of human rights and perhaps some crimes against the environment should be included only if their consequences were serious. The Commission must therefore make a rigorous examination of each crime before deciding to include it.

27. Aggression was clearly the epitome of a crime against the peace and security of mankind. It was equally clear that the Commission should not engage in the futile exercise of trying to define aggression anew but must use the definition adopted by the General Assembly,[5] which represented a minimum of agreement, and see how it could be adapted for the purposes of the draft Code. The Definition of Aggression could meet the Commission's concerns and the general implications of the definition for criminal law, but it had not been produced specifically for the purposes of codification of crimes against the peace and security of mankind. It was primarily a political definition, based largely on interpretation of Chapter VII of the Charter. The penal consequences of the Definition were more difficult to perceive than the political ones. There would be several doubtful areas, including the role of the Security Council, if the text of the Definition was included in the draft article on aggression. It would only confuse things if the Commission went into too much detail about the role of the Security Council and tried to decide, for instance, whether it was representative of the international community as a whole or could be regarded as an international legislator. But there again, the Commission should not call into question the provisions of the Charter, especially the provisions on the role of the Security Council for the purposes of Chapter VII, even though the interpretation of those provisions gave rise to serious difficulties. However, General Assembly resolution 3314 (XXIX) was not the Charter, and the Commission was entitled to discuss the legal, as opposed to the political, aspects of its content and scope.

28. There was no reason to have the Security Council intervene in the functioning of criminal jurisdictions, whether domestic or international. Therefore, if the Commission used the text of the Definition it must first subject it to scrutiny. In any event he could not agree that paragraphs 4 (*h*) and 5 of article 15 should be retained, for that would lead the Commission into a political-legal swamp from which it would be difficult to escape. With regard to the point made by Mr. Pellet (2379th meeting), nowhere did the Charter say that a determination by the Security Council was binding on a domestic or international court. Even if, by means of an audacious interpretation, such a conclusion was reached, there was no reason for such audacity to be formally written into law. The Commission must not provide a kind of impunity for a criminal enjoying the support of a State with the right of veto in the Security Council,

[5] Ibid., footnote 3.

thereby endorsing the unfair structure of international law and relations. In fact, if such inequalities did exist, it did not justify their codification by the Commission.

29. He agreed with the Special Rapporteur's position on the threat of aggression or intervention, for he had stated from the outset his reservations as to the inclusion of such vague acts. It was difficult to agree, on the other hand, that colonial or other forms of foreign domination should not be included in the list. Such domination was not a thing of the past and could resurface at any time. There might be a problem regarding definition or denomination, but foreign domination, colonial or otherwise, could amount to a serious crime. The Commission should therefore give further attention to the matter. The same applied to apartheid, which could still manifest itself, although perhaps under a different name.

30. The treatment of the crime of terrorism depended on whether it was committed by a State or by an individual or group having no connection with a State. State terrorism must certainly be included as a crime against the peace and security of mankind, but the Commission must specify the exact conditions in which an individual act of terrorism, without being linked to a State, could be regarded as such a crime. The solution might be to draft separate paragraphs for the two situations. The same applied to crimes connected with drug trafficking, for including them when they were committed by individuals might have the effect of watering down the concept of crimes against the peace and security of mankind. The Special Rapporteur's proposal to replace the present title of article 21 with "Crimes against humanity" was open to the objection that it could convey the impression some crimes not mentioned in the article were not crimes against humanity, for example, genocide.

31. Mr. LUKASHUK said that he had been following for many years the heroic struggle of the Special Rapporteur to establish peace and legality in international relations. On the whole, the draft Code, although of course not perfect, constituted a good basis for the Commission's work. It might be useful to amend the title of the Code to read "Code of crimes against universal peace and humanity". However, the main problem for the Commission was the harmonization of domestic and international criminal law. In that connection, it might be useful to amend the definition contained in article 1 to read "The crimes defined in this Code in accordance with international law and general principles of law constitute crimes against the peace and security of mankind". Furthermore, the first sentence of article 2 was too strong, and perhaps incorrect, and should be omitted. The correlation between domestic and international law must be made clear and the principle of *nulla poena sine lege* firmly established.

The meeting rose at 11.35 a.m.

2381st MEETING

Friday, 5 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO
later: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,[2] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. RAZAFINDRALAMBO said that the thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466) was a worthy successor to the previous reports and a model of conciseness and precision.

2. Speaking first of the thoughts prompted by his reading of the report, he joined the Special Rapporteur in deploring the fact that so few Governments had made known their views on the draft Code adopted on first reading. Still more worrying was the fact that no African or Asian country had done so. Those Governments that had remained silent would thus be ill advised to express surprise that, despite their countries' accession to sovereignty, the role historically played by the major countries, particularly of Europe, in originating and developing international law continued to be predominant, as, for example, in the case of the attitude towards the crime of colonial domination or the crime of apartheid. At all events, the Commission must take the fullest account of the developments that had taken place in recent years, namely, of the decisive contribution of the Security Council to the defence of human rights through the establishment of the International Tribunal for the former Yugoslavia[3] and the International Tribunal for Rwanda,[4]

[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 ... 1995*, vol. II (Part One).

[3] See 2379th meeting, footnote 5.

[4] Ibid., footnote 11.