Document:-
A/CN.4/SR.2300

Summary record of the 2300th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

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

Copyright © United Nations

Nations in 1995, as a contribution both to the anniversary celebrations and to the United Nations Decade of International Law.[12]

39. The CHAIRMAN said that the proposal to rename the Working Group was an important one and deserved serious consideration.

The meeting rose at 11.40 a.m.

[12] Proclaimed by the General Assembly in its resolution 44/23.

2300th MEETING

Tuesday, 25 May 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Vaclav MIKULKA

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/446, sect.B, A/CN.4/448 and Add.1,[2] A/CN.4/449,[3] A/CN.4/452 and Add.1-3,[4] A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ARANGIO-RUIZ said that, as most of the points he would have raised with respect to the Special Rapporteur's eleventh report (A/CN.4/449) had already been dealt with by other members of the Commission, he would confine himself to just one question on which he wished to express his views directly, in plenary, namely, the question of ad hoc or special criminal courts and of the relationship between that question and the task the General Assembly, in its resolution 47/33, had entrusted to the Commission.

2. At the end of the Second World War, the establishment of an ad hoc tribunal had been the only practical solution: there had been virtually no international political institutions, the matter had called for a speedy solution and the four victorious Powers had been in occupation of the countries from which the accused came. The matter therefore had had to be dealt with by those four Powers, but they had decided to act pursuant to an international legal instrument, the London Agreement.[5] As that Agreement had been concluded between victorious Powers, it had obviously not been possible to secure any participation by the vanquished Powers in the court that had been set up.

3. The dramatic situation which obtained at present in the territory of the former Yugoslavia likewise called for urgent measures, one being the introduction of some machinery to bring to justice any individuals guilty of crimes against humanity. That did not necessarily mean, however, that an ad hoc criminal court should be established: there were at least three reasons for saying so.

4. In the first place, as every lawyer knew, ad hoc courts were not the best method of administering criminal justice. The members of a court set up in response to a particular situation might be influenced by that situation and by, as it were, an obligation of result. Furthermore, quite apart from the very serious risk of a lack of objectivity and impartiality, ad hoc or special criminal courts were essentially instruments used by despotic regimes. It would set a bad example if the international community were to resort to such means and would not augur well for respect for human rights and the rule of law at the national level.

5. Secondly, while the perpetrators of such abhorrent acts should, of course, be prevented from pursuing their activities as a matter of urgency, the choice of the ad hoc solution would not be enough to have that deterrent effect. In any event, it would take some time to set up a court, even an ephemeral one. What operated as a deterrent was the clearly proclaimed intention of the General Assembly and the Security Council to investigate those crimes and prosecute the persons responsible and they already knew what they could expect from the international community. There was therefore no absolute necessity for the United Nations to set up institutions which might not be unimpeachable from the legal standpoint.

6. Thirdly, those who favoured an ad hoc court apparently considered that such a body would be established by virtue not of a multilateral convention adopted under United Nations auspices, for that, it was claimed, would take too long, but of a decision of the Security Council. Such a procedure was, however, even less in keeping with the fundamental principles of criminal law. Indeed, it was not at all clear under which express or implied provisions of the Charter of the United Nations the Security Council would be empowered to set up a criminal court and define its task. Those who would have to collect the evidence and decide on the criminal responsibility of the accused would have sufficient difficulty in performing that task without having, in addition, to deal with challenges to the constitutional legitimacy of the whole operation. The position would of course be differ-

[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... 1993*, vol. II (Part One).

[3] Ibid.

[4] Ibid.

[5] London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

ent if the Security Council were engaged in an action against an aggressor under Chapter VII of the Charter of the United Nations. In that case, by analogy with a belligerent State, the Council would be entitled to set up tribunals to try persons arrested for violations of the laws of war. Otherwise, a treaty would, in his view, be indispensable.

7. In order to deal with the problem of urgency, the Commission should reflect on the precise nature of the mandate entrusted to it by the General Assembly in its resolution 47/33, paragraph 6, which was not just to report to the Assembly, but to produce as a matter of priority a draft statute for an international criminal court. The Commission would have already completed that draft had its members not been restricted for too long by a narrow understanding of the obvious implications of the topic of the draft Code of Crimes against the Peace and Security of Mankind. He had repeatedly insisted, in previous sessions, on the obvious inclusion, within the Commission's mandate, of the elaboration of a statute for an international criminal court.

8. Mr. PELLET said that the only general criticism he had to make of the eleventh report of the Special Rapporteur was that it contained no statement of the doctrinal perspective within which it fell. That perspective had, of course, been outlined in the report of the Working Group that the Commission had established at its forty-fourth session[6] and the report itself had been approved by the Commission, the Sixth Committee and the General Assembly. Notwithstanding some positive elements, however, that report had still followed an unduly conventional approach, whereas it should have raised questions as to the task and functions of the court it was proposed to establish before embarking on the drafting of its statute. Although serious and massive violations of humanitarian law and the laws of war were now occurring in several places throughout the world, they were not necessarily of the same kind as the crimes that had grieved the world 50 years earlier, and the conditions in which the perpetrators should be tried were very different. It was now no longer a question of the victors judging the vanquished, but, on the contrary, of preventing the excesses of a "victors' justice". At any rate, that was one of the *raisons d'être* 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 (hereinafter referred to as the international tribunal) which the Security Council had decided to establish[7] and for which the Secretary-General had just submitted a draft statute.[8]

9. Unlike Mr. Arangio-Ruiz, he was a firm supporter of that initiative and was not persuaded by the Special Rapporteur's reference in his commentary to article 8 of the draft statute concerning the "delays" encountered in setting up the court. In point of fact, it had taken only a few months to introduce the idea of the court, to decide on its establishment and to outline its statute in broad terms, whereas it had taken more than 45 years not to create a permanent court. He questioned what the reason was for such speed and efficiency. It was essentially the fact that the court met a specific and clearly defined need. On that point, he had not changed his opinion: a single and monolithic permanent court, designed to take account of widely diverse needs, might very well not meet any of those needs satisfactorily. The Special Rapporteur had, no doubt, introduced into his proposals a measure of flexibility, but it was still not enough. The aim should be, of course, not to create a new Nürnberg Tribunal, but to provide a set of legal mechanisms that would promote respect by States and individuals for the most fundamental principles of international law and to impose penalties for failure to respect those principles. To that end, the best course might be to draw up a model statute for an ad hoc court, possibly with alternatives according to the categories of crimes contemplated; to establish, where appropriate, lists of persons to be members of that court and of the international bodies responsible for investigation and prosecution; perhaps to set up a permanent court for the special case of drug trafficking; and to provide the necessary mechanisms to assist States in applying international criminal law, including a judicial body to give a preliminary ruling on *renvois* by national courts, with a view to harmonizing national case-law.

10. The Commission and the General Assembly, however, adhered to the old, and highly questionable, postulate of the necessary parallelism between international and internal law, with the result that the Commission now had to draw up a draft statute for an international criminal court. It was from that perspective, which he regretted, but to which he could not object, that the Special Rapporteur had identified the main problems involved in the creation of such a court and had proposed a possible solution in each case.

11. The first major set of problems concerned the institution as a whole. The Special Rapporteur had been right to call the court "criminal" and not penal, for what was at issue were indeed crimes under international law. Had it been otherwise, the national courts would have sufficed. Also, if there had to be an international criminal court, it would be advisable for it to operate within the framework of the United Nations, even though, contrary to what the Special Rapporteur apparently believed, an independent court, created under a treaty and administered by the States parties to that treaty, was highly conceivable. If status as a United Nations organ was preferable, it was because it would facilitate the operation of the court and, in particular, its financing and the statute would enhance its moral authority.

12. That approach, which he endorsed, raised the fundamental problem of the method of creation of the court. If it was to be an organ of the United Nations, its creation would require either an amendment of the Charter of the United Nations, which did not seem very likely, or a resolution of the General Assembly or the Security Council (Arts. 22 and 29 of the Charter, respectively). Its joint creation, under similar resolutions from the two bodies, would be the best solution and there was nothing to prevent that under the terms of Articles 10 and 24 of the Charter. If that solution were not adopted, it would then be necessary to fall back on a treaty, in which event the court would no longer be an "organ of the United

[6] See *Yearbook... 1992*, vol. II (Part Two), document A/47/10, annex.

[7] See Security Council resolution 808 (1993) of 22 February 1993.

[8] Document S/25704, annex.

Nations". It would then be an organ that cooperated with the United Nations, but was composed of and controlled by the States parties to its statute. Apart from the material problems that situation would raise, the second solution would divest the court of its universal character when it claimed to sit in judgement on behalf of mankind.

13. The second major category of problems raised by the establishment of an international criminal court was that of jurisdiction and applicable law. On that most important and most difficult question, he did not endorse the choices made by the Special Rapporteur and, in particular, article 4 of the proposed draft statute dealing with applicable law. The draft statute of the international tribunal[9] did not include any article on that point and confined itself to defining the crimes to be prosecuted. That would be the wisest course to adopt. In any case, it was essential not to refer by name to any convention, a procedure whose drawbacks were described in the report of the Committee of French Jurists.[10] He was therefore of the opinion that article 4 should be deleted and replaced by one or more articles listing and briefly defining the punishable crimes. That article or set of articles would, as it were, define the "maximum" jurisdiction of the court, which all States would not necessarily be required to accept in its entirety. It was quite possible that States might be invited to indicate the crimes or categories of crimes in respect of which they accepted the jurisdiction of the court, or those in respect of which they rejected it. In accepting the jurisdiction of the court, States would also be free to say whether they understood that jurisdiction to be exclusive or concurrent with that of national courts. In practice, such a system would probably have the same results as might be expected of the application of article 5, paragraphs 3 and 4, as proposed by the Special Rapporteur.

14. With regard to the problem of jurisdiction *ratione personae*, he saw no reason why the jurisdiction of the court should be made subject to the agreement of two States, that of which the accused was a national and that in whose territory the crime had been committed. It should be enough for the State complaining of a crime to express the wish that its perpetrator should be brought before the court, which would obviously be free to institute proceedings or not to do so.

15. Judgement by default was a serious problem, in connection with which the Special Rapporteur was right to say in his commentary to article 27 that the solution of not permitting proceedings by default "would be liable to paralyse the work of the court". That might well turn out to be the case of the international tribunal if the Secretary-General's draft was not amended on that point. The court should at least be allowed to issue an international arrest warrant in the event of the non-appearance of the accused, if only because of the arrest warrant's deterrent effect, and to publicize the indictment. The position adopted by most States on the problem of the jurisdiction of the international tribunal was rather disturbing in that regard because, unless it was at least agreed that the indictment should be made public, there was a risk—whether the court was an ad hoc or a permanent one—of setting up an illusory court with no means of carrying out the task entrusted to it, and that would probably discredit the very idea of an international criminal court for quite some time.

16. The provisions proposed by the Special Rapporteur on the composition and functioning of the court called for many comments, but they related to points of detail. He would simply say that the concern for flexibility that had guided the Special Rapporteur could be taken much further. The question of hearings would also call for comments that were only of minor importance.

17. Turning to two questions which were, in his view, much more important, namely, prosecution and the rules applicable to investigation and penalties, he said that, as far as the first was concerned, he was completely opposed to the system proposed by the Special Rapporteur in alternative A of article 25 (Prosecution), which made the State which brought a complaint before the court responsible for conducting the prosecution. He did, of course, share the "general concern to establish a small body that would not be too costly", as referred to by the Special Rapporteur in his commentary to article 25, but the concern to save money would not justify neglecting the most fundamental principles of the neutrality and impartiality of the courts. The existence of a "filter" between prosecution and judgement would, if anything, be even more essential in an international than in a national context. On the contrary, States and, possibly, international organizations, as well as non-governmental organizations or some of them, should be free to bring cases before the court. In that case, however, applications for prosecution would have to be reviewed by an impartial body—a prosecutor or, better still, a collegiate body—that would be responsible both for instituting proceedings, where necessary, and for investigating the case. Otherwise, any type of abuse might be possible.

18. As to the rules applicable to investigation and penalties, in particular, the law applicable to certain aspects of the investigation dealt with in article 26 and the penalties referred to in article 34, he was sceptical about the Special Rapporteur's solution of referring to national systems of criminal law. The court being envisaged was an international court which would be called upon to try, on the basis of international law, individuals accused of having committed international crimes. Why then refer to a national law, whatever it might be? True, as the Special Rapporteur pointed out in his commentary to article 34, the principle *nulla poena sine lege* required that provision be made for the penalties imposed upon a guilty person before the incriminating acts had been committed. But the result would be the same if the statute itself laid down the applicable penalties, without, moreover, going into too much detail: it would be enough for the statute to establish the general framework, such as imprisonment, but certainly not the death penalty, leaving it to the court to decide for how long. To his knowledge, there was no rigid scale of penalties in States and the courts always had some measure of discretion.

19. What was true of the bringing of the charge was also true of penalties: the principles *nullum crimen sine lege* and *nulla poena sine lege* had to be respected, but they would be if both the crimes and the penalties were provided for in the statute. Any other solution would, in

[9] Ibid.

[10] Document S/25266, para. 61 (*b*).

his view, be incompatible with the international character of the court and, in that connection, he quoted the position adopted by the Committee of French Jurists in paragraph 52 of the report mentioned in paragraph 13 above: "... the essential starting point would seem to be the international character both of the crimes themselves and the institution which will be entrusted with the task of judging them. Accordingly . . . it is unthinkable that the Tribunal should apply, both as regards procedure and as regards law, national rules that are specific to a given State or States".[11]

20. In the same context, he requested the Special Rapporteur to clarify the provision in article 28, paragraph 2 (*b*), stating that "The accused does not enjoy immunity from prosecution". It seemed to him that under international law, no one was exempt from prosecution if he had committed an international crime, especially a crime against the peace and security of mankind.

21. The proposal to set up a working group on a draft statute for the court would be the best way of complying with the General Assembly's instructions, whatever reservations he might continue to have as to their merits.

22. Mr. AL-BAHARNA said that he welcomed the draft statute proposed by the Special Rapporteur, but was not sure, in view of the topic's grave political significance, whether the time for such a draft had come. It was true that the Commission had already discussed the topic, without, however, reaching a consensus on the core elements of the statute, and that recent events in the Balkans, and especially the genocidal acts perpetrated there, demonstrated the need for a machinery for the trial of international crimes.

23. As a general comment, he noted that the draft statute included several provisions which were somewhat tangential to the actual machinery of the statute. For example, articles 20 (Solemn declaration), 21 (Allowances, emoluments and salaries) and 32 (Minutes of hearings), could best be included in the rules of the court. In connection with articles 12 (Appointment of judges) and 17 (Loss of office), he considered that the proposed system was not a sufficient guarantee of the independence and impartiality of the judiciary—and those were essential requirements which should be enshrined in the statute of the court.

24. As to some of the salient features of the draft, one of the first points to be considered was whether the court should be a judicial organ of the United Nations, as proposed in article 2. The Working Group on the question of an international criminal jurisdiction had stated in paragraph 76 of its report[12] that: "In the first phase, at least, it is not necessary to seek to do this [associate the court with the United Nations] by formally incorporating the court within the United Nations structure". While he did not share that view, he would have liked the alternatives to that proposed by the Special Rapporteur to be put before the Commission, thus enabling it to choose advisedly. He personally would prefer a strong link between the United Nations and the court; the court should be an instrument of the United Nations, if not one of its organs. He would come back to that point later.

25. Bearing in mind the need for cost-effectiveness, the Special Rapporteur proposed in alternative A of article 25 (Prosecution) that the State which brought a complaint before the court should assume responsibility for conducting the prosecution. That proposal would, however, defeat the purpose of establishing an international criminal court because States might be influenced by considerations of political expediency rather than of justice in prosecuting offenders. Notwithstanding the cost factor, he preferred the "more classic" procedure proposed in alternative B of article 25, which entrusted prosecutions to a prosecutor general.

26. As to the nature and character of the court, the Working Group had recommended in paragraph 46 of its report that "a court should not be a full-time body, but an established structure which can be called into operation when required". The Special Rapporteur proposed in article 12 (Appointment of judges) that judges should be appointed by the States parties to the statute. While such a procedure might be suitable for an institution like the Permanent Court of Arbitration, he doubted whether it was apt for an international criminal court, even if the latter were not a full-time body. He therefore suggested that the Commission should consider the alternative of judges being elected by the General Assembly and the Security Council or only by the General Assembly. The elective process would contribute to the independence and impartiality of the judiciary while strengthening the links between the United Nations and the court.

27. Noting that, in paragraph 3 of article 15 (Composition of a chamber of the court), the Special Rapporteur proposed that "The President or, in his place, the Vice-President should select the judges to sit in the chambers of the court from the list referred to in article 12", he found that such power would be excessive and somewhat undemocratic, since, in the scheme of things, the court would come into being only after the President had exercised that power. In that context, it should be recalled that the Working Group had suggested in paragraph 50 of its report that "when a court was required to be constituted, the bureau would choose five judges to constitute the court"; and, furthermore, that in Article 26 of the Statute of the International Court of Justice, paragraph 2 provided that "the number of judges to constitute (. . .) a chamber shall be determined by the Court with the approval of the parties". Those examples might be useful in broadening the basis of article 15, paragraph 3, of the draft statute. Incidentally, a nine-member chamber would be too large and unwieldy; five judges, as recommended in the Working Group's proposal, would be better.

28. The Special Rapporteur admitted to taking a "restrictive" view of the applicable law in proposing article 4 (Applicable law), which read: "The court shall apply international conventions and agreements relevant to the crimes within its jurisdiction (as well as general principles of law and custom)", adding in the commentary to that article that it had been his intention "to remain faithful to the Working Group". However, the Special Rapporteur did not appear to have taken into account the Working Group's suggestion in paragraph 109 of its report that "it may be necessary to add references to other

[11] Ibid., para. 52.

[12] See footnote 6 above.

sources such as national law, as well as to the secondary law enacted by organs of international organizations, in particular the United Nations . . .". He would like the Commission to broaden the sources of applicable law in conformity with the Working Group's recommendation and, in any case, considered that the brackets in article 4 should be removed.

29. Article 5 (Jurisdiction) was undoubtedly the most important. The Working Group stated in paragraph 4 (*d*) of its report that the court "should not have compulsory jurisdiction"—a realistic position in the present world situation—and the Special Rapporteur apparently held that view as well. Although he himself agreed with the main thrust of article 5 that the jurisdiction of the court was based on the principle of consent, he recalled that some multilateral treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, conferred jurisdiction on ICJ in respect of disputes arising out of their application. The question was whether such jurisdiction should be vested in the proposed court. If the answer was affirmative, a new provision recognizing the jurisdiction of the court on the basis of pre-existing multilateral conventions should be added to article 5.

30. In the introduction to the report, the Special Rapporteur also stated that "the jurisdiction of the court is not exclusive, but concurrent, each State being capable either to judge itself or to relegate a defendant to the court". That comment was in keeping with the principle that jurisdiction was based on consent, but he was afraid that it was likely to result in confusion, if not in discord. It meant that the same international crime would be tried differently depending on whether it was brought before a national court or referred to the international criminal court, owing to the application of varying procedures and penalties. The Commission should therefore consider devising a method to minimize the detrimental effects of the dual system for the trial of international crimes. The ideal would, of course, be to create machinery for exclusive international criminal jurisdiction. Even if that solution was not practicable for all international crimes, it should exist at least in respect of aggression, genocide, war crimes and apartheid.

31. Article 28 (Handing over an accused person to the court) failed to provide a solution in cases where an accused person had fled the territory of the complainant State. In his commentary to the article, the Special Rapporteur stated that the complainant State should obtain the extradition of the accused, but that was not a satisfactory position. The Commission should consider providing for the obligatory handing over of the accused in cases brought before the court. He agreed with the Special Rapporteur, as stated in the commentary, that the court would not be competent to conclude extradition agreements, but it could be authorized by its statute to request the Security Council to secure the surrender of the accused.

32. The Special Rapporteur proposed in article 34 (Penalties) that the court could, pending the adoption of an international criminal code, apply the penalties provided for by the criminal law of the State of the perpetrator, of the complainant State or of the State where the crime had been committed. While that solution was in principle in keeping with the recommendation of the Working Group that sentencing should be based on the applicable national law, it was far from perfect because it did not indicate what particular legal system was to be chosen and how. As penalties were a core aspect of any criminal law, a more satisfactory provision than article 34 was called for. He had mixed feelings about the words in brackets in article 34: "[However, the death penalty shall not be applicable.]". While he would like the draft statute to adopt a progressive approach to capital punishment, he was sceptical about including provisions that might work against broad acceptance of the statute. It might be more prudent to leave out the words in brackets.

33. With regard to remedies, the Special Rapporteur proposed two alternative texts for article 35, the first dealing only with revision and the second with appeal and revision. As the Special Rapporteur noted in his commentary to that article, the opinion of the Commission on the subject was divided. Since the question of appeal and revision was related to the issue of jurisdiction, however, the Commission could not consider the possibility of appellate jurisdiction until it had solved the problem of jurisdiction. He therefore suggested that the Commission should discuss article 35 only after it had decided the issue of jurisdiction. The Nürnberg precedent declaring the Tribunal's judgement as final was not relevant in the present case.

34. Mr. ROSENSTOCK said that failure to respond to Mr. Arangio-Ruiz's comments on the establishment of an international tribunal should not be interpreted as agreement or disagreement with those comments. Rather, it should be construed as a desire not to distract the Commission from the task before it by venturing to comment at the present stage on matters that were being considered by another fully competent forum, namely, the Security Council. As was clear from the report of the Secretary-General,[13] in creating an ad hoc tribunal, the Security Council was acting within its mandate under the Charter to respond appropriately to a perceived need.

35. Mr. THIAM (Special Rapporteur), replying to a comment by Mr. Pellet, said that, by indicating in article 28 that a State requested to hand over an accused person to the court must ensure that "the accused does not enjoy immunity from prosecution", he had merely been referring to a conclusion reached by the Working Group. Such a provision was not at all unusual: there were persons such as diplomats who benefited from immunity from prosecution and who could not be prosecuted in the country to which they were accredited, but who could be returned to their country of origin for prosecution. If a diplomat enjoyed immunity from prosecution, he could not be arrested and handed over to the court. The advisability of the provision might be open to question, but the provision itself was perfectly understandable. Similarly, if the court requested a person's transfer, the national judicial authorities first had to ascertain that he had not already been tried.

36. Mr. KOROMA said that he did not see why, as Mr. Pellet had said, a permanent court would not play the same role as an ad hoc tribunal such as the one proposed

[13] See footnote 8 above.

in the case of the former Yugoslavia. He himself thought that a permanent court might fill the gaps left by an ad hoc court and meet very specific needs. Mr. Pellet had also been surprised that an international court might rely on national laws to sentence persons responsible for international crimes. Where international instruments could not be invoked to try the perpetrator of a particularly serious international crime, however, it was quite normal to refer to the criminal law of the State of which he was a national. Contrary to what Mr. Pellet had said, an international criminal court would not duplicate the efforts of existing bodies responsible for applying international instruments because it would try only the most serious crimes. The establishment of the court would thus not necessarily lead to the disappearance of such bodies as the Human Rights Committee, which would continue to be useful. Although it was true that the proposed international criminal court must not be a replica of the Nürnberg Tribunal, it was also true that some of the Nürnberg principles[14] remained valid and that the Commission could rely on them in elaborating the Code of Crimes against the Peace and Security of Mankind.

37. Mr. Sreenivasa RAO said he was aware that, as other members of the Commission had pointed out, the general debate on the establishment of an international criminal court was now finished and it was time to move on to specific proposals. That was the task of the Working Group and the Commission would in due course consider the results of its efforts. He nevertheless wished to make a few comments on some general ideas which had been expressed by a number of speakers, including Mr. Pellet, Mr. Yamada and Mr. Calero Rodrigues, and with which he fully agreed.

38. Provision should be made for a certain amount of flexibility in the manner in which the court was to be set up so that most States could become parties to the statute and still have an option to express certain reservations. The role of the prosecuting authority was a very important element. The Prosecutor could serve as a bridge between the court and the Security Council, particularly in cases of aggression, so that the court should not be used to bypass a potentially difficult political situation.

39. The relationship between national jurisdiction and international jurisdiction was a vital matter that must be considered very carefully. The inherent jurisdiction of States when crimes were committed in their territories was a fundamental principle that must not be undermined. The need to give precedence to territorial jurisdiction in a wide range of offences could not be underestimated, even in the process of establishing a permanent international court. At all events, that was the best solution in the interim period until the permanent court had become an acceptable institution with a well-defined structure and a well-defined jurisdiction of its own. The existing system, which, despite its imperfections, had proven its usefulness, should not be done away with and replaced by an institution that would inevitably have to evolve over time. On the contrary, the old system must be preserved, but that did not preclude building another system, which, once solidly established, would one day supplant the earlier institution. That was an important point that had not received the attention it deserved.

40. He agreed with the members of the Commission who had emphasized the need for references to national law where there were no established norms and principles in international law relevant to a particular case. National law was the standard that should be applied, particularly in the case of penalties, because none of the international conventions to which reference might be made provided for penalties. The need to apply that principle could not be overemphasized.

41. In conclusion, he pointed out once again that, while a general debate should certainly not be reopened at the present stage, the members of the Commission must be free to state and exchange general views, either in plenary or in the Working Group, because the question of the establishment of an international criminal court raised a great many concerns, of which not all had yet been expressed. The purpose of the exercise was, after all, to establish a system that took account of different cultural conceptions, backgrounds and needs so as to ensure its impartiality and objectivity and respect for natural justice.

42. The CHAIRMAN, speaking as a member of the Commission, said that the eleventh report of the Special Rapporteur should enable the Commission to make considerable progress in drafting the statute of the future international criminal court. A reading of that report and of the report by the Working Group[15] showed how important it was to preserve the judicial guarantees enjoyed by any person accused of a crime. Establishing the court by treaty should be an adequate means of giving it the necessary strong foundation it would need. As Mr. Pellet had pointed out, it was not easy to make a United Nations body of a court set up by treaty, but it was nevertheless important for the international court to be linked to the United Nations in one way or another, so that it would represent the international community as a whole and enjoy the same prestige and authority as the United Nations.

43. With regard to the question of jurisdiction, including jurisdiction *ratione personae*, he said that, while he endorsed the principle of jurisdiction limited to individuals, he did not agree with the idea that the court's jurisdiction should be subordinated to the agreement of the State of which the individual was a national and of the State in whose territory the crime had been committed. The court should be able to exercise its jurisdiction in two ways: either in the presence of the accused and with his participation, or by default. It was obvious that, in the first case, the agreement of the State directly concerned, namely, the State that was handing the accused over to the court, would be necessary, and that would limit the court's freedom of action. The court must therefore be empowered to judge by default; in view of the moral and legal authority it would have, that would enable it to reach decisions that would have a definite political weight. It would also have the advantage of bringing to the attention of world public opinion facts of which it had previously had only partial knowledge. In

[14] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (see *Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127). Text reproduced in *Yearbook... 1985*, vol. II (Part Two), para. 45.

[15] See footnote 6 above.

order to avoid any conflict with the provisions of certain international instruments, particularly the International Covenant on Civil and Political Rights, an accused person being tried before the court must be given all the necessary judicial guarantees. It might also be necessary to foresee the possibility of not automatically applying the penalty imposed if the accused subsequently agreed to appear before the court. The sentence could then be reviewed in his presence and confirmed or rejected, as appropriate. Such a system that did not require the agreement of any given State would help to enhance the court's effectiveness and its authority in the eyes of the public.

44. He endorsed article 8 on the permanent nature of the court's jurisdiction but did not agree with the composition of the court as proposed by the Special Rapporteur. In his view, the court should be made up of only a small number of judges—nine or eleven—who would be appointed by the General Assembly rather than by States and who would have no permanent function, but would be convened by the President. Only the officers of the court would operate on a permanent basis: they would consist of the President and the Vice-President(s), to be elected by the panel of judges, as well as the Registrar and the Prosecutor General, and would be assisted by a small staff.

45. Concerning the prosecuting authority, he preferred alternative B of article 25. There must be a prosecutor representing the international community, who would act entirely independently and beyond any political considerations. The States concerned also had to be able to intervene in the criminal procedure, as provided in article 24 (Intervention).

46. Speaking as Chairman, he recalled that Mr. Yankov (2299th meeting) had proposed that, in line with paragraph 6 of General Assembly resolution 47/33, the Working Group on the question of an international criminal jurisdiction should henceforth be called the Working Group on a draft statute for an international criminal court. If he heard no objection, he would take it that the Commission adopted that proposal.

It was so decided.

Mr. Mikulka took the Chair.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/446, sect. D, A/CN.4/450,[16] A/CN.4/L.487)

[Agenda item 5]

Ninth report of the Special Rapporteur

47. Mr. BARBOZA (Special Rapporteur) introduced his ninth report (A/CN.4/450) which contained the third version of a set of draft articles on prevention. He recalled that some aspects of the question had already been dealt with in the fifth, sixth, seventh and eighth reports.[17]

48. The introduction to the ninth report, made up of sections A and B, dealt with the mandate of the Special Rapporteur and the nature of obligations of prevention respectively. The Commission had assigned the Special Rapporteur a very clear mandate: to confine his study to activities involving risk, namely, activities which might cause transboundary harm as a result of accidents due to a loss of control, and to start with the articles on obligations of prevention. The question of activities "having harmful effects", or, in other words, which caused transboundary harm in their normal operation, would be discussed after the completion of the work on activities involving risk.

49. In section B of the introduction, he dealt with the main features of the obligations of prevention, defined essentially as obligations of due diligence imposed on the State; that meant that the State must make an effort in good faith to prevent any transboundary harm. The State would thus be fulfilling its obligation of vigilance if it applied reasonable administrative measures to ensure that the precautions imposed by its law on operators were observed.

50. The articles proposed in the ninth report, with the exception of article 20 *bis* (Non-transference of risk or harm), had all originated in the eighth report because they were based on the nine articles that had been placed in the annex on non-compulsory rules.

51. In the previous reports, the chapter on "prevention" had come immediately after article 10, that is, after the articles that had been referred to the Drafting Committee.[18] He considered that those first 10 articles were not affected by the directive adopted by the Commission at its forty-fourth session on the recommendation of the Working Group[19] and could thus apply without modification to activities involving risk. In the current state of affairs and subject to the opinion of the Drafting Committee, the articles on prevention would therefore begin with article 11.

52. The presentation adopted in the ninth report could serve as a starting-point for drafting new articles. Each of the articles that had been placed in the annex in the eighth report had been assigned to a section, at the head of which the text of that article was transcribed and amended where necessary to purge references to activities having harmful effects. The comments made during the debate in the Commission at its previous session and in the Sixth Committee, arguments contained in earlier reports and excerpts of international instruments and ar-

[16] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[17] The four previous reports of the Special Rapporteur are reproduced as follows:

Fifth report: *Yearbook... 1989*, vol. II (Part One), p. 131, document A/CN.4/423;

Sixth report: *Yearbook... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1;

Seventh report: *Yearbook... 1991*, vol. II (Part One), p. 71, document A/CN.4/437;

Eighth report: *Yearbook... 1992*, vol. II (Part One), document A/CN.4/443.

[18] For texts and summary of discussion, see *Yearbook... 1988*, vol. II (Part Two), pp. 9 *et seq.* For the revised articles proposed by the Special Rapporteur, which were reduced to nine, see *Yearbook... 1989*, vol. II (Part Two), p. 84, para. 311. Further changes to some of those articles were proposed by the Special Rapporteur in his sixth report, see *Yearbook... 1990*, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add.1; for the text of the proposed articles, ibid., pp. 105-109.

[19] See *Yearbook... 1992*, vol. II (Part Two), p. 51, para. 349.

ticles of doctrine underpinned the texts of the new, renumbered articles at the end of each of the sections. The new instruments cited included the Convention on the Transboundary Effects of Industrial Accidents, the Convention on Environmental Impact Assessment in a Transboundary Context and the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,[20] which dealt mainly with States' obligations of prevention. The Rio Declaration on Environment and Development[21] was also quoted in support of some of the new provisions.

53. Article I of the annex (Preventive measures), into which a text on pre-existing activities was incorporated, had been split into four and renumbered as articles 11 to 14. Article II (Notification and information) had been replaced by articles 15 and 16. Article III (National security and industrial secrets) had become article 17. Articles IV and V were not dealt with in the ninth report, as they related to activities with harmful effects. Article VI (Activities involving risk: consultations on a regime) had become article 18 after undergoing slight modifications. Article VII (Initiative by the affected State) had become article 19 (Rights of the State presumed to be affected); apart from several drafting changes, its content had not been altered.

54. He had intentionally omitted article VIII of the annex (Settlement of disputes). The settlement of disputes could relate to two types of situations. When disputes arose during negotiations, they were usually the result of diverging interpretations of facts or consequences of the activity in question and they could be rapidly settled by fact-finding experts or commissions. In such cases and given the nature of the questions involved, a non-binding procedure of that type might be acceptable to States. As far as the interpretation or application of articles was concerned, however, Governments were likely to be reluctant to accept third-party settlement. He had therefore preferred to postpone the consideration of the first type of dispute until he had submitted his proposals on a general provision for the settlement of disputes.

55. Article IX of the annex (Factors involved in a balance of interests) had been reproduced unchanged as article 20, pending the Commission's decision on where it should be inserted. Article 20 *bis* (Non-transference of risk or harm) could either be placed in the chapter on principles or left in the one on prevention, to which it primarily related.

56. Lastly, he had focused on the "polluter pays" principle, which had not yet been considered in the treatment of the topic. On reflection, he believed that the Commission should examine the subject later, in the context of the chapter on principles. Unlike the principle of the non-transference of risk or harm, which dealt mainly with measures of prevention, the "polluter pays" principle had gradually expanded beyond the framework of prevention to focus also on costs, for example those incurred in connection with compensation.

57. In view of the opinions expressed in the Commission on the very general nature of the chapter on prevention, he believed that the proposed texts, which would be referred to the Drafting Committee at the end of the current debate, were sufficient. Another article which should also go to the Drafting Committee was article 10 (Non-discrimination), the provisions of which were covered in paragraphs 29 and 30 of the sixth report,[22] and which the Commission had accepted without much comment.

58. Mr. KOROMA commended the Special Rapporteur on his clear presentation but said that he was disappointed that, in deciding to focus only on measures of prevention relating to activities involving risk, the Commission had taken a step backwards, whereas, in the seventh report[23] and during the debate in 1989, it had been decided, it seemed to him, that it would continue its consideration of activities having harmful effects. For him, that raised three questions. First, when did activities involving risk become harmful or wrongful? Secondly, where did harmful effects fit into the draft articles, if, as the Special Rapporteur had said, the proposed articles were sufficient for the drafting of a general convention? Thirdly, he wished to know whether the Special Rapporteur had provided for a separate regime on the settlement of disputes for activities having harmful effects. For his part, he did not see how the Special Rapporteur intended to dovetail activities involving risk and activities having harmful effects. For example, how would the principle of the balance of interests governing compensation be applied to activities involving risk if those activities had no harmful effects? Lastly, referring to section B of the introduction of the ninth report, which stated that "the State will not, in principle, be liable for private activities in respect of which it carried out its supervisory obligations" was, in his view, contrary to the general principles of international law and the progressive development of that law.

59. Mr. BARBOZA (Special Rapporteur) said he admitted that the approach adopted in the ninth report was a step backwards to some extent, but, although the Commission had decided, for the time being, to consider only activities involving risk, those were still activities that could cause harm. Consequently, if the Commission first designed a regime of prevention for transboundary harm, it would then have to tackle the problem of liability and mechanisms for bringing that liability into play when harm occurred. In other words, a regime of prevention and liability was to be established that included the obligation of compensation.

60. With regard to section B of the introduction of the report, it was true that, if the State complied with its obligation of prevention by adopting the necessary legislation and by supervising its application in order to prevent accidents that occurred as part of the activity of private operators from causing transboundary harm, it would not in principle be bound by any obligation. In some cases, however, the State might assume subsidiary liability, for example, if the operator or his insurance was unable to produce the funds for making good the

[20] E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

[21] A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 3-8.

[22] See footnote 17 above.

[23] Ibid.

damage caused, as provided for in some conventions in the nuclear field.

61. Mr. PELLET said he disagreed that the Commission had taken a step backwards in deciding to focus on prevention. The debate of the previous year had shown that prevention was the best line of attack for examining the topic. In his ninth report, the Special Rapporteur had systematized the old texts, producing a coherent result. Whether in plenary or in the Drafting Committee, the Commission must confine itself to the approach adopted if it did not want to make the subject incomprehensible once again.

62. Mr. VERESHCHETIN said that he agreed with Mr. Pellet, commended the Special Rapporteur on the quality and clarity of his report and noted that, although the Commission had decided in 1992 to break the subject down into several parts because it was so difficult, that did not mean that each aspect must be considered separately. Focusing at present on preventive measures for activities involving risk did not rule out examining preventive measures relating to activities that could, de facto, have harmful effects, or studying financial liability. At present, however, the Commission must confine itself to prevention and decide, when the time came, whether to continue the discussion in plenary or to refer most of the articles to the Drafting Committee.

63. Mr. THIAM said that, if the topic was not to be confined to prevention, it would be necessary to decide what the next stages would be because it was essential to have an overall plan.

64. Mr. BARBOZA (Special Rapporteur) stressed the need to follow the order of work indicated in the report. The first 10 articles already referred to the Drafting Committee might be looked at again quickly in the light of the Commission's decision to deal only with preventive measures in respect of activities involving risk and perhaps simply propose deletions or amendments. The Drafting Committee should, however, focus primarily on the wording of the articles on prevention. The Commission must in any event take care not to reopen the debate and confine itself for the time being to prevention, reserving the right to take up liability at a later stage, if only to do justice to the title of the topic.

The meeting rose at 1.10 p.m.

2301st MEETING

Friday, 28 May 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,[2] A/CN.4/449,[3] A/CN.4/452 and Add.1-3,[4] A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. THIAM (Special Rapporteur) thanked the members of the Commission for an interesting and instructive discussion, which proved very helpful. In summing-up, he wished to focus on three main points: the relationship between the court and the United Nations; jurisdiction and the applicable law; and the functioning of the court.

2. There was general agreement on the need for a link between the court and the United Nations. Indeed it was hard to see how a court could function in disregard of the Organization. The court would need United Nations logistical support for its administrative functioning, for example in electing judges, and for financial matters. Yet regardless of those material questions, the fact was that the court would have jurisdiction in matters of direct concern to the United Nations, such as war crimes and crimes against the peace and security of mankind. He asked how the court could rule on such questions without taking into account the Charter of the United Nations or the Security Council? Thus, although the Working Group might want to modify the wording of article 2 of the draft statute, some link between the court and the United Nations had to be maintained.

3. His initial proposal in a previous report had been that the applicable law should not be limited to agreements or conventions, but should also include the general principles of law, custom and even, in some cases, national law. The Working Group, however, had concluded that it should be confined to agreements and conventions. He did not agree; in such an area experiencing constant change, the Commission should not favour rigid codification. Some matters were not ripe, and it would be necessary to have recourse to national law. For instance, no appropriate formulation had yet been found for penalties, which varied greatly, depending on the State and the philosophy involved. Again, moral considerations had a great influence in determining what the penalties should be. If the court was to impose penalties and was to respect the principle of *nulla poena sine lege*, it would have to refer to a State's national law when it found that it was faced with a legal vacuum. He had proposed either the law of the State on whose territory the offence had been committed or of the State of which the accused was a national. He had no preference either way, but did not believe that national law could be ruled out systematically. In earlier proposals for a draft statute, it had in fact been envisaged that the court should apply the national law of a State in certain cases. It was gratifying to note that the Working Group had been rethink-

---

[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... 1993*, vol. II (Part One).

[3] Ibid.

[4] Ibid.