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Summary record of the 2255th 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:-
1992, vol. I

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representation of the various legal systems throughout the world. As a general rule, the Drafting Committee would meet twice a week, on Monday and Wednesday afternoons. It could also meet in the mornings if there were no speakers for the plenary meetings.

Planning Group

55. The CHAIRMAN announced that the Planning Group would be chaired by Mr. Calero Rodrigues and the other members would be Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Thiam, Mr. Vargas Carreño and Mr. Yamada.

The meeting rose at 1 p.m.

2255th MEETING

Wednesday, 6 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/442,² A/CN.4/L.469, sect. C, A/CN.4/L.471, A/CN.4/L.475 and Rev.1)

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPporteur (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

1. The CHAIRMAN said that, as decided at the previous meeting, the Commission would concentrate on aspects related to part one of the Special Rapporteur's re-

port (A/CN.4/442), deferring detailed consideration of part two until later in the week.

2. Mr. VERESHCHETIN said that the question of an international criminal jurisdiction could be regarded either as directly linked to that of the draft Code of Crimes against the Peace and Security of Mankind or as having a broader dimension that would include jurisdiction over crimes which in legal doctrine were often termed crimes of an international character. Such crimes normally fell within national jurisdiction. Unfortunately, in the draft Code itself that issue was not fully clarified. The question also had specific practical aspects in that States might be reluctant to surrender part of their sovereign rights in a prosecution involving their own citizens. Recourse to international criminal jurisdiction should be seen as the exception rather than the rule; moreover, it should concern in the main the crimes covered by the draft Code, in view of the risks they entailed for the international legal order as a whole.

3. The international criminal responsibility of individuals in accordance with the norms of international law was one of the forms of responsibility of States for the commission of an international crime, a topic which would have to be addressed in due course in the context of State responsibility. When it referred to the responsibility of individuals, the draft Code was understood to cover crimes in the commission of which the State generally played some role. Individuals committing such crimes must be amenable under the norms of international law, even if they were not liable under those of internal law. However, crimes of an international character, as distinct from international crimes, were basically punishable in accordance with the norms of national law.

4. If a direct link was established between the Code and an international criminal jurisdiction, there would be fewer problems to be solved, but if the Code was not to be backed up by such a court, it would lose most of its significance. Admittedly, it was difficult to imagine that a State which pursued policies of apartheid or genocide or was engaged in mass violations of human rights would be prepared to punish those responsible in its domestic courts. That did not mean the Commission should wait until work on the draft Code was completed before studying the problems raised by the institution of an international criminal court, and in particular those of the applicable law, the penalties to be imposed and the question whether the court's jurisdiction would be exclusive or optional.

5. Crimes of an international character in which responsibility lay with individuals were of great concern to the international community, but suppressing and punishing them would require, first of all, considerable cooperation between States in concluding special conventions and international instruments. As a rule, the competence of the court with respect to such crimes should be optional.

6. Mr. VILLAGRAN KRAMER said that he saw an international criminal court as a means of controlling unilateral actions by countries which had the economic power and the necessary means to impose their will on small countries. His object, therefore, was to avoid the

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

² Reproduced in *Yearbook . . . 1992*, vol. II (Part One).

possibility of ending up with the equation: a code without a court, or a court without a code.

7. From the legal standpoint, it was dangerous to link the court to the draft Code, since it would inevitably lead to an absurd situation in which there could be a court which had no statute yet did have jurisdiction, although over what or whom was not known. Alternatively, a code without a court would merely serve to fill out those chapters of Latin American penal codes that dealt with a range of offences, such as piracy, which fell within national jurisdiction wherever they were committed.

8. The whole question of the Code and the court involved a political decision and a sense of political opportunity. The latter was particularly evident in the cases of General Noriega of Panama and that of Iraq. It had been noted in the Sixth Committee, for example, that as the crisis in Iraq had become more acute, the interest in the draft Code and in a court had increased.

9. It was fitting to recall that, in the 1940s, the founders of the United Nations had been anxious to dispel any feeling of guilt that had arisen, with the institution of the Nürnberg Tribunal, at the violation of the *nullum crimen sine lege* principle. Young lawyers of that era had been keen to see the establishment of a code and judicial machinery with a view to strengthening the law and preventing a recurrence of similar situations. In that connection, the writings of French jurists in the 1940s and 1950s, which had made a significant contribution to the question, merited consideration. It had gradually become apparent, however, that the whole question of creating an international criminal court was highly complex, since it involved the responsibility of those who took the political decisions which violated a rule of law. The whole apparatus of the State was affected and weakened, for the people who had to be punished were people at a high level in the State hierarchy. As Hans Kelsen had observed, it was a characteristic of international law that the State applied penalties unilaterally and, unilaterally, carried out a series of acts designed to correct certain conduct or to establish a special system of penalties. He was thinking not only of reprisals but also of cases involving heads of State such as General Noriega of Panama, who had been taken prisoner by the United States of America and removed to Florida for trial. That was permissible under international law, but not under national law. He was not criticizing the United States Government, but the case was typical of unilateral action by a major Power. There was thus an interesting relationship between the Nürnberg trial and the Noriega case.

10. When the State of Israel had sent its agents to seize criminals in various parts of the world and take them to Israel for trial, without any extradition formalities, no voice had been raised by any of the major Powers in protest, nor—something that was particularly interesting—by any member of the Group of 77, at what could have been a violation of the law. Why was that so? Again, the “*Achille Lauro*”³ case had caused much concern, yet no lawyer had spoken up to say that those responsible should be tried, as indeed they should be.

11. He also had in mind the case of unilateral action by the Government of the United States of America when Libya had been the object of direct reprisals in the form of a bombing raid by United States armed forces on the private sanctuary of the head of State of Libya to teach him a lesson. The Lockerbie incident involving the Pan American Airways aircraft and Libyan intelligence agents showed that there was a whole range of actions by Governments, and criminals, which would sooner or later give rise to unilateral action. The question posed by the Special Rapporteur, therefore, was clear: should the policies of the major and other Powers—those that took unilateral action—set the standard? The maxim *nemo debet esse iudex in propria causa* applied to civil, not criminal, law. The only legal criterion that counted was the quality of the legal systems of the nations that took unilateral action and the extent of their respect for the principles of a fair trial and due process of law. Those guarantees, which General Noriega had enjoyed, could not be offered by all countries and legal systems. The right to a defence was guaranteed selectively in some cases.

12. On a point of terminology, he noted that the Special Rapporteur preferred the French term *droit international pénal*, whereas in Spanish it was customary to use the term *derecho penal internacional*. If necessary, however, the Spanish-speaking members of the Commission would no doubt be able to make the necessary accommodation.

13. His main concern was the kind of court to be established. Apparently, the new trade arrangements between Canada and the United States of America provided not only for arbitration tribunals for the settlement of disputes but also for panels. While he was not quite certain of the precise scope of the concept of a panel in international law, he would point out that General Assembly resolution 44/39 of 4 December 1989, on international criminal responsibility of individuals and entities engaged in illicit trafficking of narcotic drugs across national frontiers used the term “an international criminal court or other international criminal trial mechanism”. Furthermore, the idea had been mooted of setting up a criminal chamber at ICJ, and the same idea was currently being studied in a number of regional bodies, such as the Inter-American Legal Committee.

14. Issues of relevance to the matter had also been considered by the European Court of Human Rights and the Inter-American Court of Human Rights. In the *Velásquez Rodríguez* case,⁴ for instance, the Government of Honduras had been accused of serious human rights violations. In establishing responsibility for the commission by Government agents of serious crimes under Honduran and international law, and in awarding compensation to the victims, the Court had shown that States were prepared, in certain defined areas, to allow investigation and to consent to the imposition of penalties, irrespective, in theory, of the rank of the persons responsible.

³ Italian passenger ship seized in the eastern Mediterranean on 7 October 1985.

⁴ Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C, Decisions and Judgments, No. 4.

15. His response to the mandate conferred on the Commission was extremely positive and he considered that the Special Rapporteur's report was moving in the right direction, namely, towards the establishment of an international criminal court.

16. Mr. JACOVIDES said that the draft Code of Crimes against the Peace and Security of Mankind was important and had taken on added significance in view of recent developments on the world scene. Accordingly, it should have its rightful place in the corpus of current international law. As a complete legal instrument encompassing the three essential elements—crimes, penalties and jurisdiction—it could and should serve the purpose of deterring and punishing any violation of its provisions.

17. It had rightly been decided to consider the two parts of the Special Rapporteur's tenth report in separate stages, which would afford new members of the Commission an opportunity to reflect on the item as a whole. While there was, of course, room for divergent views, it must be borne in mind that the item was not new and should be seen in its proper perspective. A considerable amount of productive work had been done in the Commission and the General Assembly, and much progress had been achieved. The adoption of the draft Code on first reading at the previous session meant that the Commission was well on the way to bringing a major undertaking to fruition. It had also marked a major step forward in the progressive development of international law and would be a highlight of the United Nations Decade of International Law.⁵ No doubt it would be necessary, once the comments and observations of Governments were received, to take a closer look at certain aspects which required re-examination, as was in fact acknowledged in paragraph 173 of the Commission's report on the work of its forty-third session.⁶ For his own part, he considered that, while the Code should be comprehensive, care should also be taken to ensure that it would be lean and would encompass legally definable crimes so as to ensure that it was as acceptable and effective as possible. In other words, since the first reading had been completed there should be no backsliding so far as the substance of the Code was concerned, and the Commission, in its new composition, should look forward not backward. Much remained to be done with regard both to crimes and penalties and also to jurisdiction and that should take the form of constructive additions.

18. He fully sympathized with the Special Rapporteur in his predicament in trying to arrive at a suitable approach to the question of establishing an international criminal jurisdiction. For years the General Assembly had been asked for clear guidance on that point, but the response so far had been less than satisfactory, albeit for understandable reasons. Some delegations in the Assembly held that international developments warranted a much more positive approach, particularly in the aftermath of the Gulf war and in view of the current situation in Libya, and a number of influential voices had been heard to advocate the setting-up of an international

criminal court, for example, that of the Foreign Minister of Germany, Hans-Dietrich Genscher, who, in his statement before the General Assembly at its forty-sixth session, had called for the setting up of an international criminal court with jurisdiction in such cases as crimes against humanity, crimes against peace, genocide, war crimes and crimes against the environment, and those of President Carlos Andrés Pérez, of Venezuela and Nathan Shamuyarira, the Foreign Minister of Zimbabwe, in the context of the summit meeting of the Security Council held on 31 January 1992. Unfortunately, however, no unambiguous mandate had emerged from the debate in the Sixth Committee. The Commission should make a recommendation to the General Assembly to authorize it to proceed with a clear mandate to draft the statute of an international criminal court.

19. It had been argued, both in the Commission and elsewhere, that there could be no Code of Crimes against the Peace and Security of Mankind unless there was an international criminal jurisdiction to administer it. To that double negative, he would respond with a double positive: there should be both a Code—indeed the list of crimes had already been adopted on first reading—and a court, as well as penalties. They were not only desirable but feasible, given the necessary political will. He also agreed with all the points made by the Special Rapporteur in response to possible objections to the establishment of an international criminal court. As in any major and innovative undertaking, there would be difficulties and pitfalls, but it was not beyond the collective capacity of the Special Rapporteur and the Commission to overcome those obstacles.

20. The world was going through a very difficult period in international relations, with trends towards integration in some regions, counter-trends towards disintegration in others, and consequent opportunities and perils. The situation called more than ever before for clarity and predictability in international law. Mr. Bennouna (2254th meeting) had remarked on the need to settle the issue of who could be tried under an international criminal jurisdiction, the State or the individual. There had been considerable divergence of opinion in the early debates on the topic in the Commission, but there seemed to be some agreement that jurisdiction should be confined to individuals as a practical compromise enabling further progress to be made. However, as could be seen from draft article 5 of the Code, adopted in 1991, the prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of any responsibility under international law for an act or omission attributable to it. As correctly pointed out in the commentary, the draft article left intact the international responsibility of the State. That aspect came under the rubric of State responsibility, which would be further discussed in due course. Paragraph (21) of the commentary to article 19 of part 1 of the draft on State responsibility⁷ also pointed out that the punishment of individuals who were organs of the State certainly did not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which were attributed to it in such cases

⁵ Proclaimed by the General Assembly in resolution 44/23 of 17 November 1989.

⁶ *Yearbook . . . 1991*, vol. II (Part Two), chap. IV.

⁷ *Yearbook . . . 1976*, vol. II (Part Two), p. 104.

by reason of the conduct of its organs. The State might thus remain responsible and be unable to exonerate itself from responsibility by invoking the fact that the individuals who had committed the crime had been prosecuted or punished. It could be obliged to make reparation for injury caused by its agents. The point was one which provided a link between the draft Code and the topic of State responsibility.

21. Mr. BOWETT said that there would be little point in having a code without an international criminal court, although it would be theoretically possible for such a court to function without a code: after all, the Nürnberg Tribunal, ICJ and some national courts did not have comprehensive criminal codes. However, a charge brought against an individual would have to identify a specific offence recognized in some instrument of international law.

22. A criminal prosecution would begin with a complaint, lodged either by a State or an international organization. A trial would not automatically follow, since an independent body would have to be established to decide whether the evidence submitted was sufficient to justify bringing the individual to trial. The facts of the case would have to be determined, and the precise nature of the charge. If there was a code, reference would be made to the relevant provision; if not, the offence would have to be identified on the basis of recognized principles of international law, and that might prove to be a more difficult exercise.

23. The Special Rapporteur's report suggested a distinction between crimes over which there would be exclusive jurisdiction and crimes over which jurisdiction would be purely optional. The former category was designed to cover such crimes as genocide, systematic violation of human rights, apartheid, drug trafficking, seizure of aircraft and kidnapping of diplomats or internationally protected persons. Some were already covered in conventions which provided for universal jurisdiction, but it should be asked whether States were likely to surrender their own jurisdiction in relevant instances. Optional jurisdiction would cover all other crimes, but in the absence of a code it would be very difficult to define the crimes falling within that category.

24. The question also arose of the nature of consent to the jurisdiction. His understanding was that all the parties would accept the exclusive jurisdiction of the court, but that optional jurisdiction would be open to a State which was either the State in whose territory the crime had been committed or the State which was the victim, or whose nationals were the victims, of the crime. It seemed curious that the State which had custody of the accused was not among the States which would have to accept optional jurisdiction, since that was, after all, the State that would have to hand over the accused person for trial. In his view, the Commission should strive to achieve the most flexible system possible, one which might incorporate a code in which the different crimes would be categorized in groups and the States becoming parties to the court's statute would be free to accept its jurisdiction in relation to any of the groups identified. States should also be entitled to consent to the jurisdiction on an ad hoc basis.

25. Acquisition of custody of the accused by the court was a simple matter, for the draft provisions required all States parties to the statute to hand over the alleged offender. That would not preclude the need for detailed and complex arrangements with the host State, namely, the State in which the court functioned, for detention of the accused would presumably be by the host State authorities.

26. As to the trial itself, who would bear the burden of the prosecution, and who the defence? Did the accused have the right to choose his own counsel? Were there to be formal guarantees of a fair trial? Most important perhaps, could the court require any State party to the statute to produce vital evidence? Would there be rules governing admissibility, confessions, corroboration and the use of evidence? One simple device might be to adopt the host State's rules in criminal proceedings. In the event of a conviction, what law determined the penalties, and where was the person sentenced to be imprisoned? Presumably, there must be some prior arrangement with the host State. What about civil claims for compensation? It would seem from the draft Code that such claims brought against an accused individual might relate to injury to the complainant State or international organization or to injury to nationals of the complainant State. He had serious doubts about the wisdom of intermingling strictly criminal proceedings against individuals and civil claims for damages. An international court would find such a mixture difficult to handle. If compensation to the actual victim was being considered, criminal courts were familiar with the notion that compensation could be awarded as part of the penalties.

27. As he understood it, the report envisaged a system of appeals from the full court to a chamber. That was a reversal of the normal procedure and might be impractical. As to the composition of the court, he hoped that it would not be a full-time tribunal, for he suspected that the members would be underemployed for many years. Again, some consideration must be given to financing such a body.

28. The tenth report was imaginative and stimulating and had prompted his questions on how such a system would operate in practice. Many difficult issues were involved, and he trusted that the Commission would provide the Special Rapporteur with the guidance needed.

29. Mr. RAZAFINDRALAMBO said that the tenth report, which was characterized by great clarity and precision, unfortunately retained the idea of parallel international and national jurisdictions. The Special Rapporteur appeared to favour an international criminal jurisdiction that was both exclusive and optional, something which presupposed maintaining national jurisdiction in certain areas: that was the most that could be expected at the current time, for States continued to be jealous of their sovereignty.

30. His own preference was for an international criminal jurisdiction which offered a minimum guarantee of impartiality in conflicts of interest between a strong State and a weaker one, especially a developing country. He did not follow the logic of contesting the objectivity of international jurisdiction, since no State questioned the need to resort to such an arrangement. One example

was the general recognition of the value of international arbitration, even though considerable economic interests, and even a State's reputation, might be at stake. The problems of sovereignty raised by the prosecution of crimes were complex, but States had already made concessions regarding sovereignty, particularly in the field of human rights, and there was general agreement that human rights violations were international crimes. The example cited by the Special Rapporteur, the European Court of Human Rights, was pertinent, as was the Human Rights Committee, to which individuals could address complaints of human rights violations by States.

31. He agreed with the conclusions contained in part one of the tenth report. An international criminal jurisdiction must be included in the draft Code: members would recall that the relevant General Assembly resolutions had always linked consideration of the question of an international jurisdiction to the drafting of a code. From the outset, the Commission had taken the view that such an instrument must contain a section on implementation, because otherwise it would be an empty shell. A section of that kind must incorporate an international criminal jurisdiction mechanism which, regardless of its nature, would be directly linked to crimes under the Code.

32. Mr. SHI said that the Special Rapporteur's report gave the Commission much food for thought and helpful guidance.

33. In view of the increasing seriousness of international and transnational crimes, international cooperation in preventing and combating crime was perhaps desirable, but not necessarily feasible. Any attempt to establish an international criminal court would currently meet with insurmountable obstacles, the foremost being State sovereignty, the very foundation of the international community. The establishment of an international criminal court called for the surrender by States of part of their sovereignty, failing which such a court would remain an academic exercise. Yet, at the present stage in international relations, such a surrender of sovereignty was virtually impossible. Previous attempts to establish an international criminal jurisdiction of a permanent nature under the auspices of the United Nations had ended in failure, and previous draft statutes on such a court had been shelved. On several occasions, the Commission had had to request guidance from the General Assembly as to whether a statute for an international criminal court should be prepared in connection with the work on the draft Code of Crimes against the Peace and Security of Mankind. The General Assembly had never replied in definitive and positive terms. Currently, the Commission's mandate on the topic was simply to analyse the issues and explore the feasibility of the establishment of such a court or other international criminal trial mechanism, and not to draft a statute. It was therefore clear that the General Assembly was well aware of the sensitivity, complexity and virtually insuperable obstacles inherent in establishing an international criminal jurisdiction.

34. It had been argued that the trial of major war criminals of the Second World War by the Nürnberg and Tokyo Tribunals amply demonstrated the practicality of establishing ad hoc international tribunals, despite the

rather primitive stage of inter-State relations at that time. Yet the conditions for setting up ad hoc tribunals of that nature no longer existed. The unconditional surrender of the then enemy States and the control of those States under allied military government had placed them at the mercy of the allied Powers.

35. Members of the Commission were aware that, although criminal responsibility was attributed to individuals, States were behind the crimes committed, and the people responsible held high, or even the highest, positions in Government. There had been much talk that the head of State of Iraq should be brought to trial by an international tribunal on charges of having launched a war of aggression. How could Iraq be expected to hand over its own head of State for trial by an international court? One great Power had used armed force against a small State in order to arrest a high government official alleged to be involved in international drug trafficking. Was the use of force against a small State for the purpose of arresting an alleged criminal justified under international law? It must also be remembered that every post-war academic community had criticized the Nürnberg and Tokyo Tribunals, citing the principles *nullum crimen sine lege* and *nulla poena sine lege*.

36. It had also been argued that, with the end of the cold war, the concept of sovereignty was on the wane and conditions were ripe for the establishment of an international criminal court. However, international relations were still very unstable and regional crises and armed conflicts were on the increase. Old alliances might be replaced by new ones and international tensions were also building up. In such circumstances, it was in the interest of States, large and small, strong and weak, rich and poor, to develop friendly relations and to cooperate in all fields of international life on the basis of the sovereign equality of States and the other principles enshrined in the Charter of the United Nations. Any relinquishing of sovereignty by small or medium-sized States might play into the hands of a few big Powers.

37. At the risk of making a political statement, he would add that law could never be separated from politics, for law was always in the service of something. He did not believe in law for the sake of law. A decision recently taken in the Libyan case by ICJ was certainly not an example of law for law's sake, whether one agreed or disagreed with the decision.⁸

38. Mr. ROSENSTOCK said he challenged the view that the law applied by the Nürnberg trials was in some sense *ex post facto*. That would appear to ignore developments in the League of Nations between the wars. No one had had any doubts at the time of the launching of a war of aggression that the international community had already taken a position on the criminal nature of launching such a war. The record should not suggest that the

⁸ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3.* The Court found "that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures."

Commission as a whole shared the view earlier expressed about the Nürnberg trials.

The meeting rose at 12.20 p.m.

2256th MEETING

Thursday, 7 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/442,² A/CN.4/L.469, sect. C, A/CN.4/L.471, A/CN.4/L.475 and Rev.1)

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA, noting that the tenth report (A/CN.4/442) was a continuation of the earlier reports and of the first part of the Commission's work, which had culminated in 1991 with the adoption on first reading of articles 1 to 26, said that, in his view, it was only right that the normative side of the draft Code should go hand in hand with an institution. He was not so sure, however, that consideration of proposals for the establishment of an international criminal court or other international criminal trial mechanism, to borrow the terms of General Assembly resolution 46/54 of 9 December 1991, corresponded to the logic of the Code of Crimes as it had been understood until 1990. There were two possibilities. Either it was a question that touched on the very essence of an international court, in which case the objections referred to in the report could be significant, or else it was a purely technical question, in which event the problem did not arise. The establishment of an international court with responsibility for the application

of the Code simply became a practical matter that could be resolved in the light of the relevant statutory provisions and once the preliminary points of theory had been settled. It was, however, precisely those preliminary points which seemed to cast doubt on the objections referred to in the report; and that was surprising inasmuch as the Commission had already adopted the substance of those preliminary points on first reading.

2. The international situation in recent years had highlighted the need for machinery that could guarantee the rule of law in international relations and recent events had shown that there was a trend towards a curtailment of the influence of sovereignty—the concept on which most of the objections summarized in the tenth report centred. In virtually every international forum, Government representatives advocated the constitution of large groupings, whatever the name they were given—whether community or confederation—and whatever the fate reserved for such proposals. The problem of the restriction of sovereignty therefore did not arise solely in connection with the establishment of an international court for the punishment of crimes against the peace and security of mankind. Moreover, the democratic ideal was becoming increasingly universal and it was not possible at one and the same time to aspire to a law-abiding internal order and to allow States to evade the rule of law in their external conduct. There was no doubt that, on the one hand, the concept of international peace and security, which was a codified concept, and, on the other, that of the peace and security of mankind, which was in the process of being codified, would ultimately merge. Everything that could be done on behalf of mankind—and it was that endeavour which the draft Code and the idea of establishing an international criminal court reflected—was also valid in the case of States. An international criminal court would be a tangible manifestation of the Code. It was therefore necessary and it would be an additional link in the chain of deterrent and repressive machinery already in force at the international level.

3. Mr. IDRIS said that, so far as the progressive development and codification of international law was concerned, it was not possible, no matter how specialized the subject might be, to ignore the prevailing climate of international relations. At the present time, there was an extremely serious and complex crisis which, in the economic field, was marked by growing poverty, mounting unemployment, increasing international debt, collapsing commodity prices and rising protectionist barriers. There was a risk that that state of affairs, which shattered the hopes of a better world for the poor, might be reflected, at the political level, in an era of instability and world imbalance as a result of which conflicts of apocalyptic dimensions would be unleashed. From the legal standpoint, the consequences could be an increasingly politicized understanding of international law and, therefore, more hesitation in its codification. Against that background, it was appropriate to envisage the establishment of an international criminal court, a question which had already been discussed extensively in various forums and the various aspects of which the Commission should now analyse with a view to arriving at some common ground for further work. Also, the political will of Governments was a vital factor without which there could be no concrete results.

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

² Reproduced in *Yearbook* . . . 1992, vol. II (Part One).