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A/CN.4/SR.2256

Summary record of the 2256th 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

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 Mankind[1] (*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.

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[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).

4. In his view, the Code and the court went hand in hand. If the Code of Crimes against the Peace and Security of Mankind came into being, its credibility would depend largely on the existence of some machinery for its implementation, preferably in the form of an international criminal court. The principle of universal jurisdiction was not a satisfactory remedy, first, because it was controversial, secondly, because of its weaknesses in terms of infrastructure and, lastly, because it was politically sensitive for a national court to pass judgement on the conduct of a foreign Government. The establishment of an objective and impartial court would help to advance international criminal law and to secure uniformity in the punishment of international crimes, and that was in the interest of all nations. It would also serve to remedy deficiencies in domestic procedures and extradition policies.

5. There remained other complex questions, such as the composition of the court, its procedure and the means to enforce its sentences. So far as the procedure for submitting complaints was concerned, he, like Mr. Bowett (2255th meeting), considered that an independent body should be entrusted with the verification of all the evidence in a case before it was brought before the court.

6. Mr. ROSENSTOCK said he agreed with the view that, if the Code was not to be an empty shell, it had to be implemented through an international criminal court. However, the Commission should also indicate that the establishment of a court did not necessarily imply the need for a code. Other conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, might serve as a basis for the jurisdiction *ratione materiae* of the court, assuming that certain technical problems could be solved. In that way, it might be possible to put an end to what Mr. Arangio-Ruiz had described as the game of hide-and-seek between the Commission and the General Assembly (2254th meeting).

7. That having been said, he did not necessarily agree with the Special Rapporteur's reasoning in part one of the report. For example, he failed to see why internal pressures to prevent a State from surrendering a criminal to justice would be much less if it were a matter of bringing the criminal before an international criminal court rather than of extraditing him to another State. Many problems would certainly have to be solved before all objections to the establishment of an international court were removed, but the Commission should try to solve them if it wanted the General Assembly to take a decision on the momentous issue before it.

8. He reiterated his support for Mr. Calero Rodrigues' suggestion (2254th meeting) concerning the organization of work, which, with some extra effort and with the help of the secretariat, ought to enable the Commission to complete its task at the forty-fifth session. The Commission might make a start by considering some of the questions identified in part two of the report. During that time, the Special Rapporteur might, with the help of the secretariat, draw up a list of questions which were not touched upon in the report, but which had come up in the course of the debate or had already been raised in the report of the Commission on its 1990 session.[3] Such an orderly process would enable the Commission to illuminate and/or remove a sufficient number of obstacles to the establishment of an international court for the General Assembly to have to take a decision one way or the other on the issue or, failing that, to recognize that the international community was powerless, through lack of political will, to decide the matter.

9. In conclusion, he said that his comments at the preceding meeting on the subject of the Nürnberg trial in no way contradicted what Mr. Shi had said about the very special nature of the situation in 1945 and the need to view the Nürnberg precedent in that context.

10. Mr. MIKULKA said that, in resolution 46/54, the General Assembly did not invite the Commission to consider the idea of an international criminal court as such, but to consider it within the framework of the draft Code and with a view to the implementation of the latter; he therefore feared that some of the Special Rapporteur's proposals, particularly those relating to the law to be applied, might take the Commission beyond the scope of its mandate. With regard to the implementation of the articles adopted on first reading, he (Mr. Mikulka) drew a distinction between, on the one hand, crimes which had been committed by individuals with the consent or on orders of the State and, for that reason, involved State responsibility, and, on the other hand, crimes of an extremely serious nature which had been committed by individuals acting on their own behalf and were often covered by special international conventions. Those two categories of crimes might require different types of punishment. So far as the first category was concerned, the only international experience that could be drawn upon was that of the Nürnberg and Tokyo Tribunals. The punishment of other international crimes was based on the principle of universal jurisdiction.

11. The solution to the problem of penalties would depend on the choice of the mechanism for the implementation of the Code. If universal jurisdiction were adopted, the system of penalties might be based on that provided for in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the International Convention against the Taking of Hostages and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in which States undertook to punish the offences in question by penalties corresponding to their seriousness. That system made it possible to introduce a unifying factor, while taking account of the diversity of penalties in internal law. A unified system of penalties to be incorporated in the draft Code would be required, however, if the implementation of all or part of the Code was to be entrusted to an international criminal court.

12. In setting up a mechanism for the implementation of the Code, the Commission also had to bear in mind the mechanisms already established under several conventions for the punishment of certain categories of international crimes and avoid any contradiction in that regard. He therefore endorsed the view expressed by some

[3] See *Yearbook... 1990*, vol. II (Part Two), paras. 117-157.

members of the Commission at the forty-third session that it might be possible to combine the system of universal jurisdiction with the establishment of an international criminal court. The court would try crimes committed by persons who could not be judged without some evaluation having been made, at the international level, of an act of the State, such as aggression, threat of aggression, intervention, colonial domination or apartheid. The crimes covered in the other articles of the draft Code would come within the jurisdiction of national courts or, in other words, universal jurisdiction. In his view, the jurisdiction of the court, thus circumscribed, should be established *ipso facto* by its statute and should be exclusive and compulsory.

13. With regard to the crime of aggression and the possibility that the court might have to abide by a decision of the Security Council, care should be taken, whatever the solution adopted, to avoid upsetting the balance of competences established by the Charter of the United Nations in the field of international peace and security.

14. The idea of establishing an international criminal court had received valuable encouragement at the latest session of the General Assembly. The years to come would show whether that had been a passing reaction to a particular crisis or a more lasting trend. The Commission should not miss the opportunity to contribute its stone to the common edifice.

15. Mr. FOMBA requested that the 40 or so questions identified in the report of the Commission on its 1990 session[4] should be listed and made available to the Commission in order that the members might refer to specific points and engage in a genuine debate in which different or conflicting points of view could be expressed.

16. Mr. VARGAS CARREÑO said that the fact of defining certain crimes in the Code, which would have the effect of making the definitions part of internal law and applicable by national courts, was in itself a noteworthy contribution to the codification and progressive development of international law.

17. The majority trend was towards the establishment of an international criminal court and he personally was in favour of it, but the Commission had to adopt a pragmatic approach and not lose sight of certain inevitable limitations. For example, at least in the case of crimes such as illicit international trafficking in drugs or the kidnapping of diplomats, States were not prepared to give up the exercise of their sovereignty and the international criminal court should have only subsidiary jurisdiction. Similarly, the competence of the court to review decisions handed down by national courts or to hear appeals against them should be ruled out and the bringing of an action before the court should not be made contingent on the exhaustion of domestic remedies, for the two types of jurisdiction were completely different.

18. A further limitation was that some regional agreements had been concluded for the purpose of punishing systematic violations of human rights and they had their own machinery, such as the European Court of Human Rights and the Inter-American Court of Human Rights. It should also be borne in mind that, under Article 103, the Charter of the United Nations enjoyed constitutional supremacy and that States were required under Articles 25 and 39 of the Charter to abide by a Security Council determination of an act of aggression.

19. Mr. KUSUMA-ATMADJA said he regretted that, in the definitions contained in the draft Code, a distinction had never been made between crimes in which the perpetrator was linked to a State and those in which the perpetrator acted on his own, and that national sovereignty was therefore an obstacle to the implementation of the Code and to action by the international criminal court, even if the two institutions were found desirable. He therefore suggested that the Code should be divided into two parts.

20. For the crimes defined in part one (Aggression, threat of aggression, genocide and war crimes), the international criminal court and the Security Council would have concurrent jurisdiction, although the Security Council would have primary jurisdiction because it was able to react rapidly. In those cases, the jurisdiction of the court might be only optional, its purpose being to punish the perpetrator of the crime personally.

21. For the crimes defined in part two, the court would have concurrent jurisdiction with national courts, the latter having primary jurisdiction and the court subsidiary, but compulsory, jurisdiction. That category of crimes would include the recruitment, use, financing and training of mercenaries, international terrorism, illicit trafficking in narcotic drugs and wilful and severe damage to the environment. The problem of such limited cases as apartheid and systematic or mass violations of human rights would, however, remain.

22. If the Code was taken to mean a set of provisions forming a coherent whole, as was the case in the Roman law countries, he was afraid that its drafting would be laborious, but, if it was taken to mean a body of rules defining material jurisdiction, such rules already existed in conventions, treaties and other international instruments and needed only to be consolidated and codified.

23. If no distinction was made between those two categories of crimes, the problem of national sovereignty would inevitably arise in cases of crimes in which the perpetrator, by his very functions, was indissolubly linked with the State.

24. The Commission did not really need to restrict itself to the crimes enumerated: it could very well add to the list. Bearing in mind Part XII of the United Nations Convention on the Law of the Sea, he proposed that the definition of wilful and severe damage to the environment should be expanded to include damage brought about by the exploitation by a State of resources in its territory in a way that caused severe prejudice to another State. Such an act was surely the responsibility of the State, even if the perpetrator was a natural or legal person. Moreover, it was extremely difficult to regulate that type of problem in a bilateral framework because the State concerned might well disregard the protests of the injured neighbouring State. He would include the wilful misuse of biotechnology in the list of such "technologi-

[4] Ibid.

cal crimes''. The idea of a scientist of one State manipulating the genetic make-up of animals that were then let loose to spread destruction in a neighbouring State was no longer in the realm of science fiction. That would be a personal act falling first within the jurisdiction of the State concerned, but, if the State did not take action, it could come within the concurrent jurisdiction of an international criminal court.

25. In addition to the inductive tradition of Roman law, which was built on concepts, and the empirical tradition of common law, which was based on acts, there was room for the Asian tradition, which regarded law and justice not as an exercise in logic, but as the instrument for achieving the goal of an ideal balance. The Commission thus had a unique opportunity to produce a synthesis of those three traditions.

26. Mr. PELLET, commenting on the mandate given to the Commission in General Assembly resolution 46/54, said that first, unlike the Special Rapporteur, he did not think that the Commission had made its position sufficiently clear on the question in judging the establishment of an international criminal court feasible and desirable. That might well be the Commission's conviction, but it had not yet persuaded the General Assembly, which was still considering the matter and still putting questions to the Commission.

27. Secondly, the General Assembly had once again sent the issue back to the Commission by requesting information to enable it to give the Commission guidance. In fact, the General Assembly was refusing to assume its responsibilities. Accordingly, the Commission should be firm and indicate that, in the absence of instructions from the General Assembly, it did not consider itself able to pursue its consideration of the topic. The alternative would be for the Commission to start, once and for all, on the drafting of the statute of an international criminal court, assuming that article 18, paragraph 1, of its Statute authorized it to do so, which he doubted. He favoured the first alternative because, in order to continue its work, the Commission needed a clear picture. He agreed with other speakers that the Commission must either assume its responsibilities or finally resolve to prevail upon the General Assembly to do likewise by helping the Special Rapporteur draft a very firmly worded chapter for the report of the Commission on the topic.

28. It was thus with a great deal of hesitation that he took the floor in a general debate that had hardly been reflected in the first part of the report under consideration.

29. Concerning the links between the Code and the court, it was possible, as had already been pointed out, to envisage a court without a code or a code without a court or even no code and no court. He personally was in favour of both the Code and the court. Unlike some members of the Commission, however, he did not see the logic of complementarity and believed that, on the contrary, the two things must be separate.

30. With regard to the Code, the draft submitted to the General Assembly had two shortcomings: it did not go far enough and it went too far. It did not go far enough in the sense that the regime applicable to crimes against the peace and security of mankind was treated too vaguely to have any real influence on the decisions of national courts. It went too far, first, because the list of crimes was too long and thus detracted from their particularly monstrous nature and, secondly, because the definition of those crimes repeated controversial definitions that were unacceptable to certain States and had been taken from instruments that differed greatly. A clear, succinct list of exceptionally serious crimes, along with the definitions required for the applicable legal regime, would have been perfectly adequate.

31. He was therefore in favour of a code, but not the draft Code as it stood. If the proposed court was to be linked to the Code, he would have difficulty accepting it. He was not, however, insensitive to Mr. Mikulka's point of view and conceded that General Assembly resolution 46/54 drew a link between the question of the court and that of the Code, but nothing prevented the Commission, in the exercise of its mandate, from voicing an opinion to the contrary.

32. Whatever might have been said, a code without a court would not be useless: a code that was acceptable as to substance might well be applied by national courts and serve as a kind of beacon for them. A court without a code would also not be useless: as had already been said, a number of conventions determined the legal regime for crimes such as genocide or apartheid and the international criminal court could apply them, at least to States parties, just as it could adjudicate on the basis of the general principles of law and international custom.

33. In fact, the real problem seemed to be that of the jurisdiction of the court. As had already been recalled, the State could be discerned behind the individuals whom the court was called upon to try. What was true for many crimes was all the more true for the ''genuine'' crimes against the peace and security of mankind: how could anyone imagine that aggression, genocide, the establishment of an apartheid regime, the maintenance of colonial domination by force or the systematic use of torture as a means of government could be the acts of isolated individuals? Things had to be seen realistically. In such cases, the State would not take part in proceedings against itself by handing over its nationals or by requesting that they should be brought to trial. It was only if the aggressor State was defeated or the apartheid regime dismantled, for example, that an international court could take effective action. That would be rare and it was not certain that a permanent court was necessary: there was always the possibility of recourse to ad hoc bodies, along the lines of the Nürnberg Tribunal.

34. However, the proposed court might serve other purposes entirely. He shared the sentiment of legal outrage created by the kidnapping, trial and sentencing of a foreign head of State—General Noriega—by a great Power. If there had been an international criminal court, matters might perhaps have turned out differently. Similarly, the existence of an international criminal court might have provided an honourable way out for Libya in the Lockerbie affair. France might also have been able to exorcise its old Second World War demons if it had had

the possibility of referring Touvier and other collaborators to a court of that kind.

35. In order to ensure that an international criminal court was useful, however, it would be necessary to abandon the outline that was taking shape, as well as dreams of establishing a permanent Nürnberg-type tribunal. It would be better to concentrate on setting up a court to which States could, on a selective basis, hand over their own nationals and foreigners responsible for crimes to which the principle of universal jurisdiction normally applied, in the latter case with the agreement of the State of which they were nationals. That would be reasonable and a considerable achievement as well, since it offered the only possibility of making progress.

36. In conclusion, he said that, in resolution 46/54, the General Assembly had not asked the Commission to prepare a draft statute of an international criminal court: it had asked it to consider proposals for the establishment of such a court or other international criminal trial mechanism. In fact, there had been few such proposals in the Commission and the Sixth Committee. The Commission, which was not short of time at the current session, could thus, as Mr. Rosenstock had suggested, set up a working group, which, together with the Special Rapporteur, would try to draw up a systematic inventory of the possibilities, without confining itself to the statutory rules of the proposed international criminal court. There were many such possibilities. For example, it might be possible to have observers—active, if necessary—in proceedings before national courts: that would not have been out of place during the trial of General Noriega; nor would it be if Libya decided to bring its nationals accused of terrorism to trial. The possibility might also be considered of an international criminal court which would simply state the law, while national courts conducted the trials and handed down the sentences: that would solve some practical problems and ensure that the sacrosanctity of national sovereignty was upheld. Another possibility was to establish several specialized international courts or to have recourse to ICJ by means of advisory opinions, which might be binding. The fact was that the Commission would not achieve much if it stuck to the Nürnberg model.

37. Mr. CRAWFORD said that he was now in favour of the idea of an international criminal court, whereas he had previously been against it, but what the court would be like still had to be decided.

38. The first point to bear in mind was that the Commission had rightly decided that the court would not have jurisdiction in respect of States. It had also been recalled that jurisdiction in criminal matters normally lay with States themselves: they had at their disposal the constitutional and other machinery to guarantee respect for the rule of law during the investigation and in the conduct of the trial. In the present case, however, legal traditions differed considerably from one country to another and it would be pointless to hope to draft a code of international criminal procedure on the basis of those divergent traditions.

39. For its part, the international criminal court should first and foremost serve as a facility. Its jurisdiction would thus not be compulsory, since it was unreasonable to think that States would agree in advance to recognize its authority. Nor would its jurisdiction be exclusive: national courts would retain their powers in respect of the acts or situations provided for in their domestic legislation.

40. The international criminal court would nevertheless serve a purpose: it would in any case make it possible to avoid the stumbling block of retroactivity and would rule dispassionately in cases involving State officials who had committed State crimes.

41. With regard to the question whether there could be a code without a court, or a court without a code, that depended on the type of code in question. The crimes set out in the current draft were, by virtue of their definition or characteristics, those committed by persons acting as agents of the State. Aggression, threat of aggression, apartheid or international terrorism involved—somewhat paradoxically in the latter case—agents of the State. Colonial domination and the other forms of foreign domination, genocide and systematic or mass violations of human rights were typical of the crimes resulting from the actions of State officials. By definition, foreign intervention must be linked to State conduct. That was not always true of the recruitment, use, financing and training of mercenaries or of wilful and severe damage to the environment. Only one crime was not, by virtue of its specific features, linked to State conduct and that was drug trafficking. Indeed, that crime had no place in the draft Code and, if it were to be added, it would be to meet the request of certain States which were victims of such trafficking and feared for the integrity of their criminal justice system. There was, however, another way to assist them: such crimes could, for example, be brought before a regional court.

42. A problem of legitimacy thus arose where a court of a particular State sought to try an individual implicated in such State crimes. To avoid any accusation of "justice of the victors", as had been seen at the Nürnberg trials, or of "justice of the victims"—two ideas that were equally repellent—the best solution was a criminal trial mechanism rather than a permanent court. The climate was favourable to further reflection within the Commission along those lines.

The meeting rose at 12.50 p.m.

2257th MEETING

Friday, 8 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. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda,