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Summary record of the 2257th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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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,

Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRMAN said that the established pattern of work of the Commission allowed for four morning meetings of the plenary and four afternoon meetings of subsidiary bodies each week. As usual, it would be possible for the Commission to hold 10 meetings during the last week of the session, and the International Law Seminar would be provided with the requisite services. If he heard no objection he would take it that that suggested pattern of work met with the approval of the Commission.

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*)

2. Mr. GÜNEY said that the Special Rapporteur was to be commended for his tenth report (A/CN.4/442), which responded to a complex subject in a spirit of pragmatism and accommodation.

3. Referring to part one of the report, he pointed out that, in the absence of a specific request by the General Assembly to take a decision on the matter, the idea of establishing an international criminal court seemed premature. It was for the Commission to decide not on the desirability, but rather on the feasibility, of establishing such a court or other international mechanism, and it must then state its position within the limits of its advisory functions.

4. Given the well-known reservations of States regarding an international mechanism with exclusive or optional jurisdiction, the Commission must pay heed not only to the legal, but also to the political, implications. Recent initiatives taken by many States had reflected the need to work towards the establishment of an international jurisdiction, but doubts persisted as to its feasibility, because the relevant crimes already came under the peremptory norms of international law, the general rules of international law or the rules laid down in widely accepted multilateral treaties which, in view of the limited cooperation in extraditing those accused, left national institutions and courts with the task of prosecuting and punishing offenders. Despite the risk entailed in modifying the present international procedures, the lack of a replacement system had increasingly made itself felt. A direct link between the court and the Code would not make the task any easier. There were already a number of courts that operated without a code. At the present stage, the most realistic approach, and the one most consonant with realities in the international community, would be for the Commission to explore the possibility of an ad hoc jurisdictional criminal trial mechanism.

5. Mr. MAHIOU, referring to the question of a possible link between the Code and the international criminal court, said there were many options, but some were better than others. A code alone was indeed conceivable, yet in the absence of a court it would be ineffective, because there would be no way to follow up on the Code's provisions. Conversely, an international criminal court without a code would mean that certain crimes would be condemned by the international conscience, but that there would be no way of punishing them in the absence of universally acceptable rules or definitions of those crimes. Establishing an international criminal court and a code separately would seem to be absurd, because they must obviously be interrelated. It was to be hoped that, following discussion in the Commission, the nature of that interrelationship would emerge and recommendations could be sent to the General Assembly. It was time for the Commission to take a clear position in its recommendations.

6. It was important not to confuse the issue of the desirability and that of the feasibility of an international criminal court. Admittedly, the General Assembly had instructed the Commission to consider the question of feasibility, but it was difficult to separate the two concepts. Back in 1950 the General Assembly had requested the Commission to take a clear stand on both questions and the Commission had decided that it was both desirable and feasible to establish a court.[3]

7. Mr. Bennouna (2254th meeting) had alerted the Commission to the danger of the excessive impact of domestic law. Actually, it was important to bear in mind that no domestic law was perfect and therefore it would be all the more difficult to achieve a universally satisfactory result by means of an international mechanism. The Commission must find solutions where it could, but it must also call on the General Assembly and on States to take a position on the problems that went beyond the Commission's mandate.

8. He supported the suggestion already made by a number of other members to establish a working group to help the Special Rapporteur in drawing up an inventory of problems facing the establishment of such a court, along with a list of possible solutions, and in drafting recommendations to the General Assembly to serve as guidance in taking a decision.

9. Mr. AL-BAHARNA said he was in favour of an international criminal court along with a criminal code, because neither could function without the other. He had

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* Resumed from the 2253rd meeting.

[1] For texts of 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).

[3] See 2254th meeting, footnote 11.

already made his position known in earlier statements and would therefore restrict himself to addressing the substantive issues raised in the Special Rapporteur's excellent report.

10. In part one of the report, the Special Rapporteur first responded to the objection to an international court on the grounds that the current system of international proceedings based on universal jurisdiction had been functioning satisfactorily. Although the argument that both the trial and sentencing of the accused might be affected by domestic pressures was correct, it ought to be stressed that the universal jurisdiction system had yielded results that were in fact far from satisfactory. States had often failed to conduct even preliminary inquiries, particularly in cases where the crime had a strong political dimension.

11. Secondly, the Special Rapporteur responded to the contention that an international criminal court might be politicized. Personally, he agreed, and would even argue that politicization at the national level might well be greater than at the international level.

12. Thirdly, the Special Rapporteur dealt with objections raised because of the complexity of the problems posed, and, indeed, debates in the Sixth Committee seemed to highlight the fact that a great many legal and political obstacles must be overcome before the court could become a reality. True, States would have to agree on, *inter alia*, jurisdiction, rules of procedure, evidence and penalties, yet such questions were, as pointed out in the report, no more complex than those encountered by States in establishing other international judicial bodies. Furthermore, the Commission was authorized under General Assembly resolution 46/54 of 9 December 1991, paragraph 3, to consider further the issues concerning the establishment of an international criminal court. In view of that mandate, the Commission should not fail to come to grips with all of the issues, thereby forfeiting the opportunity of drafting the statute of the proposed court. Moreover, it would be unfortunate to shy away from the task of drafting a statute at a time when a consensus was slowly beginning to emerge in the Commission. Thus, as a first step towards overcoming divergent opinions, the Commission should adopt specific proposals on the various questions in that regard, so as to form a basis of discussion.

13. As to the argument that an international court would be less capable of guaranteeing protection of human rights than would a national court, which was bound by constitutional provisions of domestic law covering such rights, he agreed with the Special Rapporteur that the international situation seemed to point to just the opposite conclusion.

14. In part two of the report, containing possible draft provisions on a number of topics, two alternatives were discussed for the law to be applied by an international criminal court.[4] The first used a generic formula and the second an enumerative method. As the generic formula, namely international criminal law, was not a term of art with a fixed meaning and content, it was inappropriate in the sense in which it was employed in the second paragraph of the commentary. He was therefore not in favour of alternative A. Alternative B would be acceptable if it was modified to reflect the functions and purposes of an international criminal court. In its present form, it was defective in form and content. What had to be determined was the function of that article and whether it prescribed the "formal" sources of law. Presumably it indicated the "material" sources governing international criminal jurisdiction, in which case, the article should not be patterned on Article 38 of the Statute of ICJ, which was concerned with inter-State disputes. Rather, it should reflect the function of the court, which was to try individuals, groups and States. The differences in the functions of ICJ and the international criminal court should be borne in mind in formulating the provision on the law to be applied by the latter. The Special Rapporteur himself appeared to have reckoned with that fact, for he affirmed that, as a rule, the principles relating to basic human rights were undoubtedly applicable under international criminal law. If that was so, why were the principles relating to human rights not included in the law to be applied by the court? Plainly, the material sources of law enumerated in the draft article were incomplete.

15. Subparagraphs (*a*), (*b*) and (*c*) of alternative B were acceptable in principle, but the formulations were in the main based on Article 38 of the Statute of ICJ. It would be better to have a simpler version, reading: "(*a*) International conventions; (*b*) International custom; (*c*) General principles of law recognized by States". Subparagraph (*d*) caused some misgivings. First, judicial decisions, and teachings of highly qualified publicists could not be grouped together, and second, the characterization of judicial decisions as subsidiary means for the determination of rules of law was open to criticism. Instead, the Commission might adopt the expression "judicial decisions" *simpliciter*. Subparagraph (*e*) called for further reflection.

16. The possible draft provision on jurisdiction *ratione materiae*[5] differed substantially from that presented in the ninth report.[6] While the ninth report had proposed optional jurisdiction, the tenth spoke of a dual regime of compulsory and optional jurisdiction. While it might be desirable to confer compulsory jurisdiction on the court in respect of the crimes enumerated in paragraph 1, he doubted whether it was feasible at the present time. The court's jurisdiction would be not only compulsory but exclusive, a limitation that made matters worse. He would much prefer the version contained in the ninth report, which conferred optional jurisdiction on the court. Again, paragraph 2 did provide for optional jurisdiction in respect of crimes other than those mentioned in paragraph 1, but that solution might not be workable. Even paragraph 3 of the new draft, which precluded appeals against decisions rendered by national courts, was open to criticism inasmuch as it deprived the court of an international role. Conceivably, the court could play a role when there was a challenge to the penalties imposed by a

[4] For texts, see 2254th meeting, para. 3.

[5] Ibid., para. 4.

[6] See *Yearbook... 1991*, vol. II (Part One), document A/CN.4/435/Add.1.

criminal court. It might be recalled that paragraph 4 of the jurisdictional article in the ninth report had in fact provided for such a contingency.[7]

17. The wording of paragraph 1 of the possible draft provision on complaints before the court[8] was a marked improvement over the draft proposed in the previous report, but he still had a number of reservations. First, the word "complaint" might not be the most appropriate, because it had more than one meaning. The Commission might therefore consider using a more suitable term that accurately reflected the Special Rapporteur's intended meaning. In any case, the words "before the Court" needed to be changed. If the matter was brought before the court at the complaint stage and a decision was therefore taken to commit the accused to trial, the court's integrity and independence would be compromised. Hence, the words "appropriate prosecuting authority" should be substituted for "Court". Without prejudice to those remarks, he was not completely in favour of vesting the right to prosecute exclusively in the prosecuting body. Under the scheme of universal jurisdiction, States currently had the right to institute proceedings in respect of international crimes, and any possible derogation would require a saving clause. Obviously, the Commission should review the draft provision.

18. He was sympathetic to the idea that human rights organizations should be permitted to bring a complaint before the court, but it should be handled with the utmost care. Only human rights organizations whose work had received the acclaim of the international community should be permitted to bring a complaint or an action. He agreed with paragraph 2 of the draft provision to the effect that the official capacity of the perpetrator of a crime should not constitute a defence.

19. The broad principle underlying the possible draft provision on proceedings relating to compensation,[9] namely, that the victims of a crime, whether States or individuals, should be compensated for injury sustained as a consequence of a crime referred to the court, commanded his support, but certain fundamental questions needed to be resolved first. For example, what was the meaning, scope and function of the compensation envisaged? How was it to be determined and to whom would it be payable? A still more basic question was whether the primary function of the proposed court should not be the rendering of criminal justice, and whether the question of compensation should not be given secondary importance or be managed quasi-judicially by a commission acting as a sub-organ of the court system.

20. Alternative B of the possible draft provision on handing over the subject of criminal proceedings to the court[10] was perhaps preferable because it imposed a legal duty upon the State to hand over the alleged perpetrator, whereas alternative A merely described the legal nature of the transfer of the alleged offender to the court. Imposing a duty in that context not only offered the advantage of greater precision but also made it easier for States where internal judicial procedures had to be completed before such a transfer could be effected. On the other hand, many States might have difficulties in complying with an unqualified duty. The Commission would have to exercise great care in weighing up all the implications of the proposed provision.

21. As to the "double-hearing" principle,[11] the concept of an appeal was indeed a basic human right and the proposed court ought to have an appellate infrastructure, but the assizes system outlined in the commentary was not perhaps entirely suitable for an international criminal justice system. As for paragraph 2 of the draft provision, a cursory reference to the double-hearing principle was insufficient; the draft statute should provide a detailed set of rules on the appellate system.

22. Lastly, he wished to thank the Special Rapporteur for his promptness in producing a set of possible draft provisions on the proposed international criminal court, thus imparting momentum to the Commission's response to the invitation contained in paragraph 3 of General Assembly resolution 46/54.

23. Mr. de SARAM, addressing the general question of the desirability and feasibility, or otherwise, of creating an international criminal jurisdiction, said he appreciated the questions raised by the Special Rapporteur as to the general approach the Commission should adopt on the subject of the creation of an international criminal jurisdiction. As had been noted, there were substantial difficulties still attending the question of the draft Code of Crimes and that of an international criminal jurisdiction. There was, as well, an absence as yet of clear directives from the Sixth Committee. General Assembly resolution 46/54 enabled the Commission to consider whether or not an international criminal court, in the full sense of the term "court", or, alternatively, a more modest procedure: "an international criminal trial mechanism" would be a more realistic and, in the circumstances, the more appropriate course. It was true that many difficulties existed in the way of creating an international criminal jurisdiction. Yet, there had been other occasions in the past when seemingly insuperable difficulties had been overcome in the Commission and other United Nations legal bodies. Thus, to be hopeful that appropriate and generally acceptable solutions would eventually be found on the various aspects that now seemed to pose such extraordinary difficulty, might not be in fact so over-idealistic. The difficulties, however, needed to be fully faced, and having regard to the obvious requirement of consensus in the Commission's proceedings and of the importance of securing widest possible governmental adherence to whatever recommendations the Commission was to make, it would seem unrealistic for positions in favour of the creation of an international criminal jurisdiction to be pitched too high. Thus, to speak of the creation of an international criminal court—in the sense of a permanently established body (in the nature of ICJ) would, in the light of the record of discussions hitherto in the Commission and in the Sixth Committee, seem somewhat unrealistic. A more modest course would seem the more appropriate, namely, the creation, perhaps by international convention, of an

[7] Ibid.

[8] For text, see 2254th meeting, para. 6.

[9] Ibid., para. 7.

[10] Ibid., para. 8.

[11] Ibid., para. 9.

ad hoc tribunal—to be convened under a procedure that would preclude unreasonable use and, most important, provide safeguards which States would consider adequate and acceptable from the point of view of the considerations relating to their sovereignty.

24. The consideration was inescapable, nevertheless, that from time to time there were international occurrences of such enormity and magnitude that they shocked and aroused the conscience of the world. There had been, moreover, an ever-growing global consciousness, as in recent years in the environmental field. Thus, it was perhaps time that the Commission should begin to concentrate somewhat more on just how an international criminal jurisdiction might possibly be created, in a manner generally acceptable to all countries, rather than on the problems in the way of its establishment. It seemed unlikely that the subject of an international criminal jurisdiction would "simply go away".

25. The point could also be made with some measure of justification that the existence of an international criminal trial mechanism might serve to some degree as a deterrent to international criminal behaviour.

26. There were, nevertheless, a number of specific and difficult aspects that would have to be examined very closely—whether the court was envisaged as a permanently established body or a more modest ad hoc institution. These included the question of the role of the Security Council under the Charter of the United Nations on matters of peace and security. There was also the question, if the creation of an international criminal jurisdiction was ever to be a reality, whether some limitation on the scope of such jurisdiction might not be necessary. It might well be that, to secure the necessary consensus and widest possible adherence such jurisdiction might have to be limited to crimes to be defined in the draft Code.

27. As to the methods of the Commission's work at its present session, it should perhaps be noted that a number of matters that had been referred to in the discussion might also have been considered in the Commission, the Sixth Committee, and other legal committees between the years 1950 and 1953.

28. The discussions in the Sixth Committee the previous year had not perhaps been as full and as detailed as they might have been. It would perhaps be helpful both to the Commission itself and to the Sixth Committee (and ensure that everyone was on the same "plateau of awareness" and on the same "wavelength" when consideration was given, particularly to the more specific and technical matters) if a comparative table of the provisions of some of the principal statutes and draft statutes for international criminal jurisdictions could be put together. Such a table would, at the very least, be extremely informative to many delegations in the Sixth Committee, and it would be of interest to the Commission as well to see how some of the matters referred to in discussions might have been dealt with in other statutes or draft statutes. The discussions in the Commission in the early 1950s suggested that there were then seven such statutes. There would be more at the present time and some selection would, of course, be necessary.

29. Mr. YAMADA said that an international mechanism, possibly involving the establishment of an international criminal court, was essential for directly prosecuting perpetrators of acts such as aggression. He endorsed the counter-arguments advanced by the Special Rapporteur in his tenth report against objections raised in the General Assembly to the possible establishment of an international criminal jurisdiction. Having participated in the past two sessions of the Sixth Committee, he had formed the impression that representatives were somewhat in the dark as to the nature of the court they were discussing, and therefore tended to confine themselves to generalities. Even among those who favoured the establishment of an international criminal court, many had taken a cautious approach and had expressed reservations. In order to obtain political guidance from the General Assembly, the Commission should present it with a clearer picture of the issues involved; for example, it might prepare a table showing some of the principal options with their respective merits and drawbacks.

30. Without losing sight of the international community's ultimate goal of defining crimes against the peace and security of mankind and establishing a mechanism which would have jurisdiction over the prosecution and punishment of the perpetrators of such crimes, the Commission should proceed with caution and settle for a solution that stood a chance of commanding broad acceptance in the contemporary world. Clearly, the international community would, for the present, have to rely on national institutions for most of the executive functions: making inquiries, collecting evidence, apprehending offenders, and so on. It might also be obliged to depend on national courts for many of the proposed system's judicial functions. The Commission should therefore consider the question of judicial assistance from national institutions.

31. He agreed that emphasis should be placed on arriving at a concept of an international criminal court which was feasible and viable in the world of today. In particular, he agreed with Mr. Bowett's suggestion (2255th meeting) that each successive step in criminal proceedings should be examined separately. Similarly, Mr. Pellet (2256th meeting) was right in that, theoretically at least, the draft Code and the establishment of an international criminal court did not have to be linked together and that, for the purposes of the present exercise, it might be advisable to try to separate the two issues. However, the close connection between them in the minds of many representatives in the General Assembly had to be taken into account. As to the Commission's working methods, he supported the Special Rapporteur's suggestion (2254th meeting) for the establishment of a working group to assist him.

32. Mr. YANKOV, remarking that a specific request from the General Assembly to the Commission such as the one contained in paragraph 3 of resolution 46/54 was a somewhat rare occurrence, said that the Commission's report on the question of an international criminal jurisdiction should be in two parts, the first analytical and the second containing proposals for the establishment of an international criminal court or other international criminal trial mechanism. Of course, the report must not fail to reflect doubts and reservations about the proposals re-

lating to the establishment of a court, but proposals would certainly have to be formulated.

33. Three main trends had emerged so far, both in the Commission and in the Sixth Committee. The first was a definitely positive approach in favour of the establishment of an international trial mechanism in connection with crimes listed in the Code, it being understood that international criminal jurisdiction should be confined to individuals perpetrating such crimes. The opposite view was that the establishment of an international criminal court was not feasible, largely because no State would be willing to surrender its jurisdiction in criminal matters. A third approach, which might be described as sceptical, consisted in accepting the general principle of an international criminal body but at the same time emphasizing the great complexity of the matter. Personally, he found it difficult to make a clear-cut choice between those three positions. The difficulties involved were formidable, but they should not be considered insurmountable, even though certain objections could not be overlooked and prevailing international realities had to be taken into account.

34. A number of members had referred to the Nürnberg Tribunal and its Charter,[12] but part of the Charter consisted of what could be described as a mini-code of crimes against peace and humanity, as well as war crimes. The same was true to some extent of the European Convention on Human Rights, which was likewise a hybrid, one part containing material rules and the other being in the nature of a code. Despite numerous examples of persistent or emerging nationalism, there was increasing awareness of the need for mutual self-restraint in sovereignty so as to enhance legal order worldwide. The international community was moving towards interdependence, cooperation and the adoption of common values. The Charter of the Nürnberg Tribunal testified to the vast importance attaching to world public opinion as far back as August 1945. Why should the twenty-first century not be prepared to go ahead with the establishment of an institution that would have judicial functions in the field of crimes against the peace and security of mankind?

35. He agreed that, without an international trial mechanism, the Code would have at best a declaratory significance. The effectiveness of both the Code and the international criminal court would depend on them being closely interlinked, if possible in the form of a single instrument consisting in one part of material rules and in the other of procedures to be applied. The Code and the statute of the court would thus form one instrument. It was also important that there should be broad recognition of the court and consensual adherence by States to its jurisdiction.

36. In his view, it was feasible to envisage an international criminal court with jurisdiction in respect of the crimes listed in the Code, but caution and realism were called for in determining the scope of both the Code and the court. With regard to the court's jurisdiction *ratione materiae*, the Commission should identify the various categories of crimes against the peace and security of mankind, in particular a category which would cover crimes committed by individuals acting on behalf of a State, taking into account the criteria laid down in articles 2 and 3 of the draft Code as adopted on first reading. All attempts to classify crimes under the Code also required great circumspection, since any classification depended on the circumstances of a given case: drug-trafficking, for example, might involve private individuals or legal entities, in addition to an element of State responsibility. The same might be true of the recruitment, use, financing and training of mercenaries. However, certain crimes, such as aggression or the threat of aggression, or colonial domination, *prima facie* involved the responsibility of the individual acting on behalf of the State as well as the international responsibility of the State itself. The question therefore arose whether there should be two different trial mechanisms to consider the two categories. That question, however, was of such complexity as to require much more extended reflection.

37. There should be a close relationship between the international criminal court and national jurisdictions, and the former should avail itself of existing national practice. It should not have exclusive jurisdiction, and the rule of exhaustion of local remedies should apply where appropriate.

38. With regard to the alternatives of compulsory and optional jurisdiction, it would be preferable at the present stage to restrict the scope of optional jurisdiction, especially in view of the fact that Article 36 of the Statute of ICJ had often been used as an escape clause, and that the effect of the many reservations to paragraph 2 of the article, concerning compulsory jurisdiction, had been virtually to nullify its application.

39. Mr. Bennouna was right to say (2254th meeting) that careful consideration should be given to the relationship between the court and the Security Council, especially in connection with Articles 24 and 39 of the Charter of the United Nations. The international criminal court should not, in his opinion, act as an appeal court in respect of judgements by national courts, but it might be possible to envisage an appeal procedure within the court itself.

40. In conclusion, he supported the proposal to establish a working group to analyse the Special Rapporteur's report and the discussion at the present session with a view to drawing up concrete proposals. The working group might consider compiling a list of relevant international instruments which would provide the legal grounds for the material rules and, to some extent, the procedural provisions.

41. Mr. VERESHCHETIN asked whether some consensus had been reached in the Commission to exclude States from the jurisdiction of the international criminal court. Had there been a comprehensive discussion of the issue before a decision was taken to that effect? It was his impression in general that the so-called debate in the Commission often took the form of a series of monologues, with little interchange of views.

[12] Charter annexed to the 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).

42. The CHAIRMAN said that the issue had indeed been discussed at great length and it had been decided to confine consideration to jurisdiction over individuals for the time being, on the understanding that the Commission could revert to the topic of jurisdiction over States at a later stage.

43. Mr. KOROMA and Mr. SZEKELY said they agreed with Mr. Vereshchetin that there was a need for greater dialogue in the Commission's discussions on such important topics as the one under consideration.

44. Mr. THIAM (Special Rapporteur) said that he had long regretted the absence of genuine debate in the Commission's deliberations, but pointed out that that had not always been the case.

45. Mr. PELLET said that he agreed in principle with those members who had pleaded in favour of an informal dialogue. He also agreed that the Special Rapporteur should, from time to time, sum up the discussion.

46. Commenting on the first section of part two of the Special Rapporteur's report, he said that the concept of an international criminal court was in itself acceptable, even if he was highly sceptical about the value of the whole exercise. Such a court did not seem to respond to the needs of contemporary international society, which required more flexible machinery that was in tune with reality.

47. The French term *droit pénal international* should indeed be replaced by *droit international pénal*, since that emphasized the essentially international character of the rules to be applied, but he was not altogether certain that the notion covered by either of those formulas was sufficiently well-established to be set forth in such concise terms as those used in alternative A in the Special Rapporteur's possible draft provision on the law to be applied. Alternative B, which adopted the enumerative method, was closely modelled on Article 38 of the Statute of ICJ, yet he wondered whether that was appropriate in the case of an international criminal court, since the functions of the two jurisdictions were different and Article 38 had recognized defects.

48. In indicating the origin of the applicable rules, as he believed was advisable, it should not be forgotten that, in the case in point, it was a question not of settling disputes between States but of trying individuals accused of international crimes. If the general framework of Article 38 was accepted, therefore, great care must be taken to adapt it as narrowly as possible for the purposes of the exercise in which the Commission was engaged and to couch the list set forth in the possible draft provision in more specific terms. Broadly speaking, the rules to be applied by the international criminal court should be of three kinds: first, rules applicable to the definition of the crimes of which the accused was suspected; secondly, rules designed to protect the human rights which the accused should enjoy; and, thirdly, rules governing the conduct of the trial. On that basis, he would suggest that the opening clause of alternative B should be worded along the following lines: "The court, which shall have the task of trying accused persons brought before it for crimes characterized as such under international law, shall apply, with due respect for the rights of the defence:"; the list of the various sources of law would then follow.

49. While he was not altogether happy about the list in alternative B, he was prepared to go along with the principle. Specifically, he agreed that the court should apply international conventions, as provided for in subparagraph (*a*), but was concerned at the reference to the prosecution and prevention of "crimes" under international law, something which might encourage the court to proceed by analogy. It would be better for the international conventions to be relevant to the object of the trial and applicable to the crimes with which the accused was charged, as provided for in the draft statute of the international criminal court prepared by ILA. He also concurred that the international criminal court should apply international custom, as provided for in subparagraph (*b*), but wondered why the Special Rapporteur had dropped the adjective "general" which, in Article 38, paragraph 1 (*b*), of the Statute of ICJ, rightly appeared before the word "practice". Again, the court should apply the general principles of criminal law, as provided for in subparagraph (*c*), but he was surprised indeed at the inclusion of the words "recognized by the United Nations". The general principles of criminal law were principles common to all States and were essential to ensure the proper and humane conduct of the trial. In his view, it was in the form of principles common to the different States, and in that form alone, that municipal laws should be relevant.

50. He was at a loss to understand why subparagraph (*e*) had been included in alternative B. As PCIJ had opined in a famous dictum:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts . . . .[13]

It was not, in his view, for an international court to apply the rules of municipal law as such. The European Court of Human Rights certainly did not do so; it merely ensured that municipal law was in conformity with international principles as laid down in the relevant human rights convention. There was no reason why the same should not apply in the case of an international criminal court.

51. He had no objection to the inclusion, in subparagraph (*d*), of judicial decisions and doctrine, though the exact wording of Article 38 of the Statute of ICJ, which was perfectly satisfactory, should have been used; alternatively, the report should have contained some explanation for the departure from that wording. Something was lacking from that provision, however, for Article 38 went back a long way and was possibly already outdated at the time it was drawn up. In particular, the role of the resolutions of international organizations, and, above all, of the General Assembly and Security Council of the United Nations, could not be ignored. The functions of the proposed court and the Security Council were none the less different. Even if the Security Council did not characterize a given incident of armed action as aggression, that did not necessarily mean that, legally speaking, there was no act of aggression. Care should be taken to

[13] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J, Series A, No. 7*, p. 19.

ensure that the functioning of the court was not paralysed as a result of political paralysis in the Security Council. On the other hand, it would be scandalous if some States, even though they were aggressors, could hide behind the veto. The court should not be limited by some obligation to yield before a negative finding of the Security Council. Should the Security Council arrive at a positive determination, however, there would be a strong presumption that its resolution was binding on the court, since the Security Council had the power of determination in the matter of the maintenance of international peace and security. On the other hand, such a resolution was not to be regarded as the gospel truth, in legal terms, and the court should always satisfy itself that any given decision of the Security Council was legally correct.

52. He felt the gravest concern at the position taken by ICJ in its Order of 14 April 1992 in regard to the Lockerbie case.[14] If he had understood correctly, the Court took the view that, inasmuch as the Security Council's resolutions were imbued with the superior legal force conferred by Article 103 of the Charter, the Court could not but defer to it. That seemed to be a refusal by the Court to perform its proper functions. Obviously, in the vast majority of cases, the binding legal force of the Security Council's decisions would be recognized, but those decisions must at least not be contrary to the norms of *jus cogens* and they should certainly not be contrary to the Charter of the United Nations itself, which was definitely superior to any findings of the Security Council. The point called for careful consideration, particularly with reference to the Lockerbie case. He had the greatest respect for ICJ, but some aspects of its jurisprudence were open to criticism.

53. The Lockerbie case also showed that there was a great risk that the problem of the relations between the international criminal court and the Security Council might go much further and arise in connection not only with the crime of aggression but also with other issues. Libya and the Libyan authorities were not being held responsible for an act of aggression but were being accused of a form of terrorism, perhaps State terrorism.

54. The resolutions of the General Assembly itself could be of great relevance to the future international criminal court. For example, article 18 of the draft Code adopted by the Commission in 1991 had rightly characterized the maintenance by force of colonial domination as a crime against the peace and security of mankind, which inevitably presupposed that the General Assembly would have a major say in defining what constituted a colonial situation. In that area, therefore, the General Assembly enjoyed a very significant power of determination. The question was to what extent would the future court be bound by a determination that a situation was, or was not, a colonial situation. It was a very complicated problem to which he had no ready answer. The Commission should reflect on the place of the resolutions of international organizations, and particularly of the Security Council and the General Assembly, in the enumeration in the proposed draft provision.

55. It was important to bear in mind, first, that such resolutions could be of decisive importance in characterizing a crime and, secondly, that neither the Security Council nor the General Assembly were free to do just anything, and while their decisions had to be followed, in the case of a mere recommendation, some thought should be given to its legal force. In a *de jure* international organization such as the United Nations, those organs were bound to respect certain rules of law, in any event the norms of *jus cogens* and of the Charter of the United Nations itself; and the international criminal court, like ICJ, should satisfy itself that that was indeed the case.

56. He was not opposed in principle to differentiated degrees of jurisdiction according to the kind of crime involved, but he had serious doubts as to the merits of the list of crimes in paragraph 1 of the possible draft provision on jurisdiction of the court *ratione materiae*.[15] Illicit international trafficking in drugs, seizure of aircraft and kidnapping of diplomats were not matters that could properly be dealt with by the exclusive jurisdiction of the court. He was also a little sceptical about systematic or mass violations of human rights. On the other hand, it was surprising to see no reference in the list to aggression or threat of aggression or, indeed, to intervention. Consequently, there should be a distinguishing principle, namely that the crimes must be exceptionally serious, fundamental and genuinely prejudicial to the dignity of mankind as a whole, if they were to be included in a list for which the jurisdiction of the court would be compulsory. In other words, when, behind the accused, it was in fact the State that was being tried, it would be reasonable to provide for the compulsory jurisdiction of the court. That did not, of course, apply to the kidnapping of diplomats or illicit international trafficking in drugs, which were usually the result of an act not of the State but of private persons. For the court to have compulsory jurisdiction, therefore, the crimes must be crimes in which the State was implicated. In such cases it was pointless to expect the State to sit in judgement upon itself and it was therefore desirable for an international court to be set up.

57. Paragraph 2 of the possible draft provision also seemed to raise fairly complicated issues. It had been suggested that the Special Rapporteur had in mind a sort of optional clause, comparable to Article 36, paragraph 2, of the Statute of ICJ, but that was not immediately apparent from the terms of paragraph 2 of the draft provision. It was perfectly possible to provide for an optional clause, but how could a case be brought before the court if there was no obligation to do so? Could that be achieved by referring a matter to, or bringing an individual before, the court, or by accepting the compulsory jurisdiction of the court in advance? Those were two very different approaches, as different as taking a case before ICJ on the basis of an agreement or on the basis of Article 36, paragraph 2, of its Statute. The point required clarification.

58. Irrespective of whether jurisdiction was compulsory or optional, it was necessary to determine who

[14] See 2255th meeting, footnote 8.

[15] For text, see 2254th meeting, para. 4.

could bring proceedings against an individual before the court. Surprisingly, paragraph 1 of the draft provision, unlike paragraph 2, gave no indication as to the State or States that could do so. In that respect there seemed to be an unfortunate lack of symmetry between the two paragraphs.

59. International society was not, in his view, ready for an *actio popularis*, even for the most serious crimes, since that would open the door to all kinds of excesses. Had it been otherwise, both Saddam Hussein and George Bush might well have had to appear before ICJ, which seemed to be neither reasonable nor desirable. Consequently, he maintained the view that only the State on whose territory the crime was committed should be able to bring a case, and even that was going rather far. Also, it would be advisable to provide some means to deter States from seizing persons contrary to international law, so as to avoid a proliferation of cases such as those of Eichmann, Barbie and Noriega; no matter how unsavoury such individuals might be, their arrest did no credit to the States concerned and steps should be taken to guard against such excesses.

60. He agreed in principle with paragraph 3 of the draft provision. Other important aspects of jurisdiction remained to be considered, however, such as jurisdiction *ratione personae*, which had been dealt with only from the limited angle of jurisdiction *ratione loci*, and also jurisdiction *ratione temporis*.

61. He did not agree with Mr. Crawford (2256th meeting) about the retroactivity of the Nürnberg rules. Even though the Nürnberg Tribunal had been established after the crimes in question had been committed, the rules applied had been in force prior to its establishment. On that point he agreed with Mr. Rosenstock (2255th meeting). He also considered that a rule as to the *compétence de la compétence* should be included in the statute of the proposed court as well as some machinery to prevent frivolous requests, which could be very prejudicial to the proposed court.

62. It was necessary to pursue further leads and possibilities while also using imagination in responding to the real needs of the international community.

63. Mr. THIAM (Special Rapporteur) pointed out that, as was apparent from his earlier reports, he had already dealt with most of Mr. Pellet's points. He urged members to concentrate on the practical, rather than the academic, aspects of the issue.

64. Mr. KOROMA said that, in elaborating the draft Code, the Commission should confine itself for the time being to jurisdiction over individuals, but in the longer term, the question of jurisdiction over States was still open to discussion.

65. Mr. AL-BAHARNA said it seemed Mr. Vereshchetin had inferred from his statement that he (Mr. Al-Baharna) was of the view that charges might be brought against States in the international criminal court. In fact he had been referring to the wording of paragraph 1 of the possible draft provision on complaints before the court to the effect that:

> Only States and international organizations shall have the right to bring complaints before the Court.

66. As a further clarification relating to a comment by Mr. Pellet, for the purposes of alternative B, subparagraph (*c*) of the possible draft provision on the law to be applied, he preferred the simpler formulation in Article 38, paragraph 1 (*c*), of the Statute of ICJ, which affirmed the general principles of law recognized by civilized nations, provided "States" was substituted for "civilized nations", the latter term being by now somewhat antiquated.

67. Mr. THIAM (Special Rapporteur) said he must point out that many of the issues raised by Mr. Pellet related to part two of his report, on which he had yet to submit his additional comments to the Commission during the discussion.

68. Mr. BENNOUNA said that he had two preliminary comments on part one of the report. The first was that the concepts of universal jurisdiction and an international criminal court were not incompatible, and the second was that the international community clearly needed a jurisdiction to which it could turn, when required, as could be seen from the recent difficulties that had arisen in connection with the suspects in the bombing of the Pan American Airways passenger aircraft over Lockerbie. What was required was a highly flexible system which could make use of applicable rules drawn from an international convention or even national law, and which took into account the concern of States for the principle of sovereignty.

The meeting rose at 12.50 p.m.

2258th MEETING

Tuesday, 12 May 1992, at 10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, 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, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Statement by the outgoing Chairman

1. The OUTGOING CHAIRMAN expressed his appreciation to all members of the Commission and the secretariat for their concern over his well-being during the grave events in his country, thanked Mr. Al-Baharna for