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Summary record of the 2258th meeting

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

presiding over the opening of the forty-fourth session of the Commission, and welcomed the Commission's new members.

2. He said that, having had the honour of representing the Commission at the forty-sixth session of the General Assembly and of introducing in the Sixth Committee the report of the Commission on the work of its forty-third session,[1] he had, on that occasion, reported on the progress made on the items the Commission had been requested to consider. The General Assembly had been favourably impressed by the work accomplished at the Commission's forty-third session and had expressed its appreciation, in resolution 46/54 of 9 December 1991, for the completion of the final draft articles on jurisdictional immunities of States and their property and the provisional draft articles on the law of the non-navigational uses of international watercourses and on the draft Code of Crimes against the Peace and Security of Mankind. It had also approved the recommendation of the Commission that, with the completion of the draft articles on jurisdictional immunities of States and their property, a convention should be elaborated on the basis of those draft articles. In resolution 46/55 of 9 December 1991, the General Assembly had thus decided to include in the provisional agenda of its forty-seventh session an item entitled "Convention on jurisdictional immunities of States and their property" and to establish a working group to examine issues of substance arising out of the draft articles and the question of the convening of an international conference, to be held in 1994 or subsequently, to conclude a convention on the question. General Assembly resolution 46/54 invited the Commission, within the framework of the draft Code, to consider further the issues raised concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter, and it drew the attention of Governments to the importance of presenting, in writing, by 1 January 1993, their comments and observations on the draft Code and on the draft articles on the law of the non-navigational uses of international watercourses.

3. The General Assembly had also recognized the role of the Commission in the fulfilment of the objectives of the United Nations Decade of International Law.[2] As the leading body responsible for the codification and progressive development of international law, the Commission ought to be at the forefront in developing and shaping the activities undertaken during the Decade. Given the importance of the topic for the international community, the changes taking place in international relations and the call for the establishment of a new world order, the Commission should seek to identify an area of study in which it could make a contribution to enhancing the role of international law in contemporary society, for example, the application of international humanitarian law to the United Nations peace-keeping forces. Although such forces were becoming more universal, humanitarian law did not specifically apply to them. The Commission might undertake an in-depth study of the matter by setting up a working group, *inter alia*, to analyse all relevant materials with regard to the Decade and to ensure liaison with Governments, international and regional organizations, non-governmental organizations and all other bodies participating in the Decade in order to learn their views on the matter.

4. The General Assembly had expressed its appreciation for the efforts of the Commission to improve its procedures and methods of work and requested the Commission to consider thoroughly the planning of its activities and programme for the term of office of its members and its methods of work in all their aspects, including the possibility of dividing its annual session into two parts, and to continue to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

5. As part of its traditional policy of cooperation with other legal bodies, the Commission had been represented in Strasbourg by Mr. Pellet at the session of the European Committee on Legal Cooperation. For his part, he had attended the thirty-first session of the Asian-African Legal Consultative Committee, held in Islamabad, Pakistan. The report of the Commission had been favourably received, the discussions in the Committee having focused on the draft Code and the non-navigational uses of international watercourses. In February 1992, some members of the Commission, invited in their personal capacity, had taken part in a fruitful meeting on the draft Code organized by the International Institute of Higher Studies in Criminal Sciences in Courmayeur, Italy.

6. In conclusion, he thanked the members of the Commission and the secretariat for their unwavering support and for the confidence they had placed in him. He congratulated Mr. Tomuschat on his election as Chairman of the Commission and wished him and the other members of the Bureau every success in the exercise of their functions.

Draft Code of Crimes against the Peace and Security of Mankind[3] (*continued*) (A/CN.4/442,[4] 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*)

7. Mr. AL-KHASAWNEH said that the current debate highlighted a fundamental question: that of the relationship between the Commission and the Sixth Committee of the General Assembly. Clearly, the Commission had

[1] *Official Records of the General Assembly, Forty-sixth Session, Sixth Committee*, 22nd meeting, paras. 4 *et seq.*

[2] See 2255th meeting, footnote 5.

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

[4] Reproduced in *Yearbook... 1992*, vol. II (Part One).

been unable to obtain policy guidance from the discussions in the Sixth Committee on the subject under consideration any more than from General Assembly resolution 46/54. As a result, the Commission's codification work had been hampered, since the subject was at the intersection of law and policy and many possible options were policy options, at least in principle. As that situation was unlikely to change, the Commission should take it upon itself to formulate a specific, bold, and yet realistic, proposal and to submit it to the General Assembly, which would then have to decide either to approve or reject it.

8. For the time being, the question that arose was whether there was a need for an international criminal court. He was convinced that such a court would help strengthen the system established by the Charter of the United Nations for the peaceful settlement of disputes. It would avoid offending the susceptibilities of States without sacrificing justice and thus reduce friction between countries and threats to international peace and security. The current system of universal jurisdiction was far from satisfactory because the absence of priority was a source of conflicts of jurisdiction and competing claims and was prejudicial to the cause of justice.

9. The assertion had been made that an international criminal court would infringe on national sovereignty. Although the principle of respect for national sovereignty must not be underestimated, he did not see why a State would accept universal jurisdiction, yet refuse, for example, to hand over its nationals to an international court.

10. The work of an international criminal court would have a beneficial impact on the development of international criminal law, but it must not be at the mercy of every event. The court would not need to be permanent or to have a permanent secretariat, but it should not be left dormant, and cases must not be brought before it solely for reasons of political opportunism.

11. For the time being, the Commission might explore all possibilities, including recourse to ICJ and the formation of panels of international observers. However, the ultimate goal should be to establish an international criminal court that had its own existence and dual jurisdiction: exclusive for the most serious crimes against the peace and security of mankind and optional for the others.

12. Mr. THIAM (Special Rapporteur), summing up the discussion on part one of his tenth report, said he had had the impression that there had been an early second reading of the draft Code. It was not that there was no correlation between the establishment of an international criminal court and the draft Code, but the problem of that correlation was dealt with in part two of his report.

13. The question the Commission must answer at the current stage was simple: was it possible to establish an international criminal court? On that point, the debate had revealed three trends.

14. A substantial majority of the members of the Commission, although with some qualifications, like those expressed by Mr. Al-Khasawneh, Mr. Bowett, Mr. Crawford, Mr. Jacovides, Mr. Pambou-Tchivounda, Mr. Razafindralambo and Mr. Rosenstock, had spoken in favour of establishing an international criminal court, pointing out—on the basis of examples as diverse as the trial of General Noriega in the United States of America, the Gulf war, the attacks on aircraft in which Libya was being singled out, and the Touvier case in France—that the lack of an international criminal court was leading States to take unilateral measures which were unacceptable. The fact was that that situation, which could only benefit the strongest States, was tantamount to a denial of justice when a State, or one of its courts, refused to try a case because it involved one of its nationals. An international criminal court would fill that gap.

15. The second trend was represented by the members of the Commission who had highlighted the political and technical problems to which the establishment of an international criminal court would give rise and had said that they would prefer the Commission to move towards a more flexible mechanism which was more compatible with State sovereignty. Some proposals had been made to that effect. Mr. Pellet (2256th meeting), for example, had mentioned the participation of active observers in proceedings instituted before national courts or the possibility of requesting advisory opinions from ICJ. However, he (the Special Rapporteur) did not think that those proposals would be really effective. Trials were in principle public and open to any observer who wished to be present and the establishment of a mechanism composed solely of observers would thus not be a crucial innovation. The advisory opinions which would be requested from ICJ could not constitute the trial mechanism referred to in General Assembly resolution 46/54. Other, more specific, proposals had been made, but would require more detailed consideration. Mr. de Saram (2257th meeting) had proposed the establishment of an ad hoc court, but he personally was suspicious of such courts, which would be of the Nürnberg type and were established after the commission of the alleged crimes. Perhaps Mr. de Saram had been thinking more in terms of an institution along the lines of PCIJ. However, if it was a matter of choosing judges from a list and determining the applicable law, would that not be arbitration rather than international criminal law? The proposal did nevertheless deserve further consideration and clarification.

16. Other members of the Commission, who could be associated with that trend, had simply outlined the political and technical problems involved in establishing an international criminal court, without proposing any solutions. State sovereignty had been described as a major and virtually insurmountable political problem. He doubted that that was the case in the modern-day world, where political integration, which meant giving up some national prerogatives, was making headway, particularly in Europe, and was beginning to take shape elsewhere, for example, in Africa. The Commission should not ignore that trend. With regard to technical problems, Mr. Bennouna (2254th meeting), for example, had pointed out that criminal responsibility was a responsibility of the individual and that it was sometimes difficult to determine the responsibility of those in Government or parliament. In reply, it might be said that the responsibility of the members of a Government was collective; that was, moreover, the solution the Nürnberg

Tribunal had adopted with the theory of conspiracy. If a minister did not agree with a decision of the Government, he could resign. If he did not do so, it was because he endorsed that decision. As far as the responsibility of members of parliament was concerned, parliamentary debates were public, as were the votes of the members. There was thus no lack of clarity in the case of those two institutions. At the same time, there was an instructive case-law in that connection concerning courts, which were notoriously impenetrable in that they conducted their deliberations *in camera*. For example, there had been a British ruling that the members of a court could be prosecuted for a crime against humanity if their decision constituted an illicit act, that was to say, a criminal act, or if they had applied an unjust law or unjustly applied a just law. It stated that the principle of the secrecy of the proceedings and of the voting must give precedence to the overriding concern of justice when, through those proceedings and that vote, a crime had been committed and when the responsibility of each member participating in the decision was to be determined. If that were the case, he did not consider that secrecy was an argument which the perpetrator of a criminal act could invoke to shield himself from justice.

17. In referring to aggression, Mr. Bennouna (2254th meeting) had also mentioned the problem of the jurisdiction of the Security Council and of the future international criminal court. He himself had raised the question some years previously, pointing out that it would arise only if the international criminal court adopted a position contrary to that of the Security Council. If the Security Council did not give a ruling—and that was not a far-fetched idea, since it was a political and diplomatic organ—the international criminal court could take whatever decision it thought fit. If there was a veto by a permanent member of the Security Council, that "non-decision" would not be binding on the international community as a whole or, consequently, on the international criminal court. If the Security Council did give a ruling, the international criminal court would have to consider the appropriateness of the decision it would be called upon to take in order to avoid being flagrantly at odds with the Security Council and thus avoid disputes between the plaintiff State and the State which was being prosecuted. If the Security Council did determine that there had been an act of aggression and if the international criminal court concluded otherwise, there would be no agreement between the plaintiff State and the State being prosecuted, the former sheltering behind the Security Council's decision and the latter rejecting it. The same would be true in the opposite case. The problem was undoubtedly delicate and it was up to the Commission to arrive at a solution in all conscience. He had therefore not included the crime of aggression as one of the areas within the exclusive jurisdiction of the international criminal court.

18. The third trend, which was represented by Mr. Shi (2255th meeting) and was just as respectable as the other two, was in favour of maintaining the status quo.

19. Ultimately, apart from the problem of national sovereignty, the solution to which depended on the political will of States, all the other issues boiled down to purely technical problems that were not insurmountable. A clearly affirmed political will would thus be enough to enable the Commission to make headway in its work.

20. In conclusion, he recalled that, in 1950, the Commission had appointed two rapporteurs to study the advantages and drawbacks of establishing an international criminal court and that, having considered their two reports, it had stated that it was in favour of doing so.[5] The Commission was naturally free to change its mind 40 years later, but, if it did so, would have to indicate the reasons why. In his view, developments in the international situation in no way justified such a reversal. If the Commission maintained its position, it must put an end to a now outmoded discussion and press ahead. In order to do so, it might set up a working group, as had already been proposed, entrusting it with preparing a draft which would be submitted to the General Assembly; if that solution seemed premature, it might continue to review all the aspects of the question in plenary. If the working group solution was adopted and it was borne in mind that, with one or two exceptions, the members of the Commission favoured the establishment of an international criminal court, it would, in his view, be necessary for the working group to compile all the arguments in favour of establishing the court and to prepare a document along those lines which would reflect the general consensus.

21. Mr. ROSENSTOCK said that, since he had never expressed a categorical opinion on the question of establishing an international criminal court, he was surprised to be included among those in favour of it. The Special Rapporteur was entitled to give his impressions of the debate on the question, but his statement must not be regarded as a summary of the discussion which all members of the Commission were supposed to approve.

22. The CHAIRMAN said that the comments of special rapporteurs were of a purely personal and subjective nature.

23. Mr. THIAM (Special Rapporteur) said that he never said anything which could be binding on members of the Commission. He might also be wrong, since it was always difficult to provide a summary with which everyone would agree. He was not unaware that Mr. Rosenstock had always had considerable reservations about the establishment of an international criminal court, but he had not given up hope of seeing him change his mind.

24. Mr. ARANGIO-RUIZ said he continued to believe that the Code and the court should go hand in hand and that there could be no Code without a court. However, he did not consider that the Commission should, as Mr. Thiam seemed to be suggesting, simply submit to the General Assembly a list of the arguments in favour of the establishment of an international criminal court. It would also have to decide whether and to what extent such a court was genuinely necessary or indispensable for the proper implementation of the Code, carry out a comparative study of the results which would be achieved, with or without the court, and review the various possibilities of co-existence between an international

[5] See 2254th meeting, footnote 4.

criminal court and national courts, taking into account all possible solutions, some of which had already been mentioned, particularly by Mr. Bowett (2255th meeting).

25. Mr. KOROMA said that he agreed with Mr. Arangio-Ruiz.

26. Mr. SZEKELY said that he agreed with the proposal by Mr. Arangio-Ruiz. On the basis of the comparative study, the Commission would be able to take a definitive decision for or against the establishment of an international criminal court, thus enabling the General Assembly to provide guidance on the matter, as stated in resolution 46/54.

27. Mr. THIAM (Special Rapporteur) said that the relationship between the Code and the international criminal court was dealt with in part two of his report and members could therefore revert to the matter. For Mr. Arangio-Ruiz's information he explained that he had not meant that the Commission should not submit to the General Assembly arguments opposed to the establishment of an international criminal court, but merely that, as the majority of members favoured the establishment of such a court, the Commission should not simply mention the various views that had been expressed, but should actually take a stand on the matter.

28. The CHAIRMAN said that Mr. Koroma's proposal with regard to humanitarian law as it applied to the peace-keeping forces was extremely useful and should be examined by the Planning Group without further delay.

29. The discussion would concentrate next on part two of the Special Rapporteur's report and, in particular, on the questions of the law to be applied and jurisdiction.[6]

30. Speaking as a member of the Commission, he said that the court should, in his view, be a facility afforded to States rather than an element of a world government; in so far as possible, therefore, its jurisdiction should be optional. Indeed, it would be virtually impossible to divest national courts of the jurisdiction they already had under existing conventions and general international law. That did not mean that national courts could deal with all the crimes set forth in the Code, for, unless there was some future development in the existing law, their jurisdiction was always subject to two limitations, namely, the immunity of foreign politicians and the relative effect of international treaties.

31. The court could operate as an ad hoc institution and the answer to the question of the conferment of jurisdiction was to be found in the traditional rule whereby a State could, in the case of its own nationals, decline jurisdiction—in the event, in favour of the international criminal court—provided that there was an international element to the case.

32. In the case of foreign nationals, however, the traditional rules concerning the determination of jurisdiction—with regard to extradition, for instance—would have to be radically modified for it must not be forgotten that the court would have to try crimes that were an affront to the conscience of mankind. It would therefore be better not to have to secure the consent of the State in whose territory the crime had been committed, for, otherwise, persons who committed atrocities in their own country might be absolved of all responsibility and apartheid or genocide committed against a minority in the State, for instance, might go unpunished. Consequently, the system to be devised could certainly not be based on the traditional rules of international criminal law. In the case of certain crimes, there would be automatic, though not necessarily exclusive, jurisdiction. The institution of criminal proceedings would then depend mainly on the prosecutor's office attached to the international court. In order to counteract the inherent weakness of an international authority *vis-à-vis* those who were in power or members of parliament, various possibilities could be envisaged. For example, the relevant prosecutor's office could be required, at the request of at least three States, to consider the case and, where appropriate, to draft the indictment; or a committee of the General Assembly consisting of 15 members selected according to the normal rules of geographical distribution could take a two-thirds majority decision on the institution of proceedings, in which event the prosecutor's office would open a file with a view to deciding whether the case should be referred to the court.

33. In other cases, it would in principle suffice if, under the ordinary rules of jurisdiction, the victim State conferred jurisdiction on the court. Certain difficulties might arise in practice, however. For instance, if the immunity of the individual concerned had to be waived, action by the victim State would not be enough. Similarly, in the event of potential conflict between two States in which certain acts could be qualified as aggression or intervention by one of the parties, it would be very difficult for an international prosecutor's office to find grounds for its action. There, too, intervention on the part of the international community, possibly through the committee he had suggested, would be necessary.

34. Turning to the question of the law to be applied, he said that, so far as substantive law was concerned, the court would be bound by the *nullum crimen sine lege, nulla poena sine lege* rule. In that connection, a conviction could in principle be founded only on written law, even if the possibility of criminal penalties imposed pursuant to customary law and the general principles of law could not be ruled out altogether. There was far greater scope in the case of procedure. He therefore doubted whether the applicable law could be summarized in a single clause. In that connection, alternative A of the possible draft provision might give the impression that the court could apply only "the" criminal international law, in the sense of a universally applicable law, whereas the position depended on the status of the ratification of conventions on the subject. As to alternative B, he doubted the need to reproduce Article 38 of the Statute of ICJ so faithfully, since the function of the international criminal court would not be to rule on inter-State relations, but to impose penalties on individuals on behalf of the international community. Accordingly, it would have to apply, on the one hand, all those rules that prescribed a certain course of conduct for individuals and, on the other, those rules that stipulated the modal-

[6] For texts of possible draft provisions, see 2254th meeting, paras. 3 and 4 respectively.

ities of judicial proceedings, should the substantive rules be infringed. Only on a subsidiary basis could the international criminal court take account of the general rules of international law.

35. Subparagraph (*a*) of alternative B seemed to lose sight of substantive law inasmuch as it referred to conventions relating to the prosecution and prevention of crimes or, in other words, to procedure. Subparagraph (*c*), on the other hand, referred only to criminal law, an expression normally understood as distinct from procedural rules. He approved of the reference to internal law, since, basically, a person could be prosecuted only if he had broken a law by which he was bound, namely, a rule of internal law, which might be based on, and possibly meant to implement, international law. In that case, internal law was not just a fact, but the legal basis without which there would be no criminal proceedings.

36. Given the difficulty of finding the right answers to all the many questions that arose, he supported the idea that a working group should be set up. He also proposed that the students attending the International Law Seminar should be invited to consider certain items, in small groups.

37. Mr. KOROMA said that every State was bound by the constitutional guarantees enjoyed by its nationals when deciding on their fate and, in particular, when it handed them over to another authority.

38. The CHAIRMAN said he agreed that, when waiving its personal jurisdiction over its nationals, a State must respect all the guarantees laid down under internal law and international law.

39. Mr. CALERO RODRIGUES said that, like the Special Rapporteur, he considered that the term "criminal international law" should be adopted, in English as in French, to distinguish that new branch of law from traditional "international criminal law" which referred only to the international application of criminal law. Since the statute of the court must indicate which law the court was to apply, a generic and global definition, such as that in alternative A, should not be retained, as it would confer on the court jurisdiction that was too broad in scope. As to the analytical and enumerative definition in alternative B, he, like other speakers, regretted that it was modelled on Article 38 of the Statute of ICJ. The only new element compared to that Article—the reference to internal law in subparagraph (*e*)—did not seem very apt, as it did not appear to be applicable in practice. Quite apart from the fact that, in that case, internal law would be no more than the reflection of international law, it would lead to uncertainty and confusion.

40. With regard to the subparagraphs taken from Article 38 of the Statute of ICJ, it was necessary, in his view, to come back to the basic question of the link between the Code and the court. The Code, which was, after all, the codification of substantive law, must define the crimes, lay down the penalties and indicate the judicial mechanism for its application. As for the court, its main function was to apply the Code and that should be clearly stated. If some crimes which should have come within the jurisdiction of the court were left out of the Code, the statute should mention, in addition to the Code, the instruments which defined those acts. With regard to jurisdiction, the instrument establishing the court, which would be of a purely procedural nature, should list not the crimes, but the instruments of substantive law that defined those crimes. He was very doubtful about subparagraph (*b*), since criminal law must be particularly precise and clear, and that was not typical of custom. He was not convinced of the usefulness of subparagraph (*c*), which was incomplete and superfluous, though he recognized that general principles could shed light on the application of the law. As to subparagraph (*d*), he considered, like certain writers, that it was not for the court to apply judicial decisions and teachings of highly qualified publicists of the various nations, but to use them to ascertain and interpret the rules of law. The provision was also quite unnecessary, in his view.

41. Turning to the question of jurisdiction, on which he had already touched, he said that, in the case of an international criminal court, there could be no question of optional jurisdiction or of the conferment of ad hoc jurisdiction. States parties to the instrument establishing the court were bound to accept its jurisdiction over the crimes defined in the instruments referred to in its statute. The criminal law had to be strict and, if States were not ready to accept that, they should not become parties to the statute of the court and the Code. He was aware of the risks of that position, since it could rule out the possibility of an international criminal court, but it was better to have no court than the semblance of a court. As he was opposed to optional jurisdiction, he did not favour paragraph 2 of the draft provision on jurisdiction; nor could he accept paragraph 3, for, in his view, the question of appeal against decisions handed down by domestic courts should not be brought into the picture. The court should have compulsory jurisdiction over crimes committed by individuals and defined as crimes under international law in the international instruments specified in the statute; and the Code would be the main instrument of substantive law. The procedural provisions should be set forth in the statute.

42. Mr. MIKULKA said that, since the Special Rapporteur saw no substantive difference between alternatives A and B of the draft provision on the law to be applied, he would refer to alternative B, which lent itself to more detailed comments. In subparagraph (*a*), there was no specific reference to the Code as a primary source of applicable law. True, in his commentary, the Special Rapporteur implied that the Code, if adopted, would be one of the international conventions referred to in the subparagraph. However, even in such a case, reference to the Code would be justified because it would bring out more clearly the two possible dimensions of the international criminal court, which would be a mechanism for the implementation of the Code, but also a more complex and more ambitious mechanism. Such a reference would, in addition, make it easier for the General Assembly to consider the problem by offering it a clear choice between two separate possibilities. He entirely agreed with what had already been said with regard to the words "recognized by the United Nations" in subparagraph (*c*) and would therefore not comment on them, but he noted that alternative B was modelled on Article 38 of the Statute of ICJ and he wondered whether the analogy was entirely appropriate, since ICJ dealt

with disputes between States, whereas the future international criminal court was to deal with crimes committed by individuals. Bearing in mind the principle of *nullum crimen sine lege* he suggested that the provision should end with the third subparagraph, especially as there might be doubts about the exhaustive nature of the list of subsidiary means for the determination of rules of law. In that connection, Mr. Pellet (2257th meeting) had referred to the problem to which General Assembly resolutions gave rise. But were the decisions of the Security Council not also subsidiary means for the determination of rules of law? The best course would be simply to delete subparagraph (*d*). Subparagraph (*e*) was liable to create some problems and, read in the light of article 2 of the draft Code, might cause uncertainty. It should also be deleted.

43. With regard to the draft provision on jurisdiction, he said that paragraph 1 gave rise to many questions; in particular, it did not refer to crimes such as aggression, threat of aggression, intervention or colonialism, which were usually committed by agents or representatives of States and should logically come under the jurisdiction of an international court, whether permanent or ad hoc. In his opinion, the Commission should tell the General Assembly that, from a technical point of view, it considered such crimes to come within the jurisdiction of an international criminal court. It would then be for the General Assembly to decide whether or not that solution was politically acceptable. His own view was that paragraph 1 as proposed by the Special Rapporteur listed crimes for which the jurisdiction of the court should be optional or concurrent. The crimes in question, by virtue of special conventions, came largely within the scope of universal jurisdiction and there was no reason to deprive national courts of the competence to try them. The conferment of jurisdiction on the international criminal court should be specifically stated and based on special circumstances. As to paragraph 3, although he shared the view that the court should not be competent to hear appeals against decisions rendered by national jurisdictions, he was not sure that it was necessary to say so expressly, since the court could obviously not exercise such a function without a provision to that effect.

44. Mr. IDRIS said that the terms in which alternative A of the draft provision on the law to be applied was drafted were too general to solve the problems that arose in that regard, since the development of international criminal law had not been homogeneous. The provision was based on a draft dating back to 1953[7] and important events, to which he had already referred when speaking on part one of the report under consideration (2256th meeting), had taken place in international relations during the past 40 years. Alternative B was, however, drafted in enumerative form on the basis of a principle to which there could be little objection, since that was the method used in all previous drafts relating to the establishment of an international criminal court except the one produced by the United Nations Committee on International Criminal Jurisdiction. Unlike the Special Rapporteur, he did not think that there was no substantive difference between the two alternatives; on the contrary, they were, in his view, different both in form and in substance.

45. As to jurisdiction, the Special Rapporteur was proposing a dual exclusive and optional regime: States which acceded to the statute of the future court would recognize its exclusive jurisdiction for certain crimes characterized by their extreme seriousness and by the massive damage they caused to mankind and would confer optional jurisdiction on the court in respect of other crimes. In that connection, he realized that the Commission ought not to be too ambitious and that the Special Rapporteur had tried to reach a compromise between the trend in favour of exclusive jurisdiction and that in favour of the normal application of the law. Some problems nevertheless remained. In the first place, international realities, common sense and wisdom made it impossible to ignore the conferment-of-jurisdiction rule. Secondly, how were crimes to be separated into two groups, with those in the first group being explicitly listed and therefore subject to the compulsory jurisdiction of the court and those in the second coming under the court's optional jurisdiction? It must be borne in mind that the legal consequences of crimes in the second group could be just as serious as those of crimes in the first group. Thirdly, who was to decide whether a crime should come under the compulsory or the optional jurisdiction of the court: the State concerned, an organ of the court or the court itself? Fourthly, even in the case of optional jurisdiction, it was quite possible that four States might be concerned: the State in whose territory the crime had been committed, the victim State or the State whose nationals had been the victims of the crime in question, the State of which the perpetrator of the crime was a national, and the State in whose territory the perpetrator of the crime had been found. The point was not inconsequential because, for example, in the case of the last-mentioned State, the decision to hand over or not to hand over the perpetrator of the crime to the court could be tantamount to recognition or non-recognition of the court's jurisdiction. Yet the text proposed by the Special Rapporteur referred only to the State in whose territory the crime was alleged to have been committed and the victim State. To make the jurisdiction of the court dependent on the decision of too many States might admittedly give rise to procedural difficulties, but to reduce the number of States entitled to take the decision could also lead to practical problems.

46. Would it not be advisable—especially from the point of view of those who, like himself, considered that there could not be a code without a court—to say that the court had jurisdiction over all crimes covered by the Code? The opposite method of limiting the jurisdiction of the court to some of those crimes, while excluding certain others, might weaken the effect of the judiciary as a whole and stand in the way of the development of the fundamental principles of international criminal law.

47. Mr. BOWETT recalled that he had previously (2255th meeting) expressed a preference for a system whereby the court would be attached to the Code, the Code thus providing the applicable law. If a different system were chosen, namely, that of a court operating without the Code, he would favour alternative B of the draft provision on the law to be applied, limited to sub-

[7] See 2254th meeting, footnote 4.

paragraphs (*a*), (*b*) and (*c*) and without any mention of the general principles of criminal law being "recognized by the United Nations". The sources of law referred to in subparagraphs (*d*) and (*e*) were subsidiary and were, moreover, unnecessary because they could be invoked under the heading of international custom or of the general principles of criminal law.

48. He hoped that the Commission would request the Special Rapporteur to proceed with the study of the jurisdiction of the court *ratione materiae* on two alternative bases, at least until the General Assembly had made its preference known to the Commission: either exclusive jurisdiction of the court for certain crimes and optional jurisdiction over the other crimes covered by the Code or—and he would prefer that idea—entirely optional jurisdiction, leaving States free to specify which of the crimes covered by the Code they would accept as being crimes under the jurisdiction of the court. States would make their decision known either at the time of the signature of the statute of the court or later on an ad hoc basis.

49. There was also the question of which States would be required to have accepted the jurisdiction of the court in a given case: the State in whose territory the crime had been committed, the State of which the accused was a national, or the State which had been the victim of the crime or whose nationals had been the victims of the crime. Furthermore, would the consent of one or more of that group of States be needed in order for the court to be able to exercise its jurisdiction? The question was a difficult one and the Commission would have to deal with it. He personally considered that the State in whose territory the alleged perpetrator of the crime was found should be required to hand him over to the competent court and that the obligation should be binding on all States parties to the statute of the court.

50. In the event that a competent political organ of the United Nations had already determined that a State had committed an unlawful act—whether aggression, genocide or apartheid—he wondered what effect such a finding would have on the operation of an international criminal court and suggested that a distinction should be drawn between the various organs that might make such a determination. Like Mr. Pellet (2257th meeting) and the Special Rapporteur, he thought that, if the Security Council made no finding, the court would be entirely free to act in its judicial capacity. However, if the Security Council concluded that there had been a breach of international law, how would the jurisdiction of the court be affected? It could be argued that the court should be bound by the decision of the Security Council, it being desirable that all United Nations organs should speak with one voice; a further advantage would be that the court would not have to delve into the complex facts of the case in order to arrive at the same conclusion as the Council. But equally convincing arguments could be found against the idea of binding the court by a decision of the Security Council. In principle, he thought it undesirable that a judicial organ should be bound by a decision emanating from a political organ. However, it should be borne in mind that the decision of the Security Council would relate only to the responsibility of the State concerned, and would say nothing on the question of individual responsibility, which would be a matter for the court alone to decide. If, of course, it was the General Assembly which determined that a crime of apartheid or of aggression had been committed, the situation would be clear; Article 25 of the Charter of the United Nations would not have to be applied. The view of the General Assembly would simply form part of the evidence which the court would have to take into account, but by which it would not be bound.

51. Mr. THIAM (Special Rapporteur) said that the words "recognized by the United Nations" in subparagraph (*c*) of alternative B of the draft provision on the applicable law should read "recognized by nations".

52. Mr. AL-BAHARNA said that it would be better to refer to "States" rather than to "nations".

53. Mr. YANKOV suggested that the Special Rapporteur might use article 53 of the Vienna Convention on the Law of Treaties as a model.

54. Mr. THIAM (Special Rapporteur) said that the word "prevention" in the English text of subparagraph (*a*) of alternative B should be replaced by a more appropriate term.

The meeting rose at 1.05 p.m.

2259th MEETING

Wednesday, 13 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, 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)

[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).