Document:-

A/CN.4/SR.2259

Summary record of the 2259th meeting

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

Extract from the Yearbook of the International Law Commission:-

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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)

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

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

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. The CHAIRMAN said that the Commission would continue its discussion of part two of the Special Rapporteur's report (A/CN.4/442), concentrating first on the law to be applied and jurisdiction, and then on complaints before the court and proceedings relating to compensation.[3]

2. Mr. YANKOV said it was necessary to be clear about the sources of the international criminal law to be applied by the proposed international criminal court. The sources fell into two main categories, the first being transnational jurisdiction *ratione personae*, which generally fell within the competence of States. In such cases, the alleged criminals were individuals and the sources were for the most part to be found in the jurisprudence of domestic criminal law, since international tribunals had not yielded a sufficient body of case-law to provide the requisite guidance. The other principal source lay in international treaties and conventions and, to some extent, customary international law.

3. The first question was the degree of applicability of Article 38 of the Statute of ICJ to an international criminal court. It was important to determine the extent to which the Special Rapporteur's possible draft provision on the law to be applied, and especially alternative B, was in conformity with the format and content of that Article. The process of interaction between treaty law and customary law seemed to be less dynamic in the field of international criminal law than in some other areas of international law. At the present time, new rules and principles emerged primarily from treaty law. However, they did sometimes evolve from legislation enacted by States, a process which was conducive to greater harmonization and unification of criminal law.

4. With regard to alternative A, it would be appropriate to make specific reference to the statute of the court and the applicable international conventions. One complex problem yet to be resolved was that of the legal status of the obligations to be undertaken under the Code by States which ratified the Code but were not parties to the relevant conventions.

5. He preferred alternative B and thought that subparagraph (*b*) should be included in the draft provision, even if custom did play a fairly limited role in international criminal law. However, subparagraph (*c*) should either be deleted or substantially amended, perhaps by referring to "the general principles of law as recognized by the international community". In its present formulation, subparagraph (*d*) could be misleading, since it could be understood to refer either to judicial decisions of national courts or to decisions of international tribunals. As to subparagraph (*e*), internal law as such could not be considered as applicable law by an international criminal jurisdiction unless the parties in a given case explicitly expressed their consent to that effect in the agreement to bring the case before the court.

6. Another important issue was the relationship between the Code and the statute of the court, on the one hand, and specific international instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide, on the other. It might be useful if the Special Rapporteur paid particular attention to that matter.

7. He agreed that there should be a provision on the court's jurisdiction *ratione personae*, preferably one stipulating that the jurisdiction applied to individuals, regardless of whether they were government officials or private individuals. It could perhaps precede the draft provision concerning jurisdiction *ratione materiae*. He wondered, however, why aggression had not been included in the crimes listed in that provision, although he recognized that others mentioned in the draft Code had also been omitted. What was needed was a moderate and realistic approach to the scope of the jurisdiction, and the optional jurisdiction should not be broader than the compulsory jurisdiction. If it were, the Code might prove to be of largely declaratory significance. Lastly, the rule affirmed in paragraph 3 of the possible draft provision on jurisdiction *ratione materiae* regarding appeals was at best questionable, but at the present stage it might be prudent to retain the Special Rapporteur's provision as formulated.

8. On the question of entitlement to initiate proceedings before the court, the possible draft provision was highly restrictive. It might be preferable to adopt a more liberal approach than was reflected in paragraph 2.

9. Mr. SHI said that any scepticism he might feel about the feasibility of establishing an international criminal court at the current stage of development in inter-State relations in no sense implied a wish to obstruct a more thoroughgoing analysis of all the issues connected with such a court. On the contrary, a comprehensive analysis of all the issues involved would enable the Commission to comply with the mandate given to it by the General Assembly in resolution 46/54 of 9 December 1991. The Special Rapporteur had repeatedly made it clear that his possible draft provisions were not intended to form part of a draft statute for an international criminal court, the elaboration of which, in any case, the General Assembly had not entrusted to the Commission.

10. There was no substantive difference between alternative versions A and B, submitted by the Special Rapporteur in respect of the law to be applied. However, neither of them was satisfactory. In the first place, international criminal law, in the sense of what the Special Rapporteur would refer to as *droit international pénal*, was not universally recognized as a branch of international law and as a discipline, or indeed even as a concept. A system of international criminal law would necessarily incorporate three elements, namely an international criminal code, an international criminal jurisdiction and a mechanism for the imposition and enforcement of penalties. He agreed with the view expressed by some members that a code of crimes against the peace and security

[3] For texts of possible draft provisions, see 2254th meeting, paras. 3, 4, 6 and 7 respectively.

of mankind would amount to little without the backing of an international criminal jurisdiction. The Code could, of course, be applied by national courts, but that could lead to discrepancies in its application and thus render it less effective. On the other hand, the establishment of an international criminal jurisdiction was far from practical at the current stage of development in international relations: despite the end of the "cold war", power politics were likely to remain a feature of international relations and it was unlikely that States would be prepared to make the necessary concessions in respect of their sovereignty so that such a court could function. While he was not optimistic that the draft Code would ultimately take the form of a binding international convention, since many felt that it was too soon to speak of international criminal law in the full sense of the term, he none the less hoped for the best.

11. As to alternative B of the proposed draft provision, international criminal law must have its own distinguishing characteristics: its sources could not be the same as those of traditional international law. If the court were to apply custom, as well as general principles of law and subsidiary means for the determination of the rules of law, for instance, it would have far too much discretion, and that would do little to guarantee its impartiality, prestige and objectivity. True, article 15, paragraph 2, of the International Covenant on Civil and Political Rights did provide for the possibility of the application in criminal proceedings of general principles of law recognized by the community of nations, but the wisdom of transposing that notion to the statute of an international criminal court was doubtful. The guiding principle should rather be that of precision, as required by the maxim *nullum crimen sine lege, nulla poena sine lege*; in other words, there should be a convention to lay down precise definitions of the crimes covered and the penalties to be imposed. Even though the Nürnberg and Tokyo Tribunals had also applied custom and general principles of law, they had been established to meet the requirements of an extreme situation. Accordingly, he agreed that the sources of law to be applied by the international criminal court should derive solely from international treaties and conventions.

12. In the matter of the court's jurisdiction, the Special Rapporteur envisaged a dual regime, consisting, on the one hand, of exclusive jurisdiction and, on the other, of optional jurisdiction. The fact that a State was party to the statute of a court did not necessarily mean that it automatically conferred jurisdiction on that court. He also agreed with the terms of article 26 of the 1953 revised draft statute, on attribution of jurisdiction.[4] So far as paragraph 1 of the draft provision on jurisdiction *ratione materiae* was concerned, the crimes of genocide, systematic mass violations of human rights and apartheid could be committed only by States, whereas illicit international trafficking in drugs, seizure of aircraft and kidnapping of diplomats were generally committed by individuals. As to the first category of crimes, unless the special circumstances in which the Nürnberg and Tokyo Tribunals had been established obtained, it would be impractical to demand that a State should hand over the allegedly responsible individual for trial by the international criminal court, particularly where such an individual occupied a high government position. In such cases, there was no way of apprehending the alleged offender other than by the use of armed force against the State concerned, in which event the people of that State would inevitably suffer. What was more, with exclusive jurisdiction as envisaged by the Special Rapporteur, many States would be reluctant to become parties to the statute of the court. In the second category, namely, crimes where the State was not involved, forms of international cooperation like Interpol, extradition treaties, treaties of judicial assistance, and universal jurisdiction, made an important contribution to prevention. The defects in forms of cooperation of that kind could be remedied through the joint efforts of States; the obstacles in that respect were far easier to overcome than were those inherent in establishing an international criminal court.

13. He agreed entirely with paragraph 3 of the draft provision, for most States would certainly not accept the idea of an international court having jurisdiction to hear appeals against decisions handed down by their own national courts and any system for submitting such decisions to the international criminal court would be regarded as a flagrant infringement of sovereignty.

14. On the principle of two-tiered jurisdiction, he also agreed that an international criminal court should sit both as a court of first instance and as a court of appeal. It would be helpful if, as already suggested, a chamber of the court could sit to hear proceedings at first instance, appeals being heard by the full court.

15. Mr. MAHIOU said that, before commenting on the two draft provisions, he wished to make a preliminary remark. He noted that Mr. Pellet (2257th meeting), when speaking of the draft Code adopted by the Commission on first reading in 1991, had referred to "your" Code and "your" draft and to the Code "you" had adopted. He was somewhat perplexed by the use of those words, since any draft was adopted by the Commission as a whole, which worked by consensus. Even if that consensus was imperfect, imperfection was perhaps in the nature of a consensus. In adopting the draft Code on first reading—a draft Code that necessarily gave rise to differing reactions—the Commission had engaged in a collective endeavour. He found it difficult to understand why anyone should disavow the paternity of that endeavour, even if it was somewhat putative.

16. As to the provisions proposed by the Special Rapporteur with respect to the law to be applied by the international criminal court, alternative A required considerable amplification, while alternative B gave rise to certain objections and prompted some comment, as indeed was the Special Rapporteur's intention. The most important part of alternative B was contained in paragraph (*a*), relating, as it did, to international conventions, which were by far the most important source of international law, all other sources being of secondary importance. In that connection, he wondered whether a distinction between sources should not be made according to the type of norms covered. The distinction sometimes made between norms of conduct and norms of prevention, for instance, might perhaps have a greater impact in

[4] See 2254th meeting, footnote 4.

international law than in domestic law. Norms of conduct were those norms that enabled an act or omission to be qualified as a crime. Any such qualification should, in his view, be based on international conventions and possibly also on general principles of law, but there were serious doubts about custom. In that connection, Mr. Shi had referred to article 15 of the International Covenant on Civil and Political Rights, from which it would appear that, in the human rights field, the basis for qualifying an act as a crime was international law in general. Particularly striking, however, was the fact that article 15 made no mention at all of custom as a source of law, from which he could only deduce that the intention was not to make a customary rule the basis for qualifying an act as a crime. If that was so in the case of human rights, how could a customary rule be used for the infinitely more serious offences of crimes against the peace and security of mankind?

17. The position was different in the case of norms of prevention—namely, the norms that set forth the conditions governing the institution of proceedings and the imposition of penalties—since they were mainly of a procedural nature. If such rules could not be derived from international conventions or from the general principles of law, then they could be derived from custom and also perhaps, in certain cases, from domestic law. They could also be determined with the aid of such auxiliary sources as judicial decisions and perhaps even doctrine.

18. The draft provision on the court's jurisdiction *ratione materiae* was the most complex and sensitive in the whole draft and could be said to signify the point at which all the difficulties, both of international law in general and of the draft Code in particular, converged, since it involved State sovereignty and the issues of compulsory jurisdiction, optional jurisdiction, exclusive jurisdiction and concurrent jurisdiction. There was also the additional problem of the States concerned in the punishment of the crime, there being at least four possible States. It was not at all clear, therefore, that a generally satisfactory solution would be found.

19. One difficulty lay in the link between the content of the Code and the court, inasmuch as the former could have an influence on the latter and vice versa. If the Code was confined to a few particularly serious crimes—the approach he favoured—it would be logical to opt for the exclusive jurisdiction of the international criminal court. The problem, however, was to reach agreement on the list of crimes to be covered by such exclusive jurisdiction. If, on the other hand, the Code was to cover many crimes, some of which were already dealt with by national courts, he failed to see how compulsory or exclusive jurisdiction could be introduced and believed that it would instead be necessary to opt for concurrent jurisdiction. For instance, assuming that the court was given jurisdiction to deal with cases of illicit trafficking in drugs, a veritable army of judges would be required to deal with the tens of thousands of people now being sought for that crime throughout the world. In other words, there were difficulties of a practical nature that precluded the inclusion of certain crimes in the draft Code.

20. One, somewhat simplistic, suggestion, which satisfied him neither intellectually nor legally, was that the court should have jurisdiction over any crime referred to it by a State on the basis of an international convention. The draft Code would specify, with regard to each of the crimes it covered, whether or not the international criminal court would have jurisdiction. That solution would overcome the need to find a global solution of principle on the question of jurisdiction, which was problematic and might prove impossible to resolve at that stage. It was important not to become entangled in a question of principle to which there was no ready solution. His suggestion would also mean that it would be left to States to decide on the area over which the court would have jurisdiction and whether or not they wished to make use of the instrument placed at their disposal.

21. Mr. PELLET, referring to Mr. Mahiou's initial point, said that, if Mr. Mahiou's argument was carried through to its logical conclusion, members of the Commission would be placed in an impossible situation, and it might even have been necessary to proceed to a vote. It would be far better to recognize that a member might oppose an instrument approved by the Commission but not the transmittal of that instrument to the General Assembly. He reiterated that he was not in favour of the draft Code in the form in which it had been adopted.

22. In reply to a request by Mr. VERESHCHETIN, Mr. MAHIOU repeated his proposal concerning the jurisdiction of the court.

23. Mr. RAZAFINDRALAMBO referred Mr. Vereshchetin to the summary records, in which opinions expressed and suggestions made during the debate were duly reflected. It was perhaps regrettable that the Special Rapporteur had refrained in his tenth report from summing up, however briefly, the discussions previously held on the issues now before the Commission. While it was naturally inevitable that new issues should arise in the light of views expressed in the Sixth Committee and as a result of the presence of many new members in the Commission, it was none the less desirable, in the interests of progress, to avoid going over ground which had already been covered. Almost all members had spoken in favour of the approach adopted by the Special Rapporteur in establishing a link between the draft Code and the future court. The possible draft provisions on the law to be applied and on the court's jurisdiction *ratione materiae*, although distinct from one another, should thus be seen as being closely linked. Alternative A of the draft provision on the applicable law was, in his view, inadequate in both form and substance, and could give rise to diverging interpretations. Alternative B was more appropriate, but the formulation "crimes under international law" in subparagraph (*a*) should be replaced by "crimes against the peace and security of mankind".

24. Like Mr. Yankov and Mr. Calero Rodrigues (2258th meeting), he had doubts as to the reference to "international custom" in subparagraph (*b*). There was practically no international custom in criminal law that was not incorporated in international instruments such as the Universal Declaration of Human Rights,[5] the Interna-

[5] General Assembly resolution 217 A (III) of 10 December 1948.

tional Covenant on Civil and Political Rights and the 1949 Geneva Conventions and the Additional Protocols thereto. He therefore questioned the desirability of making international custom a specific element of the law to be applied.

25. Subparagraph (*c*) gave rise to an objection of a similar nature. Most general principles of criminal law recognized by States were embodied in existing treaty law, including, *inter alia*, part one of the draft Code itself. The subparagraph should be amended to read: "The general principles of law and, more particularly, of criminal law and criminal procedure recognized by States".

26. Subparagraph (*d*) posed no difficulty, but the reference to internal law in subparagraph (*e*) was out of place and should be dropped. The 1953 draft had envisaged a completely different system and should not serve as a model in the present instance.

27. As to the question of jurisdiction *ratione materiae*, the problem with the proposed separation of crimes into two categories—the first to include crimes in respect of which the court would exercise exclusive jurisdiction, and the second to include crimes in respect of which its jurisdiction would be optional—was that no objective criterion seemed to have been used in assigning crimes to either category. For example, although the first category included illicit international drug trafficking, seizure of aircraft and kidnapping of diplomats, it failed to include a crime as serious as aggression. The suggestion that crimes should be categorized according to whether they did or did not entail State involvement was ingenious, but it was unlikely to prove acceptable to a large number of States. The system with the best chance of gaining wide acceptance would seem to be one whereby conferment of jurisdiction would be required in the case of all crimes directly or indirectly involving State responsibility. As had been proposed in the Sixth Committee, a procedure could be instituted whereby States might recognize the exclusive and compulsory jurisdiction of the court in respect of certain crimes under the Code, to be selected by themselves in the light of their interests. The provision in paragraph 1 would then apply only to crimes such as genocide and apartheid, which, under international conventions in force, fell within the scope of national jurisdiction. He agreed with paragraph 3 of the draft provision, which, by ruling out the hearing of appeals against decisions rendered by national courts, followed a virtually unanimous view expressed in both the Commission and the Sixth Committee. Lastly, a table should be drawn up showing those fundamental questions on which some measure of agreement had been reached. Such a table, which might perhaps be prepared by a special working party set up for the purpose, would greatly assist the General Assembly in issuing more detailed guidelines to the Commission.

28. Mr. ROSENSTOCK thanked the Special Rapporteur for his helpful report, which illuminated the key issues with which the Commission must deal. It was to be hoped that the Special Rapporteur and the working group assisting him would be able to produce a list of key issues and a rough outline. The Commission must consider the possibility of ad hoc tribunals, which could be called into being as necessary. As to part two of the report, he looked forward to receiving the views of the working group. It was not necessary to draft a perfect system in order to provide a basis for the General Assembly to take a decision on whether to proceed with some form of international criminal jurisdiction. All the relevant issues must be raised, the issues clarified, and suggestions made as possible guidance for the General Assembly.

29. In the matter of the law to be applied, he wondered whether there was sufficient clarity regarding the content of an international criminal law or relevant international custom. Mr. Yankov was right to say that a body of customary law was likely to develop. A new approach, which neither excluded nor included a reference to custom, could avoid the risks that Mr. Calero Rodrigues (2258th meeting) and a number of other members, including himself, saw in connection with international custom, and the possibility would be left open for future development. With reference to alternative B, did subparagraph (*d*) mean substantive rules or only procedural ones, and where would the principle of *non bis in idem* fit in?

30. Subparagraph (*e*) referred to internal law and he understood the position of those who cautioned against mixing the two systems, but eliminating a reference to internal law or failing to incorporate internal law in some way would leave enormous gaps. The International Convention against the Taking of Hostages, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, for instance, depended on internal law in order to function properly. The working group might wish to consider whether viable short cuts could be made by using what already existed, albeit in a different context. Perhaps aspects of the 1953 approach or another innovative method would help in resolving the problem. Otherwise, the task was too large and complex.

31. One way to deal with the issue of the law to be applied would be to list the international conventions that would apply, including, either initially or once it was widely ratified, the Code itself.

32. With regard to the draft provision on jurisdiction of the court *ratione materiae*, exclusive jurisdiction in certain types of cases had an obvious appeal. However, the majority of representatives who had discussed it in the General Assembly had not been in favour of it. Mr. Mahiou's was not perhaps the best solution. The Commission might wish to provide the General Assembly with alternatives, one of which should be an entirely optional system of jurisdiction. If it suggested that exclusive jurisdiction was the only possible approach, the General Assembly would reject it outright.

33. Again, the draft Code did not adequately define the critical concept of systematic or mass violations of human rights. It was to be hoped that that question could be dealt with in due course in the commentary. As to seizure of aircraft and kidnapping of diplomats, the conventions on the protection of diplomats and on the taking of hostages were separate instruments, and it might not be helpful to create a hybrid. More important, to include the Convention for the Suppression of Unlawful Seizure of

Aircraft, and not the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation would place the Commission in the absurd position of elaborating a regime that failed to cover the Pan Am flight 103 case. Moreover, was it useful to include apartheid and colonialism in the Code and was there anything in either of those questions not adequately covered, or capable of being covered, under the crimes of systematic or mass violation of human rights or the use of force. A more neutral and less anachronistic form of language on both points would help depoliticize matters.

34. Whether the Commission chose exclusive or concurrent jurisdiction, it would have to consider how many States must give consent. Was the consent needed from any State other than the State in which the accused was found? Could consent be regarded as granted by all States parties to the statute? If consent was required from all victim States, the Pan Am flight 103 case would mean consent from 30 or 40 States. If the Code required the consent of the State of nationality of the accused, that would be alien to extradition practice. If an American citizen went to Italy to rob a bank and then fled to Switzerland, and if, for the sake of argument, the United States of America had no extradition treaty with Italy, but Switzerland did, no one would think it appropriate to ask the United States whether the American citizen should be extradited to Italy. The argument that the State of nationality was necessary reflected a concern to politicize the system. As long as the Commission insisted that permission must be granted by the State of nationality, even though the crime had not been committed there and the individual was not in the territory of that State, it was suggesting, as might well be the case, that the international community was not ready to set up an international criminal court.

35. Another question was the relationship between the Security Council and an international criminal jurisdiction. In that context, he did not wish to leave unchallenged the criticism of the decision and reasoning of ICJ in the recent *Libyan Arab Jamahiriya* v. *the United States of America* and *Libyan Arab Jamahiriya* v. *the United Kingdom* cases.[6] There was no system of judicial review in the United Nations system. ICJ had no choice but to defer to the judgement of the Security Council. It was irrelevant that in the cases in point it had no reason not to.

36. He agreed with Mr. Bowett (2258th meeting) that if the Security Council held that aggression had taken place, such a finding was binding on the court, the question of individual responsibility being obviously a separate issue. A more difficult scenario was one in which the Security Council voted, by 8 votes to 7, not to adopt a resolution that an act of aggression had taken place. Was the court free to find that aggression had, in fact, taken place, and was that acceptable? What would happen if the Security Council voted 14 in favour and 1 against such a resolution, the one vote against being that cast by a permanent member? In such an instance, the Security Council would have determined that aggression had not taken place. Was it reasonable to envisage the court coming to a different conclusion within the same system? To what extent could a system tolerate two bodies reaching different conclusions? Ignoring the views of the Security Council on such issues as aggression entailed serious risks for the stability of the international system as a whole.

37. Mr. VERESHCHETIN, referring to Mr. Razafindralambo's remark, said that only two summary records in English and only one in Russian had been circulated so far. In such circumstances it was to be feared that any reaction to proposals made orally at the current session would have to be deferred until the next session. What method should the Commission adopt? If the object was simply to hear the views of one member after another, without asking questions, receiving clarifications or attempting to thrash out an agreement, then the present system was adequate. He wondered, however, whether that system was not at least partly to blame for the slow progress made on some important topics. With all due respect, he felt unable to follow Mr. Razafindralambo's advice.

38. On the question of the law to be applied, he preferred alternative B and had no objection to its being closely modelled on Article 38 of the Statute of ICJ. Everyone was agreed that the decisions of the future court should be based principally on international law, and Article 38 of the Statute listed the main sources of international law. In principle, at least, the Special Rapporteur's approach was therefore correct. The fact that subparagraph (*a*) of alternative B referred to "crimes under international law" rather than "crimes under international criminal law" was to be welcomed. Like Mr. Shi, he came from a country where the legal system did not regard international criminal law as an existing branch of international law.

39. Subparagraphs (*b*) and (*c*) as orally amended by the Special Rapporteur did not give rise to any difficulties, and he was likewise prepared to endorse subparagraphs (*d*) and (*e*), bearing in mind the qualifying reference to "subsidiary means" in (*d*) and the use of the words "where appropriate" in (*e*); it went without saying that when the court applied internal law, as it no doubt would be obliged to do in the matter of penalties, it would have to do so on the basis of international law.

40. In regard to the court's jurisdiction *ratione materiae*, he continued to believe that a link existed between the draft Code and the future court. Once the Code came into existence, the court would concern itself principally with crimes under the Code. Unfortunately, the draft Code in its present form failed to draw a clear distinction between international crimes and crimes with international consequences. In that connection, he wondered whether, instead of one possible draft provision on the subject, the Commission might not prepare two provisions, the first relating to the jurisdiction of the court in the early stages of its existence prior to the adoption of a Code and the second applicable once the Code became part of international law. Under the first, more modest draft provision, the court's jurisdiction would be confined to crimes recognized as such under existing international conventions, the court serving as an additional

[6] See 2255th meeting, footnote 8.

guarantee that such crimes would not remain unpunished. Under the second draft provision, the court would have compulsory jurisdiction in respect of crimes defined in the Code. Such a solution, although somewhat different from the one he had proposed earlier (2255th meeting), would seem appropriate in the light of comments made by other members in the course of the discussion.

41. As a more general suggestion, it might be useful to prepare a document listing those issues on which the positions adopted by members were identical or at least reasonably close. All seemed to agree, for example, that the court's jurisdiction *ratione personae* should be limited to individuals. Most members would prefer its jurisdiction *ratione materiae* to be limited, at least in the early stages, to crimes of an international character already recognized as crimes under international conventions in force, and many members appeared to think that it would be fitting to list the relevant conventions. A degree of agreement also seemed to exist on the point that, although a link undoubtedly existed between the Code and the court, the two issues could, at the present stage, be discussed in parallel and to some extent independently; and a number of members were of the view that the jurisdiction of the court *ratione materiae* might be expanded at a later stage, as and when States desired, and once the Code was adopted. Without claiming that the Commission was of one mind on all or most of those issues, he felt that an effort should be made at the present session to draw up such a list, possibly with the help of the working group set up to assist the Special Rapporteur. In that connection, would it not be possible to set aside one or two days towards the end of the session for further consideration of the item? Apart from anything else, such a list would facilitate the task of the Commission's Rapporteur in drafting the report on the work of the session.

42. Lastly, the secretariat should be requested to provide the Commission at its next session with a comparative table of proposals advanced previously in connection with certain aspects of the international criminal court issue, such as the law to be applied, the court's jurisdiction *ratione materiae*, penalties, and so on. It would be most useful to members of the Commission to know what their predecessors, including the 1953 United Nations Committee on International Criminal Jurisdiction, and various governmental and non-governmental organizations, as well as individual authors, had had to say on those subjects.

43. The CHAIRMAN assured Mr. Vereshchetin that by raising questions he was entirely within the rules of procedure and the practice of the Commission. He disagreed with Mr. Razafindralambo's observations: it was useful to be able to ask for clarification if certain doubts remained after a member had spoken.

44. Concerning the timetable, if the Commission had not exhausted the issues, it could revert to the report. In any event, the Commission must discuss the report of the working group assisting the Special Rapporteur. In his view, at least two more weeks in June or July had to be assigned to the question of an international criminal court. Owing to many uncertainties, it had not been possible to draft an exact timetable for the entire session. As to the second suggestion, the secretariat could provide the proposals submitted by other intergovernmental bodies and private groups, and the working group should have the most important ones before it.

45. Mr. CRAWFORD said that priority should be given to the issue of an international criminal jurisdiction, upon which a debate had been developing, and to State responsibility, even if it meant not dealing with the topic of international liability to any degree at the current session.

46. Mr. YAMADA, referring to the law to be applied by an international criminal court, said he saw no substantive difference between alternatives A and B of the possible draft provision, but preferred alternative B, because it was more specific. He was, none the less, concerned about the scope of the source of the law for criminal punishment if all the categories in alternative B were approved. The Special Rapporteur intended to have the court deal not only with criminal punishment, but also compensation to the victim of a criminal act, and for that reason he might have adopted a broader source of law. For his part, he would revert to the question of compensation at the appropriate point in the discussion, but if the Commission accepted dual functions for the court, two distinct sets of laws would need to be applied.

47. Clearly, the rule *nulla poena sine lege* must be observed. Article 38 of the Statute of ICJ could not serve as a precedent: the scope of the source of law must be more limited than that. In his opinion the law to be applied for punishment of crimes was in the international conventions referred to in subparagraph (*a*) of alternative B. The other subparagraphs could only have a subsidiary function in interpreting and determining existing international criminal law.

48. In order to make sure a fair trial was held, criminal procedural laws must be carefully defined; yet international law was lacking in that regard. Consequently, procedural laws should be included in the statute of the court.

49. The establishment of exclusive and compulsory jurisdiction in respect of the most serious international crimes was the final goal of the international community, but he doubted whether it would be acceptable to the majority of States. They might accept it for crimes like genocide and apartheid, and some weaker States might do so for illicit international trafficking in drugs. However, that crime was currently dealt with effectively by a great number of States through their national mechanisms. Most of the drug cases handled in his country related to international trafficking. Japan had excellent arrangements for judicial assistance with countries in Asia and with Canada and the United States of America. China, Indonesia, Singapore, Malaysia and Thailand, in particular, had severe penalties for drug offenders, and they were combating drug trafficking successfully. Japan would like to retain its national jurisdiction and would be hesitant to recognize the exclusive and compulsory jurisdiction of the international court, because that might jeopardize the existing legal structure. In his view, it

would be more practical to have a regime of optional jurisdiction and specific consent by States.

50. Mr. KOROMA, seeking clarification from Mr. Yankov on an earlier remark, asked why he had reverted to customary law in the definition of crimes. Mr. Vereshchetin had said that the draft Code did not draw a distinction between international crime and crimes of an international character, but what would the impact be of making such a distinction? As he understood it, Mr. Vereshchetin had expressed a preference for compulsory jurisdiction for crimes of an international character.

51. Mr. VERESHCHETIN said that there was a need to distinguish between two categories of crimes containing international elements. The first category was that of international crimes, for which States were always responsible, especially crimes against the peace and security of mankind. In addition, there was a second category of crimes containing international elements, which he would call crimes of an international character, and which usually were not linked to the political actions of States. He had in mind all crimes dealt with under specific existing conventions, for example drug trafficking, the seizure of aircraft or international terrorism. If the Commission sought to draw a distinction between jurisdiction for international crimes and for crimes of an international character, a problem arose in that the Code had not yet been adopted. Therefore, the Commission should not wait until the problems associated with the Code had been resolved; it should discuss the jurisdiction with regard to crimes of an international character as set forth in existing international conventions. The court should have compulsory jurisdiction for international crimes, whereas it should have optional jurisdiction for crimes of an international character. That would supplement existing procedures for prosecuting criminals under existing conventions. There must be a guarantee that in no circumstances would crimes go unpunished.

The meeting rose at 1.05 p.m.

2260th MEETING

Thursday, 14 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, 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)

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. Mr. PAMBOU-TCHIVOUNDA said that the questions of the applicable law and the jurisdiction of the court *ratione materiae*, discussed at the beginning of part two of the report (A/CN.4/442), were closely associated with the jurisdictional function of the mechanism for the implementation of the Code, even if that mechanism might also have to implement other conventions, whether existing or to be adopted.

2. The idea of achieving peace through the rule of law in international relations, which had been present in so many minds during the period between the two World Wars, would thus take shape and the supremacy of the future court would be reflected in the fact that there would be no possibility of appealing against its decisions. Those decisions would therefore be extremely serious and could not be taken by just any mechanism. Deciding, on the basis of the law, the fate of someone who had committed a serious breach of morality and international law was a measure to create a healthier society, the implementation of which would depend on the quality of the means employed: hence the need for a careful definition of the crimes to be punished and the rules to be applied for that purpose.

3. In his tenth report, the Special Rapporteur proposed two alternatives for a possible draft provision on the law to be applied;[3] the first was generic and the second more descriptive. He would not comment on those texts, which had already been discussed by many speakers. In his view, moreover, the point was not so much to choose between the alternatives as to combine them in a single text, the introduction to which would be alternative A, while alternative B, which would make the Code the primary source of the applicable law, would also list its other constituent elements. The provision might read: "The court (or the tribunal) shall apply international criminal law as established by the Code of Crimes, conventions, custom, general principles, judicial decisions and teachings and, where appropriate, internal law."

4. The list of sources of the applicable law had been extensively criticized both as to its principle and as to its content and attention had rightly been drawn to the gaps in the text, which did not mention General Assembly resolutions or Security Council decisions. He had doubts, however, about the suggestion that references to custom, judicial decisions, teachings and, above all, internal law should be deleted. That enumeration probably

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

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

[3] For text, see 2254th meeting, para. 3.