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Summary record of the 2260th 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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(<http://www.un.org/law/ilc/index.htm>)*

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 Mankind¹ (*continued*) (A/CN.4/442,² A/CN.4/L.469, sect. C, A/CN.4/L.471, A/CN.4/L.475 and Rev.1)

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. Mr. PAMBOU-TCHIVOUNDA 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

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.

did seem like a mixture which would be inconsistent with the *nullum crimen sine lege* rule, but it must not be overlooked that, in the tenth report, the concept of the applicable law covered both substantive law and procedural law. As shown by the reference to the general principles of criminal law, the report adopted a general approach to the concept of the applicable law.

5. It would be a mistake not to recognize that the role of international custom and internal law served that purpose as well because that would limit the specific functions of the criminal court judge in sentencing an individual or individuals who had been found guilty. Both internal law and custom had a key role to play in that regard, not in determining that a punishable act had been committed, but in establishing responsibility and deciding which penalty was to be imposed. The members of the court, who would be chosen on the basis of their experience, would be guided—perhaps even without realizing it—by the legal system of which they were the product.

6. With regard to jurisdiction, the possible draft provision⁴ had been designed to take account of a dual regime: paragraph 1 assigned a major role to the principle of general and compulsory jurisdiction, while paragraph 2 embodied the principle of optional or ad hoc jurisdiction. In the implementation of that dual regime, however, the jurisdiction of the court or, in other words, its ability to fulfil the mission of creating a healthier society for which it had been established, seemed to depend on the will of States and, in particular, the State in whose territory the crime had been committed. The provision's design seemed to be faulty in two ways: in terms of law and in terms of logic. In terms of law, it was faulty because taking cognizance should not be confused with jurisdiction (paragraph 2 seemed to place more emphasis on taking cognizance than on jurisdiction); it was also faulty in terms of logic because the question of jurisdiction came before that of cognizance. The question of jurisdiction depended on the nature of the punishable act. How then could the jurisdiction of a criminal court be subject to the will of one State, which would be free at any time to call that option into question? That was the proposed system's weak point and it should be remedied before the Commission went any further in its study of the question of jurisdiction. In so doing, the Commission would realize that the principle of a dual regime should either be restricted or abandoned and it would question whether discriminatory treatment could be allowed in the implementation of the Code.

7. In his view, the Code should serve as a point of departure; it should be specifically referred to and the exclusive jurisdiction of the court or the "trial mechanism" should be provided for on the basis of the crimes defined in the Code. The list in paragraph 1 would then no longer serve any purpose. Subordinating the authority of the court to the attitude of the General Assembly or the Security Council towards a de facto situation in which the United Nations could not punish those responsible without running the risk of endangering its own existence would be tantamount to denying the court its character of an institution that was independent of the United Nations system and responsible for safeguarding international public order.

8. Mr. THIAM (Special Rapporteur) said that the words "The general principles of criminal law recognized by the United Nations" in subparagraph (c) of alternative B of the draft provision on the law to be applied should be replaced by the words "The general principles of law recognized by the community of nations", as in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

9. Mr. VILLAGRAN KRAMER said that Latin American lawyers had held an exchange of views on the establishment of an international court during which they had questioned whether the course of world events would have been the same if an international criminal court had existed in the 1970s or the 1980s. In the 1990s, if Iraq had suffered total defeat and had surrendered unconditionally, as the Axis Powers had done in 1945, would the countries which had participated in Operation Desert Storm have set up a Nürnberg-type tribunal? If so, what would have been the applicable law? It was recognized that, while the Nürnberg experience had been entirely positive in political terms, it had not been entirely satisfactory in legal terms. That was why the international community had, ever since, entertained the idea of establishing a court that would prevent the victors from acting unilaterally and ensure that the vanquished were not always the only ones to be tried.

10. As matters now stood, if the Commission stopped dealing only with aggression and started looking into crimes such as drug trafficking or the recruitment of mercenaries, it would find that it would not be so difficult to establish an international court. From that point of view, aggression and intervention should stop being the focus of legal experts' attention.

11. On the question of aggression, however, there was one important preliminary issue, namely, the determination of the crime by the Security Council. In that connection, writers on law had made it sufficiently clear that it was a State, not an individual, that was found guilty of aggression and that, when the Security Council exercised its powers under Chapter VII of the Charter of the United Nations—for example, to apply sanctions or decide on collective action against a State—it did so on the basis of the conduct of that State. A finding by the Security Council acting under Chapter VIII of the Charter or by the competent organ of a regional organization of aggression against a State could thus have consequences before a court, whether national or international. It would therefore be interesting to see what effect the existence of an international court might have on the function of the Security Council to make such a determination, since the Council would then have to assess the nature of the act of aggression and the judicial implications of its finding.

12. With regard to the jurisdiction of the court, he said that, as a lawyer, he was inclined to be in favour of compulsory jurisdiction, but, from a political point of view, he could see the advantages of optional jurisdiction. He nevertheless submitted the following problem for the Commission's consideration: what would happen if the perpetrator of an international crime who was a national of a State not party to the instrument establishing the international criminal court asked to be brought before that

⁴ Ibid., para. 4.

court because he had no confidence in the impartiality of justice in his own country?

13. The discussion on the applicable law had been very useful. Now that the Commission was about to modernize the law, it must once and for all go beyond ideas that had been valid at the time of the establishment of PCIJ and learn a lesson from research and legal thinking on the law to be applied by international courts. There could be no disagreement among the members of the Commission on treaties and the general principles of law: the positive law enshrined in treaties was obviously appropriate in the present context, as were the traditional principles of criminal law, such as the principle of respect for procedural guarantees. As to internal law, there was every reason to believe that the members of an international court would not fail to look to it for the general principles of criminal law that would be applicable. Such a link with internal law should not worry the Commission. Moreover, the court might have to apply internal law in the case of related offences committed in connection with the crimes specifically within its jurisdiction and governed by international law. As far as custom was concerned, he agreed with Mr. Calero Rodrigues (2258th meeting) that lawyers had demonstrated its role to be less important than had been believed and that there was no need to place too much emphasis on that source of law. With regard to judicial decisions and teachings, he shared the views already expressed.

14. Turning to the question of the crimes listed in paragraph 1 of the possible draft provision on jurisdiction, he recalled that the United Nations tended to adopt a special convention for every type of crime and that, whenever the authors of one of those conventions asked whether the crime in question was a crime both in internal law and in international law, they left the door open for the implementation of their text by an international court. That would, however, in no way prevent the instrument establishing an international criminal court from somehow specifying the crimes whose alleged perpetrators would be brought before the court, whether or not those crimes were already covered by an international convention. In the Special Rapporteur's view, it was essential to do so.

15. In conclusion, he requested clarifications concerning the mandate of the working group that was to be set up. Whatever mandate was decided, he considered it essential that the text to be submitted to the General Assembly should be final or close to it, should clearly indicate the main aspects of the proposed international criminal court and should specify the crimes which would come within its jurisdiction.

16. The CHAIRMAN said that the working group's mandate would be carefully defined.

17. Mr. ROBINSON said that the law to be applied depended on whether an instrument such as the Code would be the basis for the court's jurisdiction. If so, the law to be applied would be defined by that instrument, although it might be useful to add a reference to customary international law, assuming that it was not incompatible with the instrument in question. For example, article 293 of the United Nations Convention on the Law of the Sea provided that the court or tribunal having jurisdic-

tion was to "... apply [the] Convention and other rules of international law not incompatible with [the] Convention."

18. It would, however, seem clear that the court must apply international law in its two constituent elements: conventional treaty law, namely, the relevant international conventions, including, but not limited to, conventions dealing with crimes under international law, and customary international law, as derived from the practice of States and as was applicable in a particular case, which would be more relevant to other aspects of the court's work than to the identification of acts. It was to be hoped that the final text would include both elements.

19. With regard to alternative A of the possible draft provision, he considered that, although the term "international criminal law" was used in the United Nations and other bodies, it was an overstatement about an area of law that was still in embryo. In fact, the international criminal court would be called on to apply international law based purely and simply on conventional law and customary international law.

20. He did not like the reference to "national law" either because that concept raised doctrinal and even metaphysical difficulties about the monist or dualist nature of international law. If the court applied national law, it would do so at the direction of international law and not as an independent area of law. He therefore proposed that alternative A should be redrafted to read: "The court shall apply international law, comprising international conventions and international custom as evidence of a practice accepted as law".

21. Turning to alternative B, he said that, although he took the view that the sources of the law to be applied were confined to international conventions and international custom, he was in favour of proceeding from the general to the particular. With regard to subparagraph (a), he agreed that the court would apply international conventions, but he was not sure that it would apply only conventions relating to the prosecution and prevention of crimes under international law. In taking its decisions, it might well also have to refer, and not just in a tangential manner, to conventions dealing with other matters and conclusions drawn from an analysis of other conventions might even be an important part of its *ratio decidendi*. It would therefore be enough to state that the court applied international conventions.

22. Concerning subparagraph (b), he noted that, unlike other members, the idea that the court applied international custom held no terrors for him. As had already been said, criminal law required certainty and express written provisions, no doubt because the liberty of the individual was at stake. Two points must be made on that matter, however. First, regardless of the regime established for the court, the scope of customary law would be relatively small, since, for the most part at any rate, the constituent elements of international crimes would be defined in the Code or in international conventions. Not that that ruled out custom, but it would not play as significant a role as others appeared to have anticipated. Secondly, it was difficult to see how international custom as evidence of a practice accepted as law provided a less secure basis in international criminal law

than in other areas of law. It might be that custom as evidence of a practice accepted as law was more difficult to establish, but that did not answer the fundamental question whether it should be applicable. Moreover, the application of customary law would often give rise to rules that protected the accused.

23. He regarded subparagraph (c), whether in the form originally proposed or as subsequently amended by the Special Rapporteur, as inconsistent. Any general principle of criminal law recognized by the international community, for example, the principle *nullum crimen sine lege*, would qualify as a rule of customary international law.

24. He agreed with those members of the Commission who were in favour of the deletion of subparagraph (d) and he had already explained why he also favoured the deletion of subparagraph (e). He proposed that alternative B should be amended to read:

“The court shall apply:

(a) International conventions;

(b) International custom as evidence of a practice accepted as law.”

25. He preferred the regime of compulsory and exclusive jurisdiction for all international crimes of a serious nature. He took compulsory jurisdiction, as opposed to optional jurisdiction, to mean that, if a State accepted the statute of the international criminal court, it automatically accepted its jurisdiction for those crimes. His understanding of exclusive jurisdiction was that the international criminal court alone had jurisdiction under its statute for the crimes specified therein, in contradistinction to a system of concurrent jurisdiction, in which the court as well as States had jurisdiction for certain crimes under the statute. It was in that sense that compulsory and exclusive jurisdiction represented an ideal to be attained. If that was not possible because of political reality, however, he could accept a system in which the court had compulsory and exclusive jurisdiction for certain carefully defined crimes, whereas jurisdiction for other crimes would depend on the consent of the States concerned following acceptance of the court's statute.

26. In any event, he was against a system of concurrent jurisdiction, whether in the sense that the court as well as States had jurisdiction for the same crimes or in the sense in which, for a particular crime, the State was competent for the investigation and the court for the prosecution. Such a system would only lead to confusion and would not preserve national sovereignty. He was therefore happy that the Special Rapporteur had not suggested anything of the sort, although paragraph 2 of the draft provision on jurisdiction of the court *ratione materiae* was not perfectly clear on that point.

27. He would have preferred a longer list for the crimes enumerated in paragraph 1 of the draft provision on jurisdiction.

28. He also wondered how the jurisdiction of the international criminal court could be reconciled with the jurisdiction that States had for crimes under many international conventions, in particular with regard to

extradition and mutual legal assistance. How were the States parties to those conventions to be released from their obligations under those conventions? For example, of the five crimes listed in paragraph 1, four were governed by conventions that gave individual States the right to try offenders. That raised the question of the application of successive treaties relating to the same subject-matter, which was dealt with in article 30 of the Vienna Convention on the Law of Treaties. Would the regime of the international criminal court supersede that of the conventions? Would States parties to those conventions be willing to surrender their jurisdictional rights under those instruments to the international criminal court? Under the typical treaties dealing with the punishment of an international crime, a State party that had jurisdiction for the crime was entitled to apply for the offender's extradition if he had not been prosecuted by the State in whose territory he was currently found. Clearly, a regime requiring the State in whose territory the offender was found to hand him over and confer jurisdiction on an international court for trial would be incompatible with the right of other States parties that had established jurisdiction for that offence to require his extradition for trial in their territory. Was that situation dealt with under article 30 of the Vienna Convention on the Law of Treaties? Could those treaties establishing a regime for the prosecution and punishment of international crimes be said to have the same subject-matter as a treaty establishing an international criminal court? There could, of course, be a provision that, for States parties to both sets of treaties, the new treaty regime establishing an international criminal court took precedence over the many instruments dealing with the prosecution of international crimes. But that would not be appropriate, since it was not the whole regime of those treaties that was at issue, but only that part dealing with the prosecution and extradition of offenders.

29. Those questions could not all be answered at the present stage, but the new regime obviously had to be reconciled with the regime established under the various international conventions, especially since, whatever the regime adopted for the identification of crimes for which the international court would have jurisdiction, more than half of such crimes would come from existing international conventions.

30. With regard to paragraph 2 of the draft provision, there needed to be further discussion of the criteria for identifying those States that could confer jurisdiction on the court (optional jurisdiction). As it stood, the provision appeared to contain cumulative references to both criteria: the criterion of the State in whose territory the crime was alleged to have been committed and the criterion of the State that had been the victim or whose nationals had been the victims of the crime. It would seem that both criteria must be satisfied before jurisdiction could be conferred. Usually, a State party to an international convention dealing with the prosecution of a crime had jurisdiction when the crime had been committed in its territory or when the offender was found in its territory; the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation had never gone beyond that point. On the other hand, later instruments provided that any State party that

had established its jurisdiction for the crime on any one basis was entitled to exercise its criminal jurisdiction over the offender or, in other words, to put him on trial.

31. His first reaction was to question the cumulative nature of the two criteria in paragraph 2 and to ask whether they should not be separate, with either of them being applicable. Upon reflection, however, he saw merit in the Special Rapporteur's approach. Both the State in whose territory the crime had been committed and the victim State should have a say in deciding whether to confer jurisdiction on the court. Furthermore, he had difficulty accepting the victim State as the sole criterion, which was not present in earlier international conventions: that was a difficult concept and it was open to abuse. Requiring that it exist alongside the criterion of the territorial State before jurisdiction could be conferred was therefore appropriate and his only doubt was whether the criterion of the State in whose territory the alleged perpetrator of the crime was found should not also be retained.

32. Lastly, although it might be premature to discuss ways of reconciling the jurisdiction of the international criminal court and that of the Security Council with regard to aggression, he expressed an interest in the distinction drawn by Mr. Bowett (2258th meeting) and endorsed by Mr. Villagran Kramer between a determination by the Security Council, which was necessarily related to the conduct of States, and the judgements of the court, which concerned individuals. He would welcome any solution that took account of political realities while ensuring the independence, prestige and respectability of the court.

33. Mr. FOMBA said that, in his view, the answer to the question of the law to be applied and the jurisdiction of the international criminal court *ratione materiae* lay in the interpretation given to the maxim *nullum crimen, nulla poena sine lege*. The consequences differed according to whether the interpretation was strict or broad.

34. If the maxim was interpreted strictly, formal, or written, law could be perceived behind the word *lex*. Accordingly, the application of the maxim to international criminal law, and hence to the international criminal court, would mean that the crimes and penalties would be laid down in written law, namely, the Code. In other words, inasmuch as crimes against the peace and security of mankind were defined in the Code, the court would have to apply only the Code. The advantage of that would be to reduce, and properly circumscribe, the body of rules to be applied. The word *lex* as understood in the broad sense, on the other hand, could be interpreted as denoting law in general, whether or not it was written. In that case, the body of rules was not simple: it was composite and difficult to determine precisely, and that meant that the court might apply various categories of rights. Having regard to the strict character of criminal law—whether national or international—that solution would be ineffective, in his view, and should therefore be dropped.

35. A strict interpretation of the same maxim was also tantamount to concluding that the court should have jurisdiction only over the crimes defined in the Code, and that such jurisdiction must be exclusive and compulsory.

Yet, there was no unanimity either on the list of crimes set forth in the Code, or on their legal regime or the sensitive issue of the surrender of the sovereign jurisdiction of States in criminal matters.

36. Did that mean that, according to the relentless logic of the maxim, the Commission must propose that the court should apply "the Code, the whole Code and nothing but the Code" on an exclusive and compulsory basis? If so, should the Code not be reviewed for the purpose of making it less rigorous, particularly by reducing the list of crimes to the lowest possible common denominator? Above all, how was the compulsory accession of States to be achieved?

37. Would it not be preferable to depart from that logic and to show more modesty and also more realism by recommending flexible solutions which, without losing sight of the future, would take account of current political realities and offer some chance of guaranteeing a minimum of efficiency in the prevention of crimes against the peace and security of mankind? As he had not thought the matter through completely, if that were indeed possible, he could not provide an entirely satisfactory answer to those questions. However, he supported the judicious proposals made by certain members of the Commission and, in particular, by Mr. Mahiou (2259th meeting).

38. Mr. KOROMA said that he did not altogether see what Mr. Robinson had meant when he had referred to a conflict between certain international instruments and the Code. True, the various instruments must be reconciled and the Commission had in fact looked into the matter when it had considered the draft Code on first reading. The question of how that could be achieved remained, however. In the case of the definition of aggression laid down in article 15, paragraph 2, of the draft Code, the Commission had drawn on the Charter of the United Nations itself, as well as on other instruments and on General Assembly resolutions. In that connection, he would remind members that the Nürnberg Tribunal had applied all the international instruments of the times and that those who had been brought before it had known that, under the terms of those instruments, their activities had been unlawful. The draft Code itself was, as he saw it, one way in which the various instruments on the subject were reconciled and he did not think that there was any real risk of conflict.

39. He would like to have some clarification about Mr. Villagran Kramer's question on the relationship between the future international criminal court and the Security Council, having regard to the most recent resolution adopted by the Security Council with respect to Libya.⁵ Although the Security Council was supposed to judge solely the conduct of States, it had in that case requested a State to hand over two of its nationals so that they could be tried; according to the assumption adopted thus far, that would, precisely, come within the jurisdiction of the court.

40. Mr. ROBINSON said that, whatever approach the Commission took and whether or not it incorporated in

⁵ Security Council resolution 748 (1992) of 31 March 1992.

the Code all the provisions of the various international instruments, so that the Code would provide the source of the law to be applied, there would still be a risk of conflict, not so much from the point of view of the accused as from that of the State which considered that it had the right to prosecute. All States parties to those instruments, other than the State which surrendered the particular individual to the international court, had the right, under those instruments, to insist on the extradition of that individual so that it could try him. That was where the conflict arose and that was why he had suggested that a provision should be added to the draft Code to the effect that the new regime would prevail over the other international conventions. So far as he knew, the problem had never been considered in any significant way by the Commission or the Sixth Committee of the General Assembly. The Commission must therefore take up the issue if it really wanted to do useful work.

41. Mr. VILLAGRAN KRAMER said that, in the case of crimes such as aggression or apartheid, the Security Council qualified the conduct of a State and therefore imposed sanctions on that State, whereas, in the case of certain other crimes, the measures taken were directed mainly at individuals. In his view, the measures taken by the Security Council in the case of aggression should not limit the action of the court; quite the contrary, as the decisions of the Security Council were binding on the court, the court must try those responsible for the crime. As to the resolution concerning Libya, in his view, the Security Council had not judged the conduct of a State, but had taken a decision regarding an act of terrorism, which, by its very nature, necessarily had to be attributed to specific individuals; that did not mean that the decision had not been motivated by the fact that the situation could have led to an international conflict. In other cases, too, such as that of Iran, the fact that the Security Council had taken action had not stopped other bodies from considering the matter. Lastly, no provision of the Charter of the United Nations could be interpreted as constituting an obstacle to the action of a court, even following the intervention of the Security Council.

42. Mr. CRAWFORD said that, in his view, no provision added to the Code could prevent the risk of conflict with existing conventions, since it would have no binding effect on third parties. Moreover, under such conventions, States parties would have universal jurisdiction. That was a serious problem and one that would not be easy to solve.

43. Mr. ROBINSON explained that his proposal was that it should be stated clearly that the Code would prevail over other instruments for States which were parties both to the new regime and to existing international conventions.

The meeting was suspended at 11.30 a.m. and resumed at noon.

44. Mr. CRAWFORD said he understood that the Special Rapporteur had divided the members of the Commission into two camps: those who were in favour of the establishment of an international criminal court and those who were not. He himself fell into the first of those categories, but that did not mean he did not wish to

know more about the nature of the court and what it would do.

45. With regard to the question of the law to be applied, he believed, like Mr. Pellet (2257th meeting) and Mr. Yankov (2259th meeting), that it was essential to specify the crimes that would come within the jurisdiction of the court, independently of any general references to international law or international criminal law. He understood that the proposal to refer to national law had given rise to objections, but that seemed inevitable. Perhaps, if the aim was to give the mechanism to be set up a degree of flexibility, it was even necessary to consider whether the court could apply certain elements of national law as such.

46. The question of jurisdiction *ratione materiae* lay at the heart of the discussion. Yet the draft provision on the subject was, as it stood, unsatisfactory and unworkable, in his view. The first problem related to the choice of crimes over which the court would have exclusive and compulsory jurisdiction. In the first place, the draft provision ran counter to other relevant international conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide, which provided for universal jurisdiction. Secondly, some of the crimes mentioned were precisely those for which submission to an international court would not be appropriate. That was true of aggression and, in particular, of illicit international trafficking in drugs, for many more cases of that kind were heard before national courts in any month than had ever been heard in the whole history of international justice. Mention was also made of the seizure of aircraft, but not of their destruction, and of the kidnapping of diplomats, but not of the killing of diplomats. In the case of diplomats, the conferment of exclusive jurisdiction on the international court would be incompatible with the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, under the terms of which it was for national courts to prosecute. In any event, in the present or even future, state of international relations, it was inconceivable that there would be an international criminal court vested with exclusive and compulsory jurisdiction, divorced from all prosecuting mechanisms, for such a broad range of crimes. Some members of the Commission, like Mr. Shi (2259th meeting), went so far as to criticize the very idea of such a court because it would be confronted with the following dilemma: either the persons charged would have committed the crime in their private capacity, in which event national jurisdiction would be enough, or they would have committed it on behalf of the State, which would never give them up to be prosecuted by an international court. Those arguments led him to think that, although the court might have its uses, it certainly could not have exclusive and compulsory jurisdiction. Paragraph 1 of the possible draft provision on jurisdiction was therefore unacceptable.

47. The regime of optional jurisdiction was an easier solution to envisage, provided that all its aspects were specified. The court would then have jurisdiction in well-defined cases and in accordance with the provisions of international instruments that States themselves were ready to accept. Paragraph 2 of the draft provision, how-

ever, did not, first of all, deal with jurisdiction *ratione materiae* as such, but with the precondition for the existence of such jurisdiction. Secondly, it was not expressly tied to the Code or to the treaties in force, so that a State could impose on the international criminal mechanism the obligation to try someone for any crime whatsoever. Thirdly, it placed too much emphasis on the consent of the victim State, which was not necessarily the best placed to rule on the jurisdiction of a court—not to mention that such a solution was unworkable in the case of mass violations. Fourthly, it paid no regard to the State of nationality, when consent was necessary in the case of those countries where criminal jurisdiction was closely associated with nationality. Finally, the draft provision gave the right to a State to bring a case before the court without any control mechanism, which was debatable.

48. As to paragraph 3, he agreed with the view that it was unnecessary. Since the right of appeal did not exist unless it was expressly conferred, there was no reason to exclude it.

49. Mr. GÜNEY said that the jurisdiction of the court and jurisdiction in respect of a criminal action were the first two questions raised by the establishment of a criminal court, which, as the Special Rapporteur had noted, enjoyed the support of most of the members of the Commission. In his view, the court should be used only on an ad hoc basis in order to take cognizance of particularly serious and odious crimes.

50. With regard to the applicable law, alternative B proposed by the Special Rapporteur could serve as a basis for discussion. According to that text, the court would apply primarily the international conventions relating to the prosecution and prevention of crimes under international law, the general principles of criminal law recognized by the United Nations and the applicable procedural rules. The application of international custom was, in his view, not to be ruled out entirely, but, for the time being, it would be better not to mention it, as Mr. Rosenstock (2259th meeting) had suggested. It was also not necessary to mention judicial decisions and teachings as means for the determination of rules of law.

51. As to the question of jurisdiction *ratione materiae*, he could not see the need for a list of crimes. Concerning paragraph 2 of the draft provision on that question, he thought that the obligation to hand over to the court the perpetrator of a crime should not be restricted to the State in whose territory the crime had been committed. The obligation should be extended to all States parties to the statute of the court. Lastly, the court should not be bound by the decisions of a political organ when those decisions were concerned solely with inter-State relations.

52. Mr. de SARAM, referring to the Special Rapporteur's review of the trends apparent in the Commission's consideration of the general question of the desirability and feasibility of creating an international criminal court or an international criminal trial jurisdiction, stated that, since the Commission proceeded by way of consensus and it was desirable to secure the widest possible accession of States, the establishment of an international criminal trial mechanism, envisaged as one of the possible options in General Assembly resolution 46/54,

would be preferable to the establishment of a permanent court, which a number of speakers had favoured. In his view, the more realistic and, accordingly, the more appropriate course would be an ad hoc court, not a body in permanent existence: one that would be established by a convention and convened, whenever necessary, under a procedure that was generally acceptable, would ensure against unreasonable usage, and would be sensitive as well to the important concerns of States for matters affecting their sovereignty. That would be the first step in a long and gradual process of establishing an international criminal court and would have the advantage of not disrupting the existing system, which was based in large part on the adequacy of national legal systems and a network of conventions establishing the rules governing extradition. Though it appeared to him to be premature for the Commission, at its present session, to endeavour to reach a definitive conclusion on the issue of permanent status or otherwise; nevertheless much of the preparatory work towards the preparation of an appropriate statute for the court, with alternative provisions, where necessary, for a permanently established body or a body to be convened ad hoc from time to time, when necessary, could begin at the present session of the Commission, together with consideration of the many related questions, such as those raised in part two of the Special Rapporteur's report, that would, of course, need to be resolved in a generally acceptable manner if an international criminal court or an international criminal trial jurisdiction were ever to become a reality.

53. The establishment by the Commission of a working group, for the detailed work necessary and for the preparation of a report and recommendations to the Commission was an eminently sensible course. It would be extremely useful for the Commission and, subsequently, for the Sixth Committee, and would contribute to more orderly and non-repetitive discussions, if the working group and the secretariat could put together a comparative table of the provisions of the principal statutes and draft statutes that existed, though admittedly some selection would have to be made as to what were the most appropriate. It would also be very helpful, though perhaps not possible at the present session of the Commission, if it were possible for the working group and the secretariat to prepare as well an accompanying explanatory note of annotations, in summary and enumerative style, showing the principal positions that had been taken in earlier United Nations' discussions on the various provisions. As he had already noted, many of the comments being made at the current session recalled those already stated in the Commission and the Sixth Committee in earlier discussions in 1990 and 1991 and, indeed, more than a quarter of a century ago, between 1950 and 1953, when the question of establishing an international criminal court pursuant to article VI of the Convention on the Prevention and Punishment of the Crime of Genocide had been raised. Such an annotated comparative table, though its preparation would take time and effort, would serve as a continuing and easily accessible reference document that would help ensure that all delegations in the Sixth Committee were on the same level of awareness in the debate, and thus in a position to participate fully in the determinations to be made on the various and important questions involved.

54. Very careful consideration would need to be given in the working group to the difficult and sensitive question of the procedures through which an ad hoc court could be convened from time to time in a manner that would prevent unreasonable usage and provide as well for adequate safeguards with respect to the understandable sensitivities of all States on matters relating to their sovereignty. The equally difficult and sensitive question of how the role of the Security Council under the Charter of the United Nations would have to be accommodated would also have to be thought through; such as on the question of the offences in the field of peace and security, and the procedures through which offences in the field of peace and security might be brought within an international criminal trial jurisdiction.

55. A governing consideration in the many determinations that would have to be made in the course of the work of the Commission on the two questions of the substantive law to be applied and jurisdiction, would have to be that any provision the Commission adopted should meet the exacting requirements of criminal law as to greatest possible precision in language. When the provisions adopted on first reading were circulated to Governments, the latter would not fail to submit them to lawyers who had broad experience in the defence of the accused and the technicalities of criminal law and for whom precision in the use of language was crucial.

56. If precision was to be the governing consideration, it seemed to him that, in respect both of jurisdiction and of the law to be applied, the Commission could not escape the necessity of giving very serious consideration to the view that crimes to be covered by the international criminal trial jurisdiction and the law to be applied by that jurisdiction should be only as eventually defined and provided for in the Code and, additionally, in such further instruments, such as, for example, conventions supplementary to the Code that might be concluded from time to time by States specifically to place an additional crime or crimes within the jurisdiction of the international criminal court. The suggestion that the international criminal trial jurisdiction should only cover, or perhaps also cover, crimes identified and described in particular conventions, to be appropriately listed, seemed on first impression to be attractive because it might avoid some of the problems that could arise when considering the question of the offences to be brought within the jurisdiction. Yet, it seemed to him that there was still a difficulty present that made that suggestion somewhat less attractive; namely, that unless a convention was specifically designed for the purpose of placing a crime or crimes within an international criminal trial jurisdiction, there was a very real possibility that the language adopted in a convention might not be as precise as it should be to meet the extraordinary degree of precision required in criminal law.

57. In conclusion, he said that more detailed discussion and the answers to the many questions raised would be greatly facilitated by the report of the working group and still more by the comparative table which he hoped would be prepared.

58. The CHAIRMAN assured Mr. de Saram that his proposal would be taken into consideration.

59. Mr. SZEKELY said that he thought that alternative B of the draft provision on the applicable law was preferable and he would adopt an analytical approach in suggesting amendments to the text, which should list the various international legal instruments characterizing offences as the primary source of international criminal law. In that connection, he had no difficulty in accepting subparagraph (a), but he considered that the international conventions dealing with the prosecution and prevention of crimes under international law were not the only relevant ones. There were other international conventions which related to human rights, the right to life, torture or slavery and which were sources of internationally applicable law. He therefore thought that a subparagraph referring to other general or special international conventions defining certain crimes should be added after subparagraph (a).

60. The primary sources of law would be listed in the first two subparagraphs and the third subparagraph would list the subsidiary sources that would facilitate the application and interpretation of the primary sources. The third subparagraph might be based on Article 38 of the Statute of ICJ and refer to certain international conventions, whether general or special, such as the Vienna Convention on the Law of Treaties, or to other instruments such as the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.⁶ The text would then continue with the last four paragraphs of alternative B, which referred to international custom, as evidence of a practice accepted as law, the general principles of law and, in particular, criminal law, judicial decisions and teachings of highly qualified publicists of the various nations and, lastly, internal law, where appropriate.

61. He did not intend to repeat what the preceding speakers had said and would therefore refer to the question of jurisdiction *ratione materiae* from the point of view of legal philosophy rather than from the technical point of view. He too found himself hesitating between his inclinations as an international jurist and the need to design a legally viable mechanism. A balance must therefore be struck between the two possible types of aspirations: on the one hand, the hope—perhaps illusory—that the international community would agree to recognize the compulsory and exclusive jurisdiction of the future court and, on the other, the establishment of an optional mechanism, which would be fragile, since some States would be parties to it, while others would stick with universal jurisdiction; all of that would actually be a *de facto* and *de jure* reflection of the inequality of the subjects of such a system of justice and would in the end be subject entirely to the political will of States.

62. More specifically, he agreed with some of the other members that the instrument establishing the court should list the instruments defining the crimes within its jurisdiction, the most important one being the Code. He had misgivings, however, about what would happen in the case of illicit international trafficking in drugs, not only because the court would not be able to deal with the thousands of crimes of that kind that were committed,

⁶ General Assembly resolution 3074 (XXVIII) of 3 December 1973.

but also because the Code might conflict in that respect with the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

63. He was not satisfied with the draft provision on jurisdiction and wondered what kind of justice would confer jurisdiction on the court for genocide, but not for war crimes, for the kidnapping of diplomats, but not for terrorism against innocent victims, and for international drug trafficking, but not for aggression in the form of colonialism and intervention. The result would be to demolish international criminal justice.

64. He was in favour of a court which had jurisdiction for all crimes under international law. That should be the purport of any recommendation submitted to the General Assembly.

65. Mr. KABATSI said that, if the intention was to prevent crimes against the peace and security of mankind, an international criminal trial mechanism must be established to apply known international criminal law, which was basically the draft Code of Crimes against the Peace and Security of Mankind. However, to stipulate that such a court should apply internal law would be unrealistic, except where internal law was only a transposition of international law. An international criminal court could not in fact know every country's internal law and its task would therefore be difficult, both in determining the relevant internal law and in applying it. Alternative A of the draft provision on the law to be applied was too imprecise and he preferred alternative B, but hoped that both subparagraphs (b) and (e) could be deleted, since they were not in keeping with the requirements of stringency in criminal law.

66. The question of the compulsory or optional jurisdiction of the court would depend on what kind of court the international community wanted. A cumbersome and rigid mechanism was unlikely to survive, whereas an unduly lightweight mechanism would be difficult to set up and would not have the necessary authority. He therefore considered that the international criminal court should have compulsory, but not necessarily exclusive, jurisdiction and that it might be wise to wait a little in order to be in a position to establish a robust mechanism rather than one which would be anaemic and unable to solve existing problems. A court with optional jurisdiction would not have been able to find a way out of the deadlock in the Lockerbie case between the United States of America and Libya. The international community should be able to rely on an international criminal court in order to eliminate crimes against the peace and security of mankind.

The meeting rose at 1.10 p.m.

2261st MEETING

Friday, 15 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Arangio-Ruiz, 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. Szekeley, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. Mr. KUSUMA-ATMADJA, referring to the misgivings expressed by Mr. Crawford at the preceding meeting, said that reluctance to institutionalize the use of force—a sentiment with which he was entirely in sympathy—should not rule out readiness to define the conditions under which the use of force might be resorted to if necessary.

2. With reference to the possible draft provision on the law to be applied,³ he recalled his earlier suggestion (2256th meeting) that a distinction should be drawn between criminal acts committed by individuals on behalf of the State and those committed by individuals in their personal capacity. In the case of crimes in the first of those categories, the issue of sovereignty was a real impediment; he could not agree with arguments to the effect that invoking national sovereignty in connection with such cases merely revealed a lack of political will. However, sovereignty was not relevant to acts committed in a personal capacity. He had no difficulty with subparagraphs (a) and (b) of alternative B, but the reference to the general principles of criminal law in subparagraph (c) was unnecessarily restrictive; in certain borderline cases, such as those of culpable negligence, it might not be clear whether civil or criminal law was involved. The subparagraph should read: “The general principles of law recognized by the community of nations”, “nations” being preferable to “States” in that context. Subparagraphs (d) and (e) were acceptable in view of the qualifying reference to “subsidiary means” in (d) and the use of the clause “where appropriate” in (e); in that connection, he would point out that internal law could in some respects be more advanced than international law. Indeed, in some instances, international law might be unclear or even non-existent.

3. As to the court's jurisdiction *ratione materiae*,⁴ the court should have exclusive and compulsory jurisdiction

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.

⁴ *Ibid.*, para. 4.