

Document:-  
**A/CN.4/SR.2262**

**Summary record of the 2262nd meeting**

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

Extract from the Yearbook of the International Law Commission:-  
**1992, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

61. In paragraph 1 of the draft provision, reference should also be made to intergovernmental organizations and he tended to agree with the view that there should be some limitation on the categories of organizations entitled to apply to the court. Perhaps, as Mr. Mikulka had suggested, the right should be confined to the Security Council.

62. He supported the view that the two paragraphs of the draft provision should be separated and that paragraph 2 should be placed elsewhere in the draft, since it dealt with jurisdiction *ratione personae*.

63. Mr. ROBINSON said that procedural aspects needed to be discussed before the Commission could arrive at a definitive formulation of the two paragraphs of the draft provision on complaints. He noted that there seemed to be a divergence of opinion on the procedural steps to be followed, for example, in connection with the arrangements for bringing complaints before the court. The possible draft provision as it stood tended to occlude the role of the prosecutor's office in that process and the second paragraph of the commentary did not give any reason for not including a paragraph specifically dealing with that role.

64. In identifying the circumstances in which States had the right to bring complaints before the court, the underlying consideration was to establish the conditions under which they had *locus standi*. He took the view that the right to institute proceedings should be confined to States which had recognized the statute of the court and he believed that there was a necessary relationship between paragraph 1 and alternative B of the draft provision on handing over the subject of criminal proceedings to the court.<sup>13</sup> As a minimum, one of the categories of States entitled to bring complaints before the court should be the State which was identified in alternative B of that draft provision as the State in which the alleged perpetrator was found.

*The meeting rose at 1.05 p.m.*

<sup>13</sup> For text, see 2254th meeting, para. 8.

## 2262nd MEETING

*Tuesday, 19 May 1992, at 10.05 a.m.*

*Chairman:* Mr. Christian TOMUSCHAT

*Present:* Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, 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<sup>1</sup> (continued) (A/CN.4/442,<sup>2</sup> 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. VILLAGRAN KRAMER said that General Assembly resolution 46/54, paragraph 3, offered the Commission a much wider range of possibilities than the establishment of a court *stricto sensu*, as the use of the term "mechanism" showed. An intellectual effort was therefore required to go beyond the usual concepts of criminal law under the Roman or common law systems. Conceived as a dialectic between the prosecution acting on behalf of the State and the collective interest, on the one hand, and the defence of an accused person, on the other, a trial or *procès pénal* was not the only possible option. In other parts of the world, there was another system, under which any person could institute proceedings before the public prosecutor, known as a *denuncia*, which, unlike a complaint, did not necessarily involve an indictment.

2. To be sure, at the international level, in moving towards a centralization of international law—which would not necessarily yield the best results—it was not possible to deprive States, the principal subjects of international law, of their right of accusation, which was a feature of a criminal trial. For that reason, he welcomed the wording of paragraph 1 of the possible draft provision on complaints before the court<sup>3</sup> and the flexibility with which the text provided for a concurrent system that allowed States and international organizations to bring complaints before the court. The United Nations, the most active of international organizations, should be allowed to bring a complaint before the court, although it should not have any exclusive right in that regard. He ruled out the idea of a United Nations prosecutor, but the United Nations Office of Legal Affairs might set up, under the Legal Counsel, a body of legal experts of different nationalities to assist in the prosecution, for several years at least.

3. If States retained the right to prosecute the perpetrator of a crime as part of a trial in the traditional sense of the term, perhaps it should also be possible for an accused national of a country that had not accepted the jurisdiction of the international court to be judged by it if he so wished. A person accused of an odious crime might fear that the fundamental rights of the defence would be violated in the event of a trial in his own country and an international criminal trial mechanism would then be of considerable interest. He thus believed that the thrust of the draft provision, namely, the possibility

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

<sup>2</sup> Reproduced in *Yearbook . . . 1992*, vol. II (Part One).

<sup>3</sup> For text, see 2254th meeting, para. 6.

for States and international organizations and the United Nations, in particular, to bring complaints before the court, had to be retained.

4. Mr. KABATSI said that he endorsed paragraph 1 of the possible draft provision, which did not prevent States that had the right to bring a complaint before the court from doing so on behalf, for example, of national or regional human rights organizations. Under that system, complaints could be filtered and the court would not be overburdened, since States or international organizations would decide whether complaints were worth taking before the court.

5. Paragraph 2 was acceptable, but, as it was a substantive provision, it was perhaps out of place in a text on procedure.

6. Mr. FOMBA pointed out that the problem raised by paragraph 2 of the possible draft provision did not relate directly to bringing complaints before the court and that the rule of the irrelevance of the official position of the person accused of a crime had been set forth in texts of differing legal value, such as the Nürnberg Principles adopted by the Commission in 1950<sup>4</sup> or article 3 of the draft Code adopted on first reading.

7. The basic question was whether the system for bringing complaints before the court should be "closed" or "open", it being understood that both alternatives had their advantages and disadvantages. A closed system would mean that the beneficiaries of the right to bring complaints would be confined to a few subjects of international law, whereas other potential, and more or less comparable, beneficiaries would be ruled out. Such a restriction must be considered from both the legal and the practical points of view. The other alternative would be to open the list of those who could bring complaints before the court, which might seem to be a more democratic solution, but whose legal and practical validity likewise had to be demonstrated.

8. What, then, was the system on which paragraph 1 of the possible draft provision was based and, above all, was the text sufficient? Notwithstanding its clear wording, questions remained. For example, must States entitled to bring a complaint be parties to the Code and to the statute and, if so, did that hold good for all States parties to the Code and to the statute or only for some? Must international organizations be of a universal or regional character? It might also be useful to consider, as the Special Rapporteur had done, whether the bringing of a complaint must be open to legal persons of internal law, such as anti-racism or human rights organizations. To answer those questions, it would be useful to refer to the discussions in the Sixth Committee in 1991 and to the work of the last two sessions of the Commission.

9. Four sets of proposals had been made during the discussions in the Sixth Committee in 1991:<sup>5</sup> (a) reserving

the right to bring complaints to States, particularly States parties to the statute of the court, an additional criterion being the link between the State bringing the complaint and the crime; (b) reserving that right to States and individuals; (c) ruling out international organizations because they could not become parties to the statute; (d) providing for an independent body—some kind of prosecuting authority—before which States parties to the statute of the court could submit a case and which would alone be competent to bring a complaint before the court.

10. In the Commission, six possible categories of subjects of law had been identified during the 1990 discussion:<sup>6</sup> (a) all States; (b) all States parties to the court's statute; (c) any State which had an interest in the proceedings by virtue of the four traditional criteria of territorial and personal jurisdiction; (d) international organizations of a universal or regional character; (e) non-governmental organizations; and (f) individuals. The Commission had also discussed two possible restrictions on the right of submission: requiring the consent of all States which had an interest in the case and requiring authorization either of the General Assembly or of the Security Council.

11. During the Commission's discussion in 1991,<sup>7</sup> when there had been agreement on drawing a distinction between instituting criminal proceedings and bringing a case before the court, three trends of opinion had been expressed. An international system had been proposed in which the specific organs would be competent to institute proceedings against the perpetrators of international crimes, the role of States being confined to making the court aware of the crimes and the persons thought to have committed them and calling attention to the possibility of instituting proceedings; the right to bring charges would be entrusted to a prosecutor's office attached to the court. Another proposal had foreseen granting the right to bring a complaint to entities other than States, such as non-governmental or intergovernmental organizations, and indeed to individuals, in order to facilitate the prosecution and punishment of crimes against the environment, as well as war crimes and other human rights violations, for which it might be useful if humanitarian organizations took action. Lastly, it had been proposed that not only States, but also the General Assembly and the Security Council, as well as national liberation movements recognized by the United Nations, should be allowed to refer cases, the argument being that crimes against the peace and security of mankind could not be committed without the help or consent of a State.

12. Given the wide range of viewpoints, he would confine himself to a number of general comments. As stated in the report of the Commission on its 1990 session,<sup>8</sup> the choice related to the question of how limited the right to submit cases should be and it was therefore important to have a precise idea of the nature of the legal relationship

<sup>4</sup> Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal. Reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

<sup>5</sup> For summary of discussions, see document A/CN.4/L.469, sect. C.

<sup>6</sup> For summary of discussions, see *Yearbook . . . 1990*, vol. II (Part Two), paras. 135 *et seq.*

<sup>7</sup> For summary of discussions, see *Yearbook . . . 1991*, vol. II (Part Two), chap. IV.

<sup>8</sup> See footnote 6 above.

at issue. Although the relationship was clear between individuals and the international community, the concept of an international community did not lend itself to a strict legal definition. The choice would depend on whether a community of primary subjects or secondary subjects of international law was being contemplated and whether a legal or political approach to that community was taken. Moreover, the international community, which was not a subject of international law, could not act on its own and must rely on its members or representatives, namely the States parties to the Code and to the statute of the court, assuming that international community was confined to its strictly legal sense. It was also possible, however, in looking at the international community from the sociological point of view, to make the public and systematic denunciation of criminals the purpose of the right to bring a complaint. In that case, it would be necessary to determine whether such a solution was practical, for example, by referring to general international human rights law and taking stock of the work the treaty bodies were doing in that regard.

13. Mr. de SARAM, referring to the subject of complaints before the court, said that national systems of criminal law provided for a number of preliminary review procedures between the time when a crime was first reported to the appropriate authority and the formal act of accusation served on the accused. In the case of lesser crimes, such preliminary review procedures were relatively brief and simple. They were longer and more elaborate in the more serious crimes, conducted in some countries in a lower criminal court in what were often referred to as "non-summary proceedings", which were similar in purpose, but not necessarily in all modalities, to hearings before a "grand jury" in other countries.

14. Thus, one of the questions to be considered was what such preliminary review procedures should be, in the case of an international criminal court, and at what stage they should be interposed. Some measure of guidance could be obtained from a comparative analysis of other statutes and draft statutes, some of which contained elaborate provisions on the subject, while others contained relatively simple provisions. As an example of a simple provision, reference could be made to the Convention for the Creation of an International Penal Court,<sup>9</sup> which had been adopted at Geneva in 1937, but had never entered into force: and in particular to article 2, paragraph 1, article 23, and article 25, paragraph 1, thereof, which read, respectively:

... each High Contracting Party to the present Convention shall be entitled, instead of prosecuting before his own courts, to commit the accused for trial to the [International Criminal] Court;

A High Contracting Party who avails himself of the right to commit an accused person for trial to the [International Criminal] Court shall notify the President [of the Court] through the Registry;

The Court is seized so soon as a High Contracting Party has committed an accused person to it for trial.

15. The question of what the appropriate review procedures should be and at what stage they should be interposed, in the case of an international criminal court, was

one among a number of other fundamental and possibly interrelated matters, which, it seemed to him, should be collectively considered and appropriately resolved. They included such questions as: Should the court be permanent or rather a court whose statute was established by convention but which would only be brought into existence and convened by way of a generally acceptable procedure providing for safeguards against unreasonable use and for the protection of the sovereignty of States? How could the responsibilities of the future court in respect of individuals be reconciled with the responsibilities, under the Charter of the United Nations, of the Security Council in respect of States? Should the jurisdiction of the court be limited exclusively to the crimes defined in the Code or should it be broader in scope? In a particular case, what should be the relationship between the jurisdiction of the court and the existing jurisdiction of national courts? There was also, of course, the overall question which loomed over the Commission's consideration of the entire subject of an international criminal court, namely whether it would, in the light of all the circumstances, be more realistic and therefore more appropriate for the Commission not to set its sights too high, but rather to keep its sights somewhat lower, in dealing with those fundamental and admittedly difficult matters.

16. One of the most sensitive issues was that of the entities which should have direct access to the international criminal court. Clearly, they should include the States parties to the convention establishing the international criminal court, as well as States which became parties to the convention on an ad hoc basis for the purpose of submitting a specific case to the court, as was similarly permissible under the Statute of ICJ. Yet, should other entities also have direct access to the court and, if so, who should they be? If the Commission were to consider the question more in the abstract than in reality, there would be relatively little difficulty in the way of providing generally acceptable answers, and, he would, considering matters in the abstract, readily answer that in the case of an international crime, direct access to the court should, for humanitarian reasons and because of the rising and welcome tide of global consciousness, be as wide and as open as possible. However, such an answer would not take account of the realities and would not in the real world propose a feasible course, and thus be a satisfactory response, however idealistic it might be. The Commission had inevitably to view matters in the context of realities and the Commission was also, of course, very much, if not entirely, in the realm of progressive development.

17. He was hopeful, however, that, in time, the Commission, together with the Sixth Committee, would succeed in working out by consensus generally acceptable solutions to all such fundamental issues so that an international criminal trial mechanism might eventually see the light of day.

18. Referring to Mr. Koroma's comment at the 2261st meeting that some members of the Commission seemed to place undue emphasis on the importance of precision in criminal law, he said that he might have been one of the members to whom Mr. Koroma had referred. The requirement of precision should not, of course, be carried

<sup>9</sup> See 2261st meeting, footnote 11.

to the point where it defeated the purpose of the Commission's endeavours, which was the creation, if at all possible, of an international criminal trial jurisdiction. It should, however, not be overlooked that criminal law, which the Commission entered in formulating a code of crimes and the statute of an international court, had certain unique characteristics. To emphasize the requirement of precision when legislating in the field of criminal law was not to favour the guilty while remaining insensitive to the innocent; indeed, a precisely drafted statute guaranteed the successful prosecution of the guilty and prevented wrongful accusation of the innocent. Many criminals went free because of imprecision on the part of lawmakers. There was nothing the guilty liked better than an imprecisely drafted law and, with it, the likelihood of acquittal on a technicality. Moreover, there were many who might be physically on the periphery of criminal conduct, but who would not, in law, be criminally responsible. One of the main reasons why, at the end of the 1940s, the United Nations War Crimes Commission had entrusted its records to the Secretary-General, subject to very restrictive limitations on disclosure, had been to ensure that individuals who might have been physically on the periphery of crimes, but had not participated in them, should not be identified or, still less, accused as war criminals. The presumption of innocence, the heavy burden of proof required to dislodge that presumption and the safeguards embodied in the special rules of evidence and procedures applicable to criminal proceedings made criminal law a very specialized field.

19. Mr. ROSENSTOCK said that, while the issues under consideration were certainly serious and complex in nature, the constituent elements of some of them could perhaps be simplified. In his view, only States parties to the statute of the court and possibly, in some cases, the Security Council should have the right to bring complaints before the court. It would be helpful if the proposed working group were to list the problems referred to by Mr. Bowett in his first statement (2255th meeting) and those just referred to by Mr. de Saram so that the General Assembly might have an accurate sense of the problems to be solved. The working group should also try to reduce some of those problems to their essentials and envisage more modest international trial mechanisms. In that connection, it should be recognized that, even in the rather unruly modern-day world, trials for aggression would be extraordinarily rare. It was no accident that, quite apart from the right of veto, there had been so few determinations of aggression by the Security Council. What Mr. Mikulka (2261st meeting) had said about the key role of the Security Council in such cases had been extremely wise and reasonable. Such an approach was easy to criticize at the theoretical level, but, in practice, it was difficult to imagine one that would be more widely accepted.

20. Except for the Security Council, he did not see a role for international organizations, non-governmental organizations or even ICRC in instituting criminal proceedings. Of course, if ICRC were to express an interest in such a role, the matter would have to be reconsidered in the light of that organization's special responsibilities. It would, however, seem reasonable to grant any State party to the statute of the court the right to bring com-

plaints. The idea embodied in Article 35 of the Statute of ICJ that, under certain conditions, a non-State party might be authorized to have recourse to the Court's services might also be given consideration. If the Commission were to follow the civil law model and look to an independent institution empowered to prosecute, it would run into a great deal of trouble. Would such an institution be a standing one—and therefore extremely costly—or an ad hoc one? Would States be willing to grant it the enormous role such institutions played in the civil law system? It might be better to follow the common law system and recognize the prosecutor not as a quasi-independent seeker after truth, but as an adversary committed to presenting one side of the case in a crucible of controversy out of which the truth would emerge. It would be for the working group to consider the problem in depth.

21. He agreed with Mr. Crawford (2261st meeting) that any State or international organization should be free to provide information that was necessary for the consideration of the complaint. One problem was that the writ of the court might not necessarily be sent to all States in possession of evidence.

22. He regarded the idea of compensation as radically out of place and capable only of creating further confusion.

23. He was generally in favour of the proposals concerning the handing over of the subject of criminal proceedings to the court.<sup>10</sup> It might be useful for States to distinguish between extradition and the act of turning the accused over to a court, thus eliminating the possibility that a State might refuse to extradite its own nationals. Some elements of the traditional law relating to extradition which protected human rights, as well as the authority and concerns of the territorial State, should, however, not be neglected.

24. Lastly, he expressed the view that, in planning the work of the session, the Commission should give particular attention to the need to make as much progress as possible not only on the topic of State responsibility, but also on the item under consideration.

25. Mr. GÜNEY said that the conditions for the exercise of the right of public action had to be determined. To whom should the right to bring complaints before the court be granted? In his view, it should be granted to States: the victim State, the State in whose territory the crime had been committed, the State of which the alleged perpetrator was a national and the State in whose territory the accused was found. He agreed with other members that, with the exception of the Security Council, international organizations should not have the right to bring complaints; nor should non-governmental organizations and juridical persons under municipal law pursuing a universal goal, as referred to in the commentary.

26. Mr. KOROMA said the issue of who could bring a complaint before the court was important for many reasons. First of all, the Commission was dealing with

<sup>10</sup> For text of possible draft provision, see 2254th meeting, para. 8.

grave crimes, such as aggression, genocide and the mass violation of human rights, which could involve the nationals of many States; all members of the Commission were agreed that that kind of crime engaged the interest of the international community as a whole. In the circumstances, should it be only the injured State or the State whose nationals had suffered from the crime that should be able to bring a complaint before the court? And, since the interests of the international community as a whole were engaged, should that community as constituted by the United Nations—itsself the custodian of international peace and security—have such a right? He also wondered whether, from the sociological standpoint, the international community should be given the possibility of instituting an *actio popularis* or a class action.

27. Furthermore, it was essential to prevent any abuse of the judicial process for political purposes or propaganda, which meant that some control over that process would have to be introduced, while none the less ensuring that those who committed crimes were prosecuted. Such control should, in his view, be exercised at the indictment level. But who would determine the merit of the indictment? In his view, it could not be other than the court itself.

28. In the case of the gravest crimes, such as aggression and genocide, the Commission had discussed the possibility of vesting the court with compulsory jurisdiction, in which case the complaint would be brought before the court when there was a serious allegation that a grave crime had been committed. In other cases, it was possible that the court would derive jurisdiction from the States parties to its statute.

29. Turning to paragraph 1 of the draft provision on complaints before the court, he said that the Working Group would have to make it clear which States were concerned: the injured State, the State of which the accused was a national, the State in whose territory the accused was found or all the States which made up the international community and which had been injured by an act of aggression? The Special Rapporteur stated in his commentary that:

It is obvious that no State has the right itself to exercise directly a power that has been vested in the court alone or in an authority competent to bring a public action at the international level. It is equally obvious, however, that any State injured by an international offence has the power to bring a complaint before the court.

Without that second sentence, he would have asked himself whether an injured State would be entitled, as it should be, to bring an action before the court if the Security Council had failed to determine that an act of aggression of which that State had been the victim had taken place.

30. The question whether international organizations should be allowed to bring a case before the court had elicited a number of comments. It had been said that the United Nations, as the official representative of the international community, regional organizations and inter-governmental organizations, and even some non-governmental organizations, such as ICRC, should have that right. For his own part, he considered that it would be advisable, at least initially, to confine such a right to

States Members of the United Nations. If it were subsequently discovered that the United Nations could be regarded in certain cases as a subject of international law, that right could perhaps be extended to it.

31. Unlike Mr. Rosenstock and Mr. Mikulka (2261st meeting), he doubted whether the Security Council should have such a power. True, it was recognized that the Security Council was the custodian of the maintenance of international peace and security, but there were times when, for one reason or another, it did not live up to its responsibility. Nor should the right of veto be overlooked, for those States which enjoyed it might not allow the Security Council to bring a matter before the court. Moreover, once the Security Council had determined that there had been an act of aggression, it would be difficult for the court to decide otherwise, given the weight which the decisions of the Security Council carried. Several members of the Commission had said that the Security Council's decisions would not be binding on the court. The international community, however, would probably have difficulty in accepting that the court could take a direction that was contrary to that of the Security Council. In order to obviate such a difficulty and in order not to compromise the judicial process, the best thing would be to leave the Security Council out of the matter. He did not think that the right to bring an action should be extended to ICRC, as constituted, even if it was the custodian of international humanitarian law.

32. Paragraph 2 of the draft provision, which was merely a repetition of a provision of the draft Code, was superfluous.

33. In reply to Mr. de Saram, he said that the Commission should take care not to appear to favour the alleged perpetrators of very serious crimes. It was, however, important not to lose sight of the need for precision in the definition of crimes.

34. Mr. ROBINSON said that Mr. Mikulka's idea (2261st meeting) of empowering a body such as the Security Council, where decision-making was fraught with difficulty, to bring a case before the court was surprising, and even alarming. What would happen, for instance, if the Security Council referred a case of aggression to the court and subsequently arrived at a decision in the same case which was contrary to the decision of the court?

35. Mr. THIAM (Special Rapporteur), summing up the discussion on the law to be applied and the jurisdiction of the court *ratione materiae*, said he was gratified to see that the Commission wanted to move forward in the search for solutions to the problems connected with the establishment of an international criminal court or other international criminal trial mechanism. He reiterated that it had not been his aim to raise all the problems in his report or to propose solutions or even tentative solutions; he had, rather, wanted to prompt as wide-ranging and as detailed a discussion as possible and, on that score, he was more than satisfied.

36. With regard to the law to be applied,<sup>11</sup> the first question raised had been whether that right should be

<sup>11</sup> Ibid., para. 3.

confined to the Code. At the current stage, he did not want to limit the law to be applied in that way, first of all, because the Code was still only at the draft stage and also because it covered only certain categories of international crimes—crimes against the peace and security of mankind or, in other words, the most serious crimes. He had made a point of proceeding with caution and of not being unduly optimistic. Had Mr. Shi (2259th meeting) not said, for instance, that there was little chance of the Code one day becoming an instrument that could be applied? He had therefore preferred to refer to conventions in general. If the Code was to take the form of a convention one day, it would become part of that category of sources of law. If not, the international criminal court could do without the Code and still be an institution that was acceptable to the international community.

37. It was alternative B of the draft provision on the law to be applied that had found favour with the Commission, although there had been some criticism. The first criticism, which was purely a matter of drafting, was that he had taken Article 38 of the Statute of ICJ as a model. That was only partially true, however, for similar forms of wording were to be found in a number of other draft conventions on the establishment of a criminal court, some of which dated back to before the establishment of the United Nations. For instance, article 18 of the draft Convention for the establishment of a United Nations war crimes court, of 30 September 1944,<sup>12</sup> read:

The Court shall apply:

(a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing laws of war between the parties thereto;

(b) International customs of war, as evidence of a general practice accepted as law;

(c) The principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience;

(d) The principles of criminal law generally recognized by civilized nations;

(e) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.

Another example was article 23 of the draft Statute of the International Penal Court which had been drawn up in 1927 by the International Law Association<sup>13</sup> and which read:

The Court shall apply:

(1) International treaties, conventions and declarations, whether general or particular, recognised by the States which are before the Court;

(2) International custom, as evidence of a general practice accepted as law;

(3) The general principles of Public or International Law recognised by civilised nations;

(4) Judicial decisions, as subsidiary means for the determination of rules of law;

Doctrines of highly qualified publicists may also be referred to.

38. Nor did he accept the second criticism, which involved substance, that it would not be possible in the present case to draw on Article 38 of the Statute of ICJ.

In his view, there was no watertight division between the law to be applied by a criminal court, such as the proposed international court, and the law applied by a court such as ICJ.

39. The elements listed in alternative B of the draft provision had given rise to considerable controversy. The members of the Commission had generally stated that they were in favour of referring to international conventions, subject to their content. It was true that not all international conventions could serve as the basis for a criminal action, since not all of them were universally accepted. Apartheid, for example, had been included, after lengthy discussion, in the list of crimes against the peace and security of mankind, not in accordance with the International Convention on the Suppression and Punishment of the Crime of Apartheid, but in accordance with the peremptory norms of international law.

40. Custom had been the most disputed element and some had gone so far as to say that the *nullum crimen sine lege* principle ruled out any possibility of basing a criminal action on custom. On that point, he ventured to recall that the draft Code covered different categories of crimes, including war crimes. However, in the case of war crimes, custom was inseparable from their definition. Moreover, article 1, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions referred expressly to "established custom" and the commentary thereto<sup>14</sup> stated that:

... despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment.

He considered that it was impossible to detach custom from the applicable law, particularly in international law, which was essentially customary.

41. Referring to the general principles of criminal law recognized by nations, he pointed out that, since the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land, a similar provision analogous to the Martens clause<sup>15</sup> had been used in all the relevant codification instruments. There was thus no question of ignoring it.

42. Jurisprudence was a source of law in many legal systems and played a particularly important role in the common law countries, where the judge could create law.

43. In connection with internal law, he emphasized that the generally accepted principle in the issue under consideration was that of the conferment of jurisdiction. The international criminal court could not take cognizance of a case unless the States concerned—the State in whose territory the crime had been committed, the victim State, the State of which the suspected perpetrator of

<sup>14</sup> ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), p. 38.

<sup>15</sup> Incorporated into the Preamble to the 1907 Hague Conventions. It provides, in essence, that the principles of international law apply in all armed conflicts, whether or not a particular case is provided for by treaty law, and whether or not the parties to the conflict are bound by the relevant treaty law.

<sup>12</sup> For text, see *Historical survey of the question of international criminal jurisdiction*, p. 116, appendix 10.

<sup>13</sup> See 2261st meeting, footnote 11.

the crime was a national and the State in whose territory the suspected perpetrator was found—had recognized its jurisdiction. However, the possibility could not be ruled out that one of those States might make the conferment of jurisdiction on the court subject to the application of its internal law, provided, of course, that the latter was not in conflict with the general principles of criminal law. It was difficult to believe that the international criminal court would never be called upon to apply internal law in a given case, even though it would obviously have to apply international law first.

44. Replying to Mr. Mikulka's comment that, under article 2 of the draft Code, the characterization of an international crime as a crime against the peace and security of mankind was independent of internal law, he pointed out that that would not prevent the international criminal court from applying internal law in connection with other aspects of the action.

45. With regard to the jurisdiction of the court, he said that he had not referred to jurisdiction *ratione personae*, it being understood for the time being that "the Court shall try individuals", as was stated at the preceding session in a possible draft provision.<sup>16</sup> In the same text, he had also proposed a provision stipulating that the court should have cognizance of any challenges to its jurisdiction, thus giving it authority to consider matters relating to its jurisdiction.

46. He noted that, with few exceptions, the members of the Commission had stated that they were in favour of the conferment-of-jurisdiction rule, since the court could not take cognizance of a case if jurisdiction had not been conferred on it by the States concerned. He recalled that the corresponding draft provision, submitted at the preceding session,<sup>17</sup> had been regarded as too rigid by some members, who had feared that no case would ever come before the court if its jurisdiction was subject to that rule. At the current session, he had therefore submitted an intermediate solution, which provided for exclusive jurisdiction in respect of certain crimes. That solution had also been sharply criticized and he expressed the hope that the working group would find a solution on which everyone could agree.

47. He had been reproached for not having indicated a criterion for dividing crimes into two categories, depending on whether or not they would come within the exclusive jurisdiction of the court. It was true that he had not included aggression in the category of crimes within that exclusive jurisdiction, in view of the Security Council's jurisdiction in that regard, which must not be overlooked. He nevertheless recalled that, at the preceding session, he had proposed a possible draft provision<sup>18</sup> under which States wishing to bring a complaint of aggression had to go through the Security Council and that that proposal had been rejected. He would therefore like the Commission's guidance on that point. He had learned very little from the debate which had just taken place and in which contradictory opinions had been expressed.

<sup>16</sup> For text, see *Yearbook* . . . 1991, vol. I, 2207th meeting, para. 3.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

48. The case of genocide did not give rise to any difficulties, since the Convention on the Prevention and Punishment of the Crime of Genocide was widely accepted. Apartheid was mentioned largely for the record, since it was in the process of disappearing, but there was no guarantee that it would not reappear somewhere in the world in other forms. Illicit international trafficking in drugs was a crime against humanity that was of great concern to the international community and it was, moreover, in connection with that crime that the General Assembly had requested the Commission to consider the question of an international criminal court. It went without saying that only trafficking on a large scale was being taken into account.

49. The list of crimes for which the court would have exclusive and compulsory jurisdiction was not final: it could be shortened or lengthened.

50. He was not unaware of having proposed a dual regime of jurisdiction: exclusive jurisdiction and optional jurisdiction. He had intended to be cautious, however, since his proposal for solely optional jurisdiction had been rejected at the preceding session, although that principle seemed to be accepted at the current session.

51. He was aware that the proposed working group would have an extremely difficult task, since it would have to propose flexible and viable solutions on the basis of a debate during which opposing points of view had been expressed.

52. Mr. MIKULKA, replying to the comments made by Mr. Koroma and Mr. Robinson on his proposal to give the Security Council the right to bring a complaint for a crime of aggression before the court, said that a decision by the Security Council, which dealt with the conduct of States, not with that of individuals, would not prevent the court from deciding that an individual was guilty on account of his participation in an act of aggression committed by a State. The question of the extent to which the Security Council might be bound by a decision of the court was purely academic. It was hard to see how the Security Council could first bring before the Court a complaint in respect of aggression against the representative of a State and then characterize the act of that State on the basis of the decision of the court. The Security Council had to take a prompt decision in the event of aggression and it could not wait for the outcome of difficult and complicated proceedings before the criminal court. It was true that the Security Council's action could be paralysed by the right of veto, but he did not think that that argument was sufficient to deny the Security Council the possibility of bringing a complaint before the court, even in cases where it had already determined the existence of an act of aggression.

53. The CHAIRMAN invited the members of the Commission to continue their consideration of part two of the Special Rapporteur's report and, in order to save time, to express their views simultaneously on the three points yet to be considered, namely proceedings relating to compensation, handing over the subject of criminal proceedings to the court, and the double-hearing principle.<sup>19</sup>

<sup>19</sup> For texts of possible draft provisions, see 2254th meeting, paras. 7, 8 and 9 respectively.

54. Mr. CALERO RODRIGUES recalled that, at the Commission's preceding session, the question of compensation had been discussed only in connection with the question of total or partial confiscation of stolen or misappropriated property. It was, moreover, by no means obvious that the matter needed to be discussed at all and he was inclined to agree with Mr. Rosenstock that there were quite enough problems to be solved without the issue of compensation. If the Commission wished to discuss it, however, the question was whether the international criminal court would have jurisdiction in the matter and, if not, before which courts proceedings relating to compensation could be brought. Would they be national courts? In no case should the compensation issue be dealt with by ICJ, which could hardly take cognizance of an action brought by an individual. Accordingly, it would be better to leave the issue aside for the time being.

55. With regard to the question of handing over the subject of criminal proceedings to the court, it was clear that the alleged perpetrator of the crime had to be handed over to the court if he was to be judged by it. As the Special Rapporteur stated in his commentary, there was no substantive difference between alternatives A and B of the draft provision proposed on that point. However, alternative B seemed clearer and it might be expanded, although that did not really seem necessary, to incorporate the idea expressed in alternative A that handing over the alleged perpetrator of a crime to the prosecuting authority of the court was not an act of extradition.

56. As to the double-hearing principle, he was not sure that the right of appeal was a fundamental human right, but he thought it fair that the principle should be incorporated in a system of international criminal justice. He also endorsed paragraph 2 of the possible draft provision if it meant that the court would be composed of several chambers and that a decision taken by one of those chambers could be reviewed, either by another chamber, or by the plenary court. Greater precision was needed, however, since review did not necessarily entail a complete re-examination of the case and could be limited to a verification of the correctness of the proceedings. Such a system, which was that of the *pourvoi en cassation* (application for judicial review) in French law, might perhaps be more readily acceptable.

57. Mr. CRAWFORD said that he agreed with Mr. Rosenstock and Mr. Calero Rodrigues that provisions on compensation for injury had no place in the draft Code.

58. Referring to the possible draft provision on handing over the subject of criminal proceedings to the court, he said that he associated himself in principle with the comments made by Mr. Calero Rodrigues. States parties should certainly be required to hand over to the court persons properly charged before the court. It was not sufficient, however, to state that "handing over . . . is not an extradition"; the argument in alternative A should be elaborated and added to alternative B. He hoped that the prosecutorial system to be established would contain special guarantees so that the preliminary hearing normally required in extradition proceedings could be dispensed with. However, all those points were dependent

on the general provision that would be adopted on the question of handing the accused over to the court.

59. With regard to the double-hearing principle, he agreed with the Special Rapporteur that some provision would be required. Within the context of a very detailed scheme for a court, which, for the present, did not exist, it would, however, be necessary to spell out the precise nature of the appeals that could be brought.

60. Mr. YAMADA said that he had difficulty in visualizing how the court could concurrently deal with criminal matters and civil proceedings concerning compensation; in Japan, there was a strict division of labour between criminal and civil courts. That did not mean he was opposed to the system, which worked in other countries, such as France. In his view, however, the main purpose of an international court should be the punishment of the perpetrator of an international crime and it would be unwise to expand the court's function beyond criminal proceedings.

61. Before commenting on the possible draft provision on handing over the subject of criminal proceedings to the court, he wished to come back to the question of complaints before the court, with regard to which some confusion seemed to have arisen because the discussion had not been based on a common understanding of criminal procedure. He understood that that draft provision<sup>20</sup> related only to bringing a case to the attention of the court and not to prosecution. Any State having accepted the jurisdiction of the court should surely have the right to bring a case to the attention of the court regardless of whether or not nationals of that State were involved or whether the crime had or had not been committed in that State's territory. Some intergovernmental organizations could also be made eligible to bring the case to the attention of the court when States might hesitate to do so for political reasons. Once the complaint had been brought, however, the next step was the indictment of the accused and the question which arose in that connection was the nature of the prosecuting authority. In alternatives A and B of the draft provision on handing over the subject of criminal proceedings to the court, the Special Rapporteur referred to "the prosecuting authority of the court", which presumably meant that the prosecuting authority would be a branch of the court. It should be borne in mind, however, that legal regimes concerning criminal prosecution differed widely from country to country. In France, for example, a large part of the prosecuting function belonged to the judiciary, whereas, in the Anglo-American and Japanese systems, it belonged to the executive. Would the prosecuting authority be independent of the court? Such a solution might help to guarantee the court's neutrality. In any case, the organizational aspect of the prosecuting authority warranted careful consideration.

62. That being said, he supported the idea that handing over the alleged perpetrator of a crime should not be regarded as an act of extradition. He preferred alternative B of the possible draft provision, but thought it necessary to stipulate very clearly that a State which had accepted the jurisdiction of the court in respect of a crime

<sup>20</sup> See footnote 3 above.

was under an obligation to produce for trial by the court any alleged perpetrator of the crime who was found in its territory. Lastly, in order to avoid mistrial, the Commission should also discuss the question of various forms of assistance from States, such as the submission of investigation reports and the production of evidence and witnesses. Other steps in the sequence of criminal proceedings might be considered at a later stage.

63. Mr. YANKOV said that, at the present stage of work on the draft Code, a discussion on compensation might raise more questions than it could provide answers; it might be advisable to consider compensation proceedings simply as a possibility or an option. In that connection, he noted that the possible draft provision made no reference to the rule of the exhaustion of local remedies. He also drew the Special Rapporteur's attention to the fact that Article 36, paragraph 2 (d), of the Statute of ICJ, referred to in the report, dealt with reparation for the breach of an international obligation by a State rather than by an individual and that it would therefore not be possible to have recourse to ICJ on the basis of that article.

64. With regard to the draft provision on handing over to the court, he preferred alternative B. The explanation that the handing over of an alleged perpetrator of a crime was not an extradition would be more appropriately placed in the commentary than in the article itself.

65. As to the double-hearing principle, the proposed working group might usefully envisage possible means of providing an appeals panel or chamber so as to furnish all guarantees for a fair trial; to that end, he suggested that the appeals body should be empowered to take into consideration all facts, evidence and other pertinent elements that might assist it in adopting a final decision.

66. The CHAIRMAN noted that the majority of the members of the Commission were in favour of the establishment of a working group to consider and analyse the main issues to which the report of the Commission on its forty-third session<sup>21</sup> had given rise in connection with the establishment of an international criminal court, or, in the words of General Assembly resolution 46/54, "other international criminal trial mechanism". The working group should also take account of all the points discussed by the Special Rapporteur in his ninth<sup>22</sup> and tenth reports and considered by the Commission at its forty-third and forty-fourth sessions, and draft specific recommendations on the various issues it would consider and analyse within the framework of its mandate. The working group would be chaired by Mr. Koroma and composed of Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Crawford, Mr. Idris, Mr. Jacovides, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. de Saram, Mr. Vereshchetin and Mr. Villagran Kramer, with Mr. Thiam, in his capacity as Special Rapporteur, participating *ex officio*.

*The meeting rose at 1 p.m.*

<sup>21</sup> See *Yearbook . . . 1991*, vol. II (Part Two), chap. IV.

<sup>22</sup> See *Yearbook . . . 1991*, vol. II (Part One), document A/CN.4/435 and Add.1.

## 2263rd MEETING

*Wednesday, 20 May 1992, at 10.05 a.m.*

*Chairman:* Mr. Christian TOMUSCHAT

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, 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<sup>1</sup> (continued) (A/CN.4/442,<sup>2</sup> 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. The CHAIRMAN invited further comments on the possible draft provisions contained in the Special Rapporteur's tenth report (A/CN.4/442), on proceedings relating respectively to compensation, handing over the subject of criminal proceedings to the court, and the court and the double-hearing principle.<sup>3</sup>

2. Mr. GÜNEY said that the draft provision on proceedings relating to compensation was in conformity with the general principles of the right to compensation and, as worded, was satisfactory. Inasmuch as international criminal law was the reflection of internal law, proceedings for compensation could be separated from, or joined with, criminal proceedings. International organizations, however, should enjoy that right only when they had been the victims of a crime.

3. The obligation to surrender to the court an accused person who was the subject of criminal proceedings should apply to all States parties to the statute of the court from the time when they had acceded to it and that rule was in fact set forth in alternative B of the draft provision proposed by the Special Rapporteur. It was self-evident that the surrender of the accused to the court was not an act of extradition and alternative A of the draft provision was therefore superfluous in that particular context.

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

<sup>2</sup> Reproduced in *Yearbook . . . 1992*, vol. II (Part One).

<sup>3</sup> For texts, see 2254th meeting, paras. 7, 8 and 9 respectively.