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Summary record of the 2263rd 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

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[21] 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[22] 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.

[21] See *Yearbook... 1991*, vol. II (Part Two), chap. IV.

[22] 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[1] (*continued*) (A/CN.4/442,[2] A/CN.4/L.469, sect. C, A/CN.4/L.471, A/CN.4/L.475 and Rev.1)

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. 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.[3]

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.

[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 texts, see 2254th meeting, paras. 7, 8 and 9 respectively.

4. With regard to the principle of the right of appeal, or what the report termed the "double-hearing principle", although that right was one of the fundamental guarantees in any international criminal proceedings, it would involve a lengthy and complex process. He therefore wondered whether consideration might not be given to a court of appeal or even a system of internal appeal heard by judges who had not participated in the decision that was the subject of the appeal. The system of appeal which obtained under certain systems of national law and under which only points of law, not points of fact, were considered should have no place in an international criminal court.

5. Mr. VILLAGRAN KRAMER said that it would always be open to the Security Council to bring proceedings before the international criminal court through the Secretary-General of the United Nations, the most apposite precedent in that connection being the advisory opinion of ICJ in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*.[4] The main thing was not to broaden the powers and functions of the Security Council, but to provide a channel so that action could be taken, within the framework of existing machinery, with respect to any of its decisions.

6. The questions of compensation and civil claims might arise as preliminary issues—before the criminal aspects of a case had been resolved—or *a posteriori*. In the case of such issues, it was therefore necessary to be as flexible as possible so that claims could be decided by the court in the light of the relevant general principles of law.

7. As to whether the same court should deal with the civil and criminal aspects of a case, he considered that the possibility of the international criminal court dealing with both aspects should be viewed in a favourable light, particularly given the linkage with the double-hearing principle.

8. Further options should be explored in the case of both civil liability and the hearing of appeals and he wondered whether ICJ might not have a role to play in that regard. The working group to be appointed by the Commission should also consider the relationship between the civil aspects of the crime and appeals against sentence.

9. The purpose of criminal trials was to institute proceedings against offenders. Accordingly, extradition should not enter into the picture, particularly since it would only be prejudicial to the interests of the international community.

10. Mr. SZEKELY said that, if the international criminal court was to try individuals only, he would not be in favour of the inclusion in the statute of an article on compensation. All matters pertaining to that question were better left to other judicial machinery, such as ICJ. In that way, the international criminal court would deal with criminal law and sentencing in the true sense of the terms.

11. The two alternatives of the draft provision on the handing over of an individual to the court were not mutually exclusive, but complementary. Since the wording of each provision was clear, they should, in his view, both be included in the statute of the court. Alternative A was important because of the kind of reforms that would have to be introduced into domestic legislation if the statute of such a court was to be brought into force; that was particularly true in the case of extradition and where the State involved was not a party to the statute. Alternative A would also make it easier to take advantage of the many extradition treaties in force between States and of certain treaties for mutual assistance in legal and, specifically, in criminal law matters.

12. So far as the double-hearing principle was concerned, the formula should be reversed so that a case would be heard in first instance by a chamber of the court and appeal would lie to the plenary court.

13. Mr. ROBINSON said he doubted whether the question of the institution of proceedings for compensation for injuries suffered as a result of a crime referred to the court was within the scope of the mandate that the General Assembly had given the Commission. That mandate related to the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism. Whatever might be involved in those differing concepts, they all had one common feature, namely, proceedings leading to the punishment of convicted offenders, as opposed to proceedings leading to the payment of compensation. A forum already existed to deal with the latter.

14. The Commission might wish to seek further instructions from the General Assembly on whether it should consider the question of compensation. If the General Assembly gave such instructions, one of the questions raised by paragraph 2 of the possible draft provision was whether, under the customary rule concerning exhaustion of domestic remedies, a national would be required to exhaust those remedies before his State was entitled to bring proceedings before the court for compensation.

15. With regard to the handing over of the subject of criminal proceedings to the court, he preferred alternative B of the two alternatives proposed for the possible draft provision. If it were necessary to state that the surrender of a person to the court was not in the nature of an extradition—and he doubted whether it was necessary—that statement could be added to alternative B. One question the draft provision left unanswered was whether a State, when handing over a person to the court, would be entitled to hold domestic proceedings to determine whether its own standards with regard to the protection of human rights and other matters had been met. As the draft provision was worded, once an offender was found in the territory of a given State, there was an obligation on that State to hand the offender over to the court. That seemed to contrast with the position under various international conventions for the prevention and punishment of specific crimes. The States parties to those conventions, unlike the States parties to the statute of the court, had some discretion inasmuch as it was left open to them

[4] *I.C.J. Reports 1949*, p. 174.

to hold an extradition hearing; if that hearing resulted in a decision not to extradite for reasons relating to their internal law, the State party concerned was obliged to submit the case to its competent authority for prosecution. The situation thus appeared to be different under the draft provision, and perhaps rightly so.

16. He had great difficulty with the pre-condition for the imposition of an obligation on a State to hand over a person to the court, namely that the person to be handed over must be the alleged perpetrator of a crime which fell within the jurisdiction of the State. That differed markedly from existing international conventions which imposed an obligation on a State in whose territory an alleged offender was found. A State's jurisdiction was not necessarily coterminous with its territory. If the jurisdictional tentacles of certain States and the resultant unwarranted incursions into the territory of other States were to be avoided, an obligation should be imposed, as in most extradition treaties, on the State in whose territory the alleged offender was found.

17. The reference to "double hearing", which he had at first taken to mean the *non bis in idem* principle, was not clear. It was better to avoid such labels and to explain exactly what was meant. What was apparently meant in the present case was the right of an accused to a second hearing or appeal, although, in many systems of law, an appeal was not regarded as a hearing.

18. Mr. KOROMA said that the Special Rapporteur had reminded the members of the Commission that, under certain domestic legal systems, proceedings relating to compensation could be combined with criminal proceedings. Even some of the systems which had not originally allowed claims for compensation together with criminal proceedings were now embracing the idea in order to ensure that a victim was compensated by the individual who had caused him the harm.

19. That was particularly relevant in the case of grave and mass violations of human rights in which individuals suffered serious injury. He considered that serious thought should be given to the possibility of including a provision in the statute of the court on the compensation of victims of crimes and he was at a loss to understand why such a provision would discourage States from acceding to the statute of the court. On the other hand, he saw no reason to involve ICJ, for, if such a claim were to be submitted to that Court, it would inevitably reconsider the whole range of evidence already examined by the international criminal court. What was more, there might be a disparity in the findings of the two bodies. In his view, it would therefore be wise to avoid any possible conflict by providing that the international criminal court would deal with both aspects of the matter, namely, punishment and compensation.

20. The handing over of the subject of criminal proceedings to the court was the next logical step after the determination of the applicable law and the question of jurisdiction. The possible draft provision had the merit of precluding the need for the complicated process of extradition proceedings. Under the terms of alternative B, every State party would be required to surrender an accused person to the court at the request of the court. At the same time, however, it was essential to ensure that the principle of fundamental justice was observed and the basic human rights of the accused respected. In particular, he trusted that the principle of the surrender of an accused person would exclude the illicit kidnapping of an alleged offender in another State, for to make such a person stand trial before the international criminal court would obviously be contrary to the provisions of its statute. He also trusted that there would be no illegal surrender of persons, as had apparently happened in one case that was currently *sub judice*.

21. The possible draft provision on the question of appeal, or "double hearing", should have a place in the statute of the court. The right of appeal was a basic human right and was enshrined in the International Covenant on Civil and Political Rights. Either the full court or a special chamber of judges, composed of judges other than those who had delivered the earlier judgement, should rule on an appeal, which could be an appeal on fact or on law or an appeal against sentence. The actual composition of the court should, however, be determined in the light of the gravity of the case.

22. It had been suggested by some members of the Commission that, in the case of claims for compensation, domestic remedies should be exhausted first. It was not clear to him why that was so and he would be grateful for clarification.

23. Mr. RAZAFINDRALAMBO said that the two paragraphs of the draft provision on proceedings relating to compensation dealt with the situation where proceedings before the international criminal court for the commission of a criminal act were instituted against an individual, who might be personally liable to pay for the injury caused. However, the Special Rapporteur did not seem to have taken account of the case in which a civil action was also brought against the instigator of, or accomplice in, the criminal act. Such cases might concern aggression, genocide and other crimes against humanity, including war crimes, in which the State could be prosecuted as being civilly liable. A similar situation would exist in cases involving legal persons of public law on whose behalf a crime under ordinary law had been committed.

24. The problem posed by such cases was of considerable practical importance, since only a State would be in a financial position to make compensation for the substantial harm caused to the victim State. One solution was to be found in the application of article 5 of the draft Code, which affirmed the principle of a State's responsibility for an act or omission attributable to it. By virtue of a civil action, a State might find itself the subject of proceedings before the international criminal court, a situation which States might not be willing to accept. If, however, the civil action was to remain the sole prerogative of ICJ, individuals seeking compensation would be completely without recourse should the State of which they were nationals decline to institute proceedings, whether for political or other reasons. He therefore believed that those who would prefer not to deal with the question of compensation in a specific provision of the draft Code might have some justification for their view. Without such a provision, the court would have broad discretion to apply the general principles of law.

25. Of the two alternatives proposed for the draft provision on handing over the subject of criminal proceedings to the court, he preferred alternative B, which was both simple and comprehensive. Alternative A was too much like a definition, which would not be appropriate in the context of a criminal code.

26. The principle embodied in the draft provision on the court and the double-hearing principle was based on the assumption that the proper administration of justice entailed the right to successive hearings by two tiers of the judiciary. Obviously, the principle, which was valid in civil procedure and in criminal procedure, had limits. Cases of minor importance did not require a double hearing, but, in the most serious cases, a trial by jury was held both in first instance and on final appeal: that was true of the French criminal law system and similar arrangements existed in many other countries, especially in Africa. Its merit lay in the fact that justice was actually administered by the people, as represented by the jury. However, a system whereby a court of cassation or a supreme court acted as the final arbiter in a case was obviously of a different nature, since such courts were empowered only to review the application of the law and not the facts of the case.

27. The double-hearing principle was not recognized in absolute terms in either system. However, what seemed to be at issue was the general principle of international criminal law embodied in article 14, paragraph 5, of the International Covenant on Civil and Political Rights, which stated that:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

He considered that the Special Rapporteur was thus correct in believing that the draft Code should include a special provision relating to the double-hearing principle.

28. The principle should, of course, be applied rigorously, along the lines of article 14, paragraph 5, of the Covenant, since the double-hearing provision would be meaningless unless two tiers of the judiciary were involved. In such a system, cases in first instance should be heard by junior, or associate, judges and appeals assigned exclusively to more senior judges sitting in banc. A system where judges at the same level of seniority within the hierarchy were called upon to review the decisions of their peers could be seen as a travesty of justice in that it would call into question the reputation of the judges in first instance and, by extension, the credibility of judgements of the international criminal court itself.

29. Mr. VERESHCHETIN recalled that Mr. Koroma had rightly asked why the victim of a crime should not be compensated by the offender. It should be pointed out that those who considered that a specific provision on compensation should not be included in the draft did not necessarily mean that there should not be compensation: the question was how such compensation should be made. It was quite likely that cases before the international criminal court would involve damages on such a scale that no physical person, or group of physical persons, would be able to make restitution in the event of an award by the court. It was for that reason that some members of the Commission, including himself, would prefer not to deal with the issue now, since it involved the whole question of State responsibility. Compensation was an important and complex topic which should be dealt with separately.

30. Mr. ROBINSON said that Mr. Koroma had also raised the question whether internal law and procedures would apply prior to the handing over of a suspect to the international criminal court. As the draft provision on that question stood, it required a State to hand over the suspect once that person was in the territory of that State. It would not avail a State in that position to argue that some requirement of its internal criminal law had not been met in order to evade compliance with that obligation. States accordingly would have to consider seriously whether they could accept the provision as currently drafted. If it so wished, the Commission could include wording in the provision which would take account of certain features of internal law, but he did not think that that would be a good idea.

31. The question of the exhaustion of domestic remedies arose in connection with paragraph 2 of the draft provision on compensation and Mr. Koroma had asked whether the same issue would not also arise in relation to criminal proceedings. In reply, he would say simply that the customary rule relating to the exercise of diplomatic protection by a State in respect of its nationals did not apply in the case of criminal proceedings.

32. Mr. FOMBA said he agreed with the Special Rapporteur that any injury suffered as a result of a criminal act should give rise to compensation, but the problem that arose was whether the right to claim compensation should be exercised before an international criminal court or before some other court, whether domestic or international. The machinery for such actions was well established at national level; it provided that the criminal proceedings and the civil action could be either separated or joined and that, in the latter case, it was for the judge of the criminal court to rule on the two counts. The proposal to transfer that system to international criminal law would give rise to practical difficulties, particularly in terms of the amount of work it would create for the court. It might therefore be possible to envisage separate actions, using such traditional procedures as diplomatic protection and recourse to ICJ under Article 36, paragraph 2 (*d*), of its Statute.

33. He saw no substantive reason why humanitarian associations or organizations should not be entitled to bring proceedings for compensation before the international criminal court.

34. He fully agreed with the idea that a person who was the subject of a criminal prosecution should be handed over to the court and with the Special Rapporteur's view that the procedure should be distinguished from that of extradition. Of the two alternative versions of the draft provision, he preferred alternative B, since it established a legal obligation, and acceptance of that obligation would imply acceptance of the terms of alternative A.

35. He supported the double-hearing principle and welcomed the Special Rapporteur's clarity and scientific approach in dealing with the issue. He had established

the basic rule that the international criminal court was both a court of first instance and a court of final appeal and had gone on to argue the case for the double-hearing principle, which took account of the fact that no court was infallible and that appeal was an important legal safeguard. An efficient mechanism would be based on the establishment of a special chamber which would not include the judges who had taken part in a particular decision and which would be called upon to review that decision on appeal. Although the proposal might be considered unorthodox, it would ensure effective internal monitoring of the lawfulness of the court's decisions. The arrangements for the practical organization of the court's proceedings would have to wait until its statute had been finalized, but the Special Rapporteur's proposal warranted serious consideration.

The meeting rose at 11.50 a.m.

2264th MEETING

Friday, 22 May 1992, at 10.05 a.m.

Chairman: Mr. Carlos CALERO RODRIGUES

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, 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. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

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

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on part two of his report.

2. Mr. THIAM (Special Rapporteur), noting that the discussion on the question of complaints before the court had concentrated on paragraph 1 of the possible draft provision,[3] said that it was a provision which dealt with principle, not procedure, and its purpose was to provide, on the one hand, that only States, and not individuals, were empowered to bring a complaint before the court and, on the other, that all States were concerned whether or not they were parties to the statute of the court. That right to bring a case should not be confined to States parties, since, by referring a matter to the court, a State that was not a party was, in a sense, showing that it had confidence in the court and that it wished to become a State party. What had to be ascertained was in which capacity a State—again, regardless of whether it was a party to the statute of the court—could bring a complaint before the court. The answer was that a State must have been the victim of an international crime, whether or not the act had been committed in its territory and whether or not the alleged perpetrator was one of its nationals. Furthermore, it was impossible for a prosecutor to refer a case to the court, as some members of the Commission had envisaged. The role of the prosecutor—the custodian of law and order—would be to receive complaints, if necessary, to initiate inquiries and to draw up the indictment.

3. As to international organizations, it should not be forgotten that they had certain interests to protect. An international organization could itself be a victim of aggression against its property or its agents, in which case it was for the organization and not for the State to bring a complaint. International organizations should be regarded as legal persons under public law which had interests separate from those of their member States and they should therefore be able to refer a complaint to the court in the same capacity as States.

4. He realized that paragraph 2 of the draft provision was not absolutely necessary, since it already appeared in the draft Code. If the Code was adopted, there would be no reason for retaining the provision. If it was not, the court would at least know that it mattered little whether the individual who was the subject of the complaint had acted in his personal capacity or as the representative of a State.

5. With regard to proceedings relating to compensation,[4] he was not sure that the question had no place in the draft because the court dealt mainly with criminal cases, as some members of the Commission believed. In internal law, it frequently occurred that a criminal court had to rule in criminal proceedings and at the same time in the civil proceedings which arose out of them and he saw no reason why an international criminal court could not do likewise. Nor did he see why the international criminal court should be denied that possibility on the pretext that only ICJ would have jurisdiction in proceedings for compensation. He therefore trusted that the draft provision would be taken into consideration.

6. The draft provision on the handing over to the court of the alleged perpetrator of a crime[5] had given rise to many reservations which were justified in particular by

[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. 6.

[4] Ibid., para. 7.

[5] Ibid., para. 8.