Document:-
**A/CN.4/SR.2264**

**Summary record of the 2264th 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**

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.*

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## 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.

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**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.

the need to take account of the basic human rights which were protected by extradition treaties. In his view, the handing over to the court of the alleged perpetrator of the crime should be automatic; it was an obligation of all States parties to the statute of the court. The court could also conclude extradition agreements with States that were not parties to the statute. In any event, if an international criminal court was established, it was necessary to have confidence in it, to allow it to perform its function and not to paralyse its action by provisions that would render it ineffective and futile. He appreciated that alternative A of the draft provision, which was longer and of a more explanatory nature than alternative B, had not found favour with the Commission. The actual principle of handing over the perpetrator should, however, not be open to question.

7. He understood the hesitancy of some members with regard to the draft provision on the double-hearing principle.[6] It was true that, inasmuch as the court was the highest international criminal body, it would be anomalous for its decisions to be reconsidered on appeal. Under some legal systems, no appeal lay against decisions handed down by the highest national courts. The decisions of ICJ were themselves final. Admittedly, they did not relate to questions of individual freedom, but they could have an effect on the property of the persons concerned. He therefore considered that no appeal should lie, either on a point of fact or on a point of law, against the decisions of the international criminal court and he was prepared to drop the provision if that was the Commission's wish.

8. Mr. CRAWFORD, referring to the question of complaints before the court, said that Mr. Thiam had referred in his summing up to one possibility that was not reflected in the draft provision, namely, that international organizations, in their capacity as legal persons, could bring a complaint before the court if they were the direct victim of an international crime, and not merely because the crime was one of general concern to them, as envisaged thus far. He would like to know what procedure should be followed if the system of prosecution adopted did not provide for a public prosecutor.

9. Mr. THIAM (Special Rapporteur) said that the procedure would be the same whether the complaint was submitted by a State or by an international organization. The injured international organization would submit a complaint to the authority empowered to receive complaints, which would be the prosecutor if a prosecutor's office was set up; if there was no prosecutor's office, it would have to file its complaint directly with the court. The main thing was not to divest international organizations of the right to bring a complaint.

10. The CHAIRMAN said that the point to be clarified was whether international organizations could bring a complaint only if their interests were directly affected or whether they could do so on a general basis, like any State, or in other words, even if they were not themselves the victim of a crime.

11. Mr. THIAM (Special Rapporteur) said that it would not be essential for an international organization to have itself been the victim of an international crime for it to be able to bring a complaint before the court: it would suffice for it to have been injured indirectly by a criminal act which had, for instance, interfered with its objectives.

12. In that connection, he wished to revert to the question of whether or not the Security Council could bring a complaint before the court. Inasmuch as it was the function of the Security Council to safeguard international peace and security, it should, in his view, be able not only to take the measures provided for in that respect under the Charter of the United Nations, but also to bring before the international court any complaint against natural persons allegedly responsible for criminal acts that were prejudicial to international peace and security. In the case of aggression, for example, the Security Council could simply determine the existence of the aggression, leaving it to the international criminal court to determine the individual responsibility of the perpetrators of the aggression. That was not a new or original idea, since it already appeared in many drafts according to which any complaint of that kind should first be referred to the Security Council or the General Assembly before being considered by an international criminal court.

13. Mr. VERESHCHETIN asked whether, in the event that individuals were prosecuted before the international criminal court for an act of aggression that had caused suffering to tens of thousands of people, who were in principle entitled to compensation, the Special Rapporteur considered that individuals or any one particular individual tried by the court, could be required to pay such compensation.

14. Mr. THIAM (Special Rapporteur) said that the internal law rule concerning the so-called liability of the principal—which was in fact enshrined in the draft Code, since it provided that a State could be obliged to make reparation for injury caused by its agents[7]—should be transposed, in some way, into international law. In the case of aggression, if those in power or officers of high rank were prosecuted before the court, it was the State in whose name or on whose behalf such individuals had acted that would have to pay compensation. From the procedural standpoint, it was conceivable that such a State would be brought before the court by a simple summons to answer for the consequences under civil law of the act of aggression.

15. The CHAIRMAN said that the question seemed to arise above all in the case of compensation which was claimed from an individual and which, in actual terms, would inevitably be far less than the compensation which could be claimed from a State. In the case of crimes against the peace and security of mankind and, in particular, of the crime of aggression, it would therefore be easier to seek compensation from the State than from a head of State convicted in criminal proceedings. Viewed

[6] Ibid., para. 9.

[7] See commentary to article 5 in *Yearbook... 1991*, vol. II (Part Two), chap. IV.

from that standpoint, however, the question might rather come within the topic of State responsibility.

16. Mr. THIAM (Special Rapporteur) said that he agreed, but pointed out that there was no sharp divide between issues relating to the topics dealt with by Mr. Arangio-Ruiz, the Special Rapporteur on State responsibility, and himself, respectively. In that connection, he referred to article 19 of part 1 of the draft articles on State responsibility.[8] Once an act had been characterized as an international crime engaging the responsibility of its perpetrator, State responsibility deriving directly from the act could not be ruled out.

17. Mr. VILLAGRAN KRAMER said that the examples of the European Court of Human Rights and the Inter-American Court of Human Rights, which dealt with violations committed by States and the compensation of the victims, suggested that it might be possible for an international criminal court to rule in matters of compensation. The Special Rapporteur should clarify whether, if the statute of the international criminal court gave it jurisdiction to deal with serious violations of human rights, the regional human rights commissions in Africa, the Americas and Europe would have the right to bring complaints before the prosecutor of the court.

18. Mr. THIAM (Special Rapporteur) said that human rights commissions dealt only with violations committed by States in respect of their own nationals. Such cases were not part of the topic under consideration and were consequently not within the jurisdiction of the international criminal court. In the event of serious and systematic violations of human rights going beyond the context of the State, however, the question of the right of national organizations serving a humanitarian purpose to bring complaints before the court had been raised in the report and was still open.

19. Mr. PAMBOU-TCHIVOUNDA said that he would like to have a clearer idea of how an international criminal court might conclude extradition agreements with States.

20. Mr. THIAM (Special Rapporteur) said that the idea that the international criminal court might be able to conclude extradition agreements with States had not been his, but had been put forward by certain authors, including Cherif Bassiouni. No State would be able to request the extradition of an individual on behalf of the court. The court would therefore have to have legal personality which would enable it to conclude extradition agreements.

21. The CHAIRMAN pointed out that the Special Rapporteur's report dealt with extradition only in the case of States not parties to the statute of the court; since, for States parties to the statute, the court was not a foreign State. However, the question would naturally have to be considered in greater depth.

22. Mr. KOROMA said that, in view of the many variables involved, the question of compensation had to be given further consideration. In the case, for example, of a chain of responsibilities going from high-ranking agents of the State to their subordinates, the amount of compensation payable by each one could not be the same, since they would not all have the same financial means. The amount of compensation would also depend on the nature of the crime.

23. The possibility of a case being brought before ICJ was not, in his view, entirely theoretical; the offender might be insolvent, in which case the victim might wish to claim compensation from the State.

24. He also thought that, contrary to what the Special Rapporteur had said, the majority of the members of the Commission had stated that they were in favour of the double-hearing principle. Provision should therefore be made for an appeal procedure, either before a special chamber of the court or in some other way.

25. The CHAIRMAN said that he agreed with Mr. Koroma on the last point.

26. Mr. THIAM (Special Rapporteur) said that, while he was not personally in favour of the idea that the decisions of so important a trial mechanism as the international criminal court should be subject to appeal, he was not categorically opposed to it, as shown by the fact that he had drafted a text providing for an appeal procedure. He nevertheless referred to the example of ICJ whose decisions, which might have far-reaching consequences as far as property was concerned, were final in every respect. It would be for the Commission to take a decision.

27. With regard to Mr. Koroma's first point, he said that the State was answerable for damage caused by its agents. In that connection, he stressed the importance of distinguishing between the penalty, or punishment, and compensation, which was designed to remedy the consequences of the crime.

28. Mr. YANKOV, referring to the manner in which the Commission should proceed with its consideration of the item, proposed that it should conclude its exchange of views and that the Working Group should study the various questions raised. Once the Commission had considered the report of the Working Group, the Chairman of the Commission could try, with the assistance of the Special Rapporteur, to formulate guidelines for the use of the Drafting Committee and the Commission in their further work on the subject of the international criminal court.

29. The CHAIRMAN confirmed that the questions would all be reconsidered in greater depth both in the Working Group and in plenary.

30. Mr. KOROMA stressed that the Commission should try to hold genuine exchanges of views instead of formal debates, which did not contribute to the development of the law.

31. Mr. KUSUMA-ATMADJA said he regretted that, in his summing up, the Special Rapporteur had not referred to the trends in relation to the topic as a whole as they had emerged from the discussion. He personally

[8] See 2261st meeting, footnote 8.

had found that there were two main trends: that of those who proposed out-and-out rejection and that of the optimists who hoped that a solution might one day be found. However, he believed that there was also an intermediate position, namely, that, if the Commission was not too ambitious, it would be able to draft a text that could answer the questions the General Assembly and the Sixth Committee had asked in connection with an international criminal court in the general sense of the term. Some speakers had made very useful proposals that should be reflected in the Commission's work. However, it might be for the Working Group or the Drafting Committee to identify the trends that would make it possible to find such an intermediate solution and consider the question more realistically.

32. The CHAIRMAN said that the Special Rapporteur had done his best at the current meeting to provide answers to specific questions on part two of his report. He agreed, however, that, generally speaking, a summary of opinions and trends would be helpful once the consideration of the topic had been completed at the current session. The question should be brought to the Planning Group's attention.

33. Mr. THIAM (Special Rapporteur) said he was sure that the Working Group, which had taken note of all the views expressed, would have useful ideas on how to draft the report to the General Assembly, which should reflect the two main trends in the Commission.

34. The CHAIRMAN said that those comments concluded the discussion on the Special Rapporteur's tenth report and that the consideration of the topic would be resumed in the Working Group chaired by Mr. Koroma. The Commission would come back to it after it had received the Working Group's report.

*The meeting rose at 11.20 a.m.*

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## 2265th MEETING

*Tuesday, 26 May 1992, at 10 a.m.*

*Chairman*: Mr. Christian TOMUSCHAT

*Present*: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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**State responsibility (A/CN.4/440 and Add.1,[1] A/CN.4/444 and Add.1-3,[2] A/CN.4/L.469, sect. F, A/CN.4/L.472, A/CN.4/L.478 and Corr.1 and Add.1-3, ILC(XLIV)/Conf.Room Doc.1 and 4)**

[Agenda item 2]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR

ARTICLE 5 *bis and*
ARTICLES 11 TO 14[3]

1. The CHAIRMAN invited the Special Rapporteur to give a brief summary of the contents of his third report on State responsibility (A/CN.4/440 and Add.1) for the benefit of the new members of the Commission. He recalled that that report had been introduced at the previous session.[4] Consideration of the fourth report (A/CN.4/444) would begin later.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had decided to conform to fashion and speak of countermeasures instead of reprisals, but if he should refer to measures or to reprisals at any time, they should be understood as being synonymous with countermeasures. He happened to prefer the term reprisal because it was clear when a distinction was drawn with self-defence and retortion.

3. With regard to the beginning of the "operative" part of the third report, the first point in connection with the regime of countermeasures was the basic condition for lawful reprisals: the existence of an internationally wrongful act, or—to use a term proposed by one of the new members—a breach, whether of short duration or ongoing. Bona fide belief that a breach had occurred was not in itself sufficient justification to resort to a countermeasure. Such a belief on the part of State A, allegedly injured by a breach allegedly committed by State B, could, once it had been found that there was in fact no breach or that State B was not the wrongdoer, only diminish the degree of unlawfulness, and therefore liability, of State A for having resorted to an unjustified reaction. The existence of a breach and its author need not, however, be the object of a prior determination by a judge, arbitrator or political body, except to the extent that a settlement procedure was envisaged.

4. A second point was the function of countermeasures, which some considered to be strictly compensatory, whereas others believed that measures of that kind were also, or even mainly, punitive. He was inclined to take the view that both elements were present, although in varying degrees, depending on the case. Undoubtedly, in resorting to a countermeasure an injured State would feel that it was securing not just compensation but also the satisfaction that fell to an injured party as a result of meting out some kind of punishment. In his opinion, the Commission should not state explicitly either that the

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[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

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

[3] For texts of proposed draft articles 11 and 12, see 2273rd meeting, para. 18; for 5 *bis*, 13 and 14, see 2275th meeting, para. 1.

[4] See *Yearbook... 1991*, vol. I, 2238th meeting, paras. 2 *et seq.*