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Summary record of the 2299th 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:-
1993, vol. I

successful. The Group should devise its own working methods and decide whether to break into subgroups for specific purposes. It should, of course, concentrate on those issues that remained unresolved, or for which a number of alternatives had been put forward at the previous session, but at the same time, it could work on formulating individual articles of the statute. It was precisely in the course of that drafting work that the merits or disadvantages of various approaches could best be discerned. He did not wish to imply that work on the statute should proceed at a forced pace but it should not be artificially slowed down either.

59. He agreed with Mr. Tomuschat that the goal should be to complete work on the statute by no later than the end of the forty-sixth session. Regrettably, the slow pace of that work had resulted in the task of drafting the statute for an international tribunal being done elsewhere than in the Commission. He hoped, however, that the work on the statute of an international criminal court would be useful in the efforts to set up an international tribunal. The time had now come to concentrate on the wording of specific articles. It would be possible to work with the useful proposals already put forward by Mr. de Saram and others. As much time as possible should be allocated to the Working Group so that true progress could be made in fulfilling the mandate entrusted to the Commission by the General Assembly.

60. Mr. EIRIKSSON said he agreed that the basic issues surrounding the statute had been adequately debated, and that the drafting of the statute was the task at hand. The fact that other institutions had accomplished similar tasks, with fewer resources and less time available than the Commission, should inspire it to achieve its goal. He would have favoured completing the work by the end of the current session, but could accept the goal of finishing it by the end of the next session.

61. The CHAIRMAN said it was apparent from the discussion that comments in the plenary on the Working Group's progress at the end of the session should not take the form of a general debate but should focus on the wording of the draft statute.

Expression of appreciation to Mr. Vladimir Kotliar, former Secretary to the Commission

62. The CHAIRMAN, speaking on behalf of all members, thanked Mr. Kotliar for his many years of devotion and assistance to the Commission and wished him all the very best for the future.

63. Mr. KOTLIAR thanked the Chairman for his kind words.

The meeting rose at 12.55 p.m.

2299th MEETING

Friday, 21 May 1993, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, 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. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,[2] A/CN.4/449,[3] A/CN.4/452 and Add.1-3,[4] A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN announced that Mr. Yamada, who had been called away from Geneva, had asked that his views on the subject under discussion be circulated. The secretariat would take the necessary steps.

2. Mr. FOMBA said that in resolution 47/33, the General Assembly had given the Commission a clear mandate: to draft a statute, taking into account the views expressed in the Sixth Committee and the written comments received from Governments and to submit a progress report to the Assembly at its forty-eighth session. With the submission of the Special Rapporteur's eleventh report (A/CN.4/449), the Commission had a draft statute to work with. It now had to determine whether the draft adequately reflected the views expressed in the Sixth Committee and by States in their written comments.

3. One could agree or disagree with the Special Rapporteur's approach in various instances, but there was no disputing the fact that he had accomplished the task assigned to him. He deserved thanks for the high degree of professionalism with which he had tackled a sensitive issue that had major implications for mankind in the future. The members of the Commission needed to work constructively in order to achieve the broadest possible consensus on certain important matters as rapidly as possible, so that cohesive material could be incorporated into the progress report and the expectations of the General Assembly could be fulfilled.

4. He had had a number of specific proposals to make concerning the best way the Commission could operate

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[3] Ibid.

[4] Ibid.

in order to fulfil its mandate, one of them being the establishment of a working group. He accordingly welcomed the Commission's decision along those lines and hoped the Working Group would have sufficient leeway to determine its own working methods.

5. Two things must be borne in mind. First, it was most important to establish a permanent body—to set something in motion, even at the risk of its being imperfect, for imperfection was inevitable in human justice. Secondly, the essential point in criminal matters was to avoid devising rules that were technically well made but inapplicable in practice. There was precious little jurisprudence in the area, for the experiences of Nürnberg, Tokyo and, just recently, the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991[5] (hereinafter referred to as the international tribunal), were the only precedents.

6. He agreed with Mr. Bennouna and others that a general debate was to be avoided at the present stage, but a few remarks were called for on the general institutional framework for the international criminal court, and specifically, whether it should be part of the United Nations system.

7. In the commentary to article 2 of the draft statute, the Special Rapporteur gave two reasons for his conviction that the court should be an organ of the United Nations. First, the coexistence of an international criminal court and ICJ would not be contrary to the Charter of the United Nations, and secondly, the Security Council's establishment of an international tribunal proved that there was room for a judicial organ, other than ICJ, with jurisdiction in criminal matters. Actually, there were a number of other precedents. The report of the 1953 Committee on International Criminal Jurisdiction[6] showed that all members of the Committee had agreed that there should be some degree of sponsorship by the United Nations for the creation of an international criminal court. Some members had felt that the court should be an organ of the United Nations, or at least a body set up and functioning within its framework.

8. The community of which the United Nations constituted the organized form needed a criminal court in order to pronounce upon acts considered crimes within that community. The establishment of the court within the United Nations would clearly express recognition of the principles of individual criminal responsibility towards the world community, grant the court the desired authority, open the road to universal acceptance of its jurisdiction and guarantee its functioning for the common good. He shared those views.

9. Again, in a report by the European Parliament dated 26 March 1992 on the establishment of an international criminal court for war crimes, the idea that such a court must be a United Nations body was upheld, with emphasis being placed on the need to move towards universality. A number of other texts could be cited such as article 1 of the London International Assembly's draft convention of 1943[7] and article 13 of the draft statute prepared by Mr. Bassiouni in 1992.[8]

10. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on his *tour de force* in drafting an intellectually stimulating document in record time. The message of the eleventh report was clear: the Commission's task should be approached with pragmatism, realism and flexibility. The report focused on the substantive and procedural aspects of an international criminal court as well as on its operation and on administrative matters. Yet it did not claim to solve all the delicate problems caused by the creation of such a court. As pointed out in the report, it constituted at most a plan of work for the Commission.

11. The Special Rapporteur appeared to have complied with the wishes of the Working Group, which had indicated in its report[9] that concrete recommendations should be made with a view to assisting the Commission in fulfilling the mandate assigned to it by the General Assembly. Yet in so doing, the Special Rapporteur might well have tied his own hands. In terms of methodology, the draft under consideration represented a set of questions, leaving fundamental problems unresolved. Such problems included the statute's relationship to domestic legislation and the interplay between the international criminal court and the other bodies of the United Nations system.

12. It was regrettable that a desire for concrete results had led to the unsystematic treatment of certain issues. A rewording of some of the provisions on the applicable law, the competence of the court and the procedures to be used within the court, for example, might serve to highlight better, including for the benefit of the General Assembly, the position of an international criminal court within the United Nations system as a whole. It was to that end that a few specific remarks could be made.

13. Article 2 stated that the court was a judicial organ of the United Nations. The commentary discussed the specificity of the court's jurisdiction in relation to the primacy of ICJ as the principal judicial organ of the United Nations, but the report failed to delve into the consequences of that institutional arrangement. The Statute of ICJ gave it the authority to handle cases arising out of the application or interpretation of treaties. But the international criminal court was to be established on the basis of a treaty. He wondered whether the decisions of that court should be deemed subject to the jurisdiction of ICJ and whether that would not make ICJ an appeals court for the decisions of the international criminal court. He wondered whether ICJ would have the authority to review the decisions of the international criminal court, as it had done in the past for decisions of the Administrative Tribunal.

[5] See Security Council resolution 808 (1993) of 22 February 1993.

[6] *Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645).

[7] United Nations, *Historical survey of the question of international criminal jurisdiction*, memorandum by the Secretary-General (Sales No. 1949.V.8), p. 97, appendix 9 B.

[8] Association internationale de droit pénal, *Nouvelles Etudes Pénales* - Draft statute, international criminal court (Erès, Syracuse, Italy, 1992).

[9] See *Yearbook... 1992*, vol. II (Part Two), document A/47/10, annex.

14. Article 4, on the applicable law, was another source of difficulty. It had a lacuna in regard to substance that could only be filled when the article was read in conjunction with article 34, on penalties. The law applicable by a criminal court must primarily have a punitive function, and only secondarily a protective one. A reference to internal law defining the penalties for various offences was conspicuously absent from the text. Without such a reference, all the penalties set out in internal law would have to be mentioned in international conventions or agreements before they could be applied by the international criminal court. He asked, conversely, if the draft were to refer to internal law, what would happen when national laws did not cover all the offences mentioned in international conventions and agreements. Clearly, the wording of article 4 was incomplete.

15. There seemed to be no need for paragraph 1 of draft article 5, which merely duplicated the terms of article 1, while the alternative formulation, in paragraph 3, lacked consistency and was unrealistic. It lacked consistency because it would be difficult in particular to reconcile the question of enforceability (*opposabilité*) with that of conferment of jurisdiction, which was implicit in any international agreement. In his view, the article was of faulty construction and should perhaps be re-examined. It lacked realism because the idea of defining offences in a unilateral instrument of a State involved a host of unknown factors. He asked whether the provision, which was couched in general terms, was directed at the State on whose territory the crime was committed, or at the State of which the perpetrator of the crime was a national, or at any State whose domestic law provided for a regime identical to that laid down for crimes which could be tried by the court. The last of those possibilities would apply only in cases for which there was a code of crimes, but, in that eventuality, he wondered why a State which had a comprehensive system should not have direct jurisdiction to try the criminals in question. Such questions were not unrelated to the nature of the body it was hoped to establish.

16. Mr. KABATSI said that a solution to the question of the establishment of an international criminal court to try and punish individuals guilty of criminal conduct that outraged the conscience of the world seemed to be imminent now that the Commission had been requested by the General Assembly to prepare a draft statute for such a court as a matter of priority. No longer was the world prepared to stand by as innocent blood was being shed. The world community was looking to the Commission to fire the first shot in the war against criminals who had thus far acted with impunity. It had at last recognized that the situation could not be allowed to continue and was asking the Commission to initiate the process that would put an end to such shameful events.

17. The Commission had the capacity, and the legal materials, to carry out its task expeditiously. It had worked on the subject for some time and had had the benefit of contributions from the Sixth Committee, from Governments and from various international law bodies. Above all, it had before it the excellent draft statute prepared by the Special Rapporteur. Hence there was every reason to believe that the Commission would be able to respond to the General Assembly's request sooner rather than later. The Working Group, which had already achieved commendable results, was moving ahead with more confidence at the current session. A project of the kind envisaged would inevitably encounter difficulties, but the current mood throughout the world was that those difficulties were not insurmountable and should not be allowed to stand in the way of the establishment of an international criminal court in the foreseeable future. The Special Rapporteur's eleventh report would provide the Commission with a valuable working document on the basis of which it would be able to submit a draft statute of an international criminal court to the General Assembly, if not at its next then at the following session.

18. Mr. MAHIOU said that he agreed with the Special Rapporteur's general approach, as reflected in the statement in paragraph 4 of the report, that the aim should be to establish "an organ with structures that are adaptable, not permanent and of a modest cost". That was a somewhat idealistic solution perhaps, but it signified the general direction in which the Commission should move.

19. He also endorsed the general idea behind article 2, which was, however, somewhat terse. The proposed court must, of course, be an organ of the United Nations but the nature of the link between the two still had to be determined.

20. It would be premature for the Commission to discuss the seat of the court (art. 3), which was primarily a political matter. However, provision should perhaps be made for the court to move in order to cater for situations in which it could not sit at the normal place. It might, for instance, have to try a national of the State in which it had its seat. He wondered whether it would be possible in such a case to ensure that the trial was conducted in the necessary calm environment?

21. Article 4 was at once too general and too absolute, and a distinction might be made between two types of rules: on the one hand, rules governing the characterization of a crime, which could be drawn from international conventions and agreements, and on the other, rules governing the functioning of, and procedure before, the international criminal court, when it would be only logical to draw on general principles of law and on custom. No statute could ever cover all eventualities. It was therefore important to leave the door open so that reference could be had to other sources of law. The Special Rapporteur and the Working Group might wish to reflect on the matter.

22. Article 5, on the jurisdiction of the court, would no doubt prove to be the most controversial. Paragraph 2 caused some difficulty in that it required two States to confer jurisdiction: the State of the territory in which the crime had been committed, and the State of which the accused was a national. As rightly noted by the Special Rapporteur in his commentary to article 5, the principle that was generally applied was territorial jurisdiction. The best solution, therefore, would be to give priority to that principle and to apply others, such as the principle concerning the consent of the State of which the accused was a national, as secondary rules in specific cases. It was important not to give a right of veto, as it were, to

the State of which the accused was a national since, in the final analysis, that would only neutralize the court.

23. His interpretation of the Commission's discussion of the type of crime that would come within the jurisdiction of the court was more optimistic than that of the Special Rapporteur, as reflected in the commentary to article 5. There were many crimes, in addition to genocide, that could fall within the jurisdiction of the court and he trusted that, at the current session, the Working Group would spell out the crimes with which the court could deal.

24. With regard to the procedure for the appointment of judges (art. 12), there seemed to be some concern to avoid the drawbacks of full-time judges. In particular, the Special Rapporteur, in his commentary, established a link between judges who sat full time and the election of such judges by the General Assembly. Such a link was not automatic, however. There were organs that could be elected by the General Assembly but that did not have a permanent function—the Commission itself being a prime example—and the same would, in his view, apply to an international criminal court. The most important thing was to ensure that the members of the court were appointed in a highly formal manner, by the General Assembly, inasmuch as they sat on behalf of the international community to ensure respect for law and order at the international level.

25. The procedure for the appointment of judges by States would result in a veritable armada of judges and, for that reason, it would be advisable to provide from the outset for a modest structure. By the same token, the number of judges of which a chamber of the court was composed—the subject of article 15—should not be too large and should certainly be less than nine; in his view, seven would suffice. In addition, there would of course be the judges who dealt with the investigation; and if a prosecution authority or department were to be set up there would also be the judges who were to form part of it. In appointing the judges, the traditional principles should be observed, including those relating to representation of the different legal systems and different regions and also the principle that more than one national from the same State could not sit on any organ which tried the accused.

26. Paragraph 1 of article 23 (Admission of a case to the court) was linked to article 25 (Prosecution) inasmuch as any decision adopted with respect to the submission of a case to the court would have an effect on the prosecution procedure. If States were to be responsible for conducting the prosecution, then it was only logical that they should also be responsible for the submission of cases to the court, as provided for in article 23. If, on the other hand, the prosecution was to be the responsibility of an organ of the court or of a prosecution department, the right to submit a case to the court could be open to complainants other than States—for instance, to international organizations and possibly also to certain non-governmental organizations concerned with humanitarian matters. Under the terms of article 23, States alone would be complainants, so that an exception should be introduced so as to allow the United Nations, and specifically the Security Council and the General Assembly, to refer a case to the international criminal court.

27. So far as article 25 was concerned, he would favour a prosecution department to conduct the prosecution, rather than the complainant State or States, since that would ensure that the trial was conducted in a calmer atmosphere. He therefore did not altogether agree with the commentary to alternative B of article 25, which established an automatic link between the existence of a prosecution department and the permanence of such a department. A prosecution department could become permanent if the numbers of accused persons were such that it had to work on a full-time basis, but it would be permanent in operational, not structural, terms.

28. The Special Rapporteur was obviously hesitant about article 27 because it appeared between brackets. For his own part, he did not agree that proceedings by default should be excluded. Also, he was not sure whether, as stated by the Special Rapporteur in the commentary to that article, the predominant view in the Commission really had been opposed to proceedings by default. If so, he would invite members to reflect on the consequences of such an exclusion. All an accused would have to do to escape proceedings was to take refuge in a State which was not party to the statute of the court. That was particularly serious for two reasons. In the first place, the State in question could simply take no action and allow the accused to leave for a friendly country, the reasoning being that it would then have neither to extradite nor to try him. That would open the door to evasion of the terms of the statute of the court, particularly when it came to trying a State's political leaders. Secondly, the lack of any provision for proceedings by default could create the idea of impunity but, if the accused were found guilty in such proceedings, the threat of arrest would hang over him like the sword of Damocles and he would not be able simply to stay quietly where he was.

29. With reference to article 34 (Penalties), he was strongly in favour of the court's applying the penalties provided for in the criminal law of the State on whose territory the crime had been committed. When for whatever reasons, a State ceded to an international criminal court the right to judge the perpetrator of a crime committed on its territory, it transferred to the court its own power of jurisdiction over the accused, and it was logical to assume that such a transfer of jurisdiction also entailed transfer of the provisions of that State's criminal law, including the rules applicable to penalties. Another reason for preferring the solution based on territoriality was that it was important to avoid what might be described as *à la carte* penalties, as could be the case if two or more individuals were accused of the same crime on the territory of the same State and the court decided to apply the penalties provided for by the criminal law of the State of which each of the accused was a national. In such a situation, several different penalties might be imposed for the same crime committed in the same country.

30. Lastly, in regard to article 35 (Remedies), although he was convinced that revision alone would provide sufficient guarantee of the quality of the court's judgements, especially as the proceedings would undoubtedly

take place in the presence of international observers and would be extensively reported by international media, version B of the article included appeal and thus seemed more in line with developments in the field of human rights and of the relevant principles of international law.

31. Mr. RAZAFINDRALAMBO said that he had hesitated about speaking, because the Special Rapporteur's eleventh report seemed to propose nothing that had not formed the subject of extensive discussion in the past and which had not been recommended by the Working Group the previous year. However, there had been some unprecedented developments since the Commission's forty-fourth session. The decision to establish an international tribunal,[10] and the highly instructive report of the Secretary-General,[11] were undoubtedly the most striking of those developments. However, the international legal community's concern with the issue was also reflected in the convening of the World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights by the International Institute for Higher Studies in Criminal Sciences at Syracuse, Italy, from 2 to 5 December 1992. Those events on the international scene since July 1992 would in themselves warrant renewed discussion, although the Commission should not, of course, revert to those points on which a consensus had already been reached.

32. There appeared to be a trend in favour of giving priority consideration to the statute of an ad hoc criminal court. The adoption of such a course, could consign the matter of the statute of a permanent international criminal court to oblivion and render the exercise conducted by the Commission over the past few years completely useless. That possibility would become a reality if, for political and budgetary reasons, the Commission were to accept the view held by some members that it was materially impossible for two international criminal jurisdictions, one ad hoc and the other permanent, to coexist. Unfortunately, some of the proposals in the Special Rapporteur's eleventh report appeared to be based on considerations of that kind. In particular, he did not agree with the procedure for the appointment of judges proposed in article 12. Criminal judges, unlike those on arbitration tribunals or even those of ICJ, were called upon to pronounce upon the honour, reputation and fate of individuals; in consequence, they were exposed to pressures and threats of all kinds. It was therefore quite unacceptable to advocate a judicial system which provided, on the one hand, for the appointment of international criminal judges by their own Governments, rather than by an impartial international election process, and on the other, for them to return home without any security guarantees whenever the court was not in session. Such proposals could only be the fruit of a timorous reluctance to uphold the impartiality and independence of international courts for fear of losing the support of certain Powers.

33. As the World Conference at Syracuse, Italy had made abundantly clear, the international community wanted the Commission to continue its work and redouble its efforts with a view to the early completion of its task of elaborating a permanent international criminal jurisdiction worthy of that name. He would comment in greater detail on specific points at a later stage and wished to thank the Special Rapporteur for a report which provided a most useful basis for the work at hand.

34. Mr. YANKOV said that, as a member of the Working Group, he would have other opportunities to express his views on specific articles of the draft statute and he wished to express his appreciation to the Special Rapporteur for an excellent and well-structured report.

35. The first organizational point he wanted to raise might appear at first glance to be a minor one, but it related to a significant change in the Commission's mandate. Whereas the General Assembly, in its resolution 46/54, had invited the Commission to consider the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism, in resolution 47/33, the Assembly requested the Commission to continue its work on the question "by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority". He therefore proposed that the Working Group previously known as "the Working Group on the question of an international criminal jurisdiction" should henceforth be called the "Working Group on a draft statute for an international criminal court". In addition to the more formal advantage of reproducing the language of Assembly resolution 47/33 on the subject, such a step would offer the substantive advantage of clearly determining the Working Group's mandate.

36. His second general observation was that the statute should, through its provisions relating to the composition and jurisdiction of the court, applicable law, investigation, evidence and the trial procedure, including enforcement and penalties, provide the foundations and the legal guarantees for an impartial judicial institution based on the principles of the rule of law and be free, as far as possible, from political considerations. That was all the more indispensable as the cases referred to the court would for the most part be of a political nature. The court's impartiality and viability as a court of law would largely depend on the way it was established and the way its composition was determined. Naturally, the more subjective factor of the moral integrity, independence and competence of the court's members was also of the greatest importance. Those general considerations should find expression, as far as practicable, in the relevant provisions of the statute, namely, the internal regulations relating to its functioning and the rules governing investigation and trial procedures.

37. In that connection he wished to enter a reservation in respect of article 15, paragraph 3, stipulating that the President or Vice-President of the court should select the judges to sit in the chambers of the court, and also to express doubts about the provisions in article 5, paragraph 3, and articles 23 and 25, associating himself in that connection with the comments made by Mr. Mahiou.

38. Lastly, the Commission should aim at submitting a finalized draft statute to the General Assembly in time, at the latest, for the fiftieth anniversary of the United

[10] See footnote 5 above.

[11] Document S/25704 and Corr.1 and Add.1.

Nations in 1995, as a contribution both to the anniversary celebrations and to the United Nations Decade of International Law.[12]

39. The CHAIRMAN said that the proposal to rename the Working Group was an important one and deserved serious consideration.

The meeting rose at 11.40 a.m.

[12] Proclaimed by the General Assembly in its resolution 44/23.

2300th MEETING

Tuesday, 25 May 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Vaclav MIKULKA

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/446, sect.B, A/CN.4/448 and Add.1,[2] A/CN.4/449,[3] A/CN.4/452 and Add.1-3,[4] A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ARANGIO-RUIZ said that, as most of the points he would have raised with respect to the Special Rapporteur's eleventh report (A/CN.4/449) had already been dealt with by other members of the Commission, he would confine himself to just one question on which he wished to express his views directly, in plenary, namely, the question of ad hoc or special criminal courts and of the relationship between that question and the task the General Assembly, in its resolution 47/33, had entrusted to the Commission.

2. At the end of the Second World War, the establishment of an ad hoc tribunal had been the only practical solution: there had been virtually no international political institutions, the matter had called for a speedy solution and the four victorious Powers had been in occupation of the countries from which the accused came. The matter therefore had had to be dealt with by those four Powers, but they had decided to act pursuant to an international legal instrument, the London Agreement.[5] As that Agreement had been concluded between victorious Powers, it had obviously not been possible to secure any participation by the vanquished Powers in the court that had been set up.

3. The dramatic situation which obtained at present in the territory of the former Yugoslavia likewise called for urgent measures, one being the introduction of some machinery to bring to justice any individuals guilty of crimes against humanity. That did not necessarily mean, however, that an ad hoc criminal court should be established: there were at least three reasons for saying so.

4. In the first place, as every lawyer knew, ad hoc courts were not the best method of administering criminal justice. The members of a court set up in response to a particular situation might be influenced by that situation and by, as it were, an obligation of result. Furthermore, quite apart from the very serious risk of a lack of objectivity and impartiality, ad hoc or special criminal courts were essentially instruments used by despotic regimes. It would set a bad example if the international community were to resort to such means and would not augur well for respect for human rights and the rule of law at the national level.

5. Secondly, while the perpetrators of such abhorrent acts should, of course, be prevented from pursuing their activities as a matter of urgency, the choice of the ad hoc solution would not be enough to have that deterrent effect. In any event, it would take some time to set up a court, even an ephemeral one. What operated as a deterrent was the clearly proclaimed intention of the General Assembly and the Security Council to investigate those crimes and prosecute the persons responsible and they already knew what they could expect from the international community. There was therefore no absolute necessity for the United Nations to set up institutions which might not be unimpeachable from the legal standpoint.

6. Thirdly, those who favoured an ad hoc court apparently considered that such a body would be established by virtue not of a multilateral convention adopted under United Nations auspices, for that, it was claimed, would take too long, but of a decision of the Security Council. Such a procedure was, however, even less in keeping with the fundamental principles of criminal law. Indeed, it was not at all clear under which express or implied provisions of the Charter of the United Nations the Security Council would be empowered to set up a criminal court and define its task. Those who would have to collect the evidence and decide on the criminal responsibility of the accused would have sufficient difficulty in performing that task without having, in addition, to deal with challenges to the constitutional legitimacy of the whole operation. The position would of course be differ-

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[3] Ibid.

[4] Ibid.

[5] London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).