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Summary record of the 2301st 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

damage caused, as provided for in some conventions in the nuclear field.

61. Mr. PELLET said he disagreed that the Commission had taken a step backwards in deciding to focus on prevention. The debate of the previous year had shown that prevention was the best line of attack for examining the topic. In his ninth report, the Special Rapporteur had systematized the old texts, producing a coherent result. Whether in plenary or in the Drafting Committee, the Commission must confine itself to the approach adopted if it did not want to make the subject incomprehensible once again.

62. Mr. VERESHCHETIN said that he agreed with Mr. Pellet, commended the Special Rapporteur on the quality and clarity of his report and noted that, although the Commission had decided in 1992 to break the subject down into several parts because it was so difficult, that did not mean that each aspect must be considered separately. Focusing at present on preventive measures for activities involving risk did not rule out examining preventive measures relating to activities that could, de facto, have harmful effects, or studying financial liability. At present, however, the Commission must confine itself to prevention and decide, when the time came, whether to continue the discussion in plenary or to refer most of the articles to the Drafting Committee.

63. Mr. THIAM said that, if the topic was not to be confined to prevention, it would be necessary to decide what the next stages would be because it was essential to have an overall plan.

64. Mr. BARBOZA (Special Rapporteur) stressed the need to follow the order of work indicated in the report. The first 10 articles already referred to the Drafting Committee might be looked at again quickly in the light of the Commission's decision to deal only with preventive measures in respect of activities involving risk and perhaps simply propose deletions or amendments. The Drafting Committee should, however, focus primarily on the wording of the articles on prevention. The Commission must in any event take care not to reopen the debate and confine itself for the time being to prevention, reserving the right to take up liability at a later stage, if only to do justice to the title of the topic.

The meeting rose at 1.10 p.m.

2301st MEETING

Friday, 28 May 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bennouna, 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. THIAM (Special Rapporteur) thanked the members of the Commission for an interesting and instructive discussion, which proved very helpful. In summing-up, he wished to focus on three main points: the relationship between the court and the United Nations; jurisdiction and the applicable law; and the functioning of the court.

2. There was general agreement on the need for a link between the court and the United Nations. Indeed it was hard to see how a court could function in disregard of the Organization. The court would need United Nations logistical support for its administrative functioning, for example in electing judges, and for financial matters. Yet regardless of those material questions, the fact was that the court would have jurisdiction in matters of direct concern to the United Nations, such as war crimes and crimes against the peace and security of mankind. He asked how the court could rule on such questions without taking into account the Charter of the United Nations or the Security Council? Thus, although the Working Group might want to modify the wording of article 2 of the draft statute, some link between the court and the United Nations had to be maintained.

3. His initial proposal in a previous report had been that the applicable law should not be limited to agreements or conventions, but should also include the general principles of law, custom and even, in some cases, national law. The Working Group, however, had concluded that it should be confined to agreements and conventions. He did not agree; in such an area experiencing constant change, the Commission should not favour rigid codification. Some matters were not ripe, and it would be necessary to have recourse to national law. For instance, no appropriate formulation had yet been found for penalties, which varied greatly, depending on the State and the philosophy involved. Again, moral considerations had a great influence in determining what the penalties should be. If the court was to impose penalties and was to respect the principle of *nulla poena sine lege*, it would have to refer to a State's national law when it found that it was faced with a legal vacuum. He had proposed either the law of the State on whose territory the offence had been committed or of the State of which the accused was a national. He had no preference either way, but did not believe that national law could be ruled out systematically. In earlier proposals for a draft statute, it had in fact been envisaged that the court should apply the national law of a State in certain cases. It was gratifying to note that the Working Group had been rethink-

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[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.

ing its position on that subject, because the previous day the draft articles proposed in the Working Group had repeated the text he himself had suggested two years earlier.[5]

4. With regard to the court's jurisdiction, there again, differences of opinion had emerged in both the Commission and the Working Group. Originally, he had proposed that the jurisdiction of the court should not depend on acceptance by certain States. Later, seeking to accommodate the objections raised by one member of the Commission, he had altered his proposal to make jurisdiction subordinate to acceptance by certain interested States. That proposal had in turn been criticized by other members, who argued that, on the contrary, it was out of the question for jurisdiction to depend on the agreement of the State of which the accused was a national. Actually, that possibility had been envisaged in the 1953 draft statute for an international criminal court.[6] In his view, a court could not be created without taking into consideration the existence and jurisdiction of States. Some form of compromise had to be found, because the court must function with the agreement of States; otherwise, it would be paralysed from the outset. Perhaps jurisdiction could be dependent on acceptance by the State in whose territory the accused was found, for if the court were to try to judge the accused without such acceptance, it would constantly be judging by default, something that was hardly the best solution. Clearly, a number of divergences of opinion still had to be overcome.

5. In the matter of the organization of the court, the Working Group had hesitated as to whether the judges should be elected or appointed. As far as he was concerned, there was no great difference. Judges who were appointed were just as independent as those who were elected, provided they were afforded certain guarantees, for instance that they could not be removed or could not be sanctioned for the decisions they took. It was common practice in many States for the Executive to appoint judges, and yet those very same judges, acting independently, could issue summonses against the very ministers who had appointed them and could even institute proceedings against them. In the case of constitutional courts, judges who had been appointed could annul laws if they were unconstitutional. Thus, as long as they were guaranteed independence, it was irrelevant whether the judges were elected or appointed. Members of the Commission should not confuse the procedure for appointing arbitrators according to the statute of the Permanent Court of Arbitration with the appointment of judges by an international criminal court. In the case of the Permanent Court of Arbitration, the parties to the conflict chose arbitrators from a pre-existent list, whereas in the case in point, States parties to a dispute would not choose the judges who must have jurisdiction in the case. Objections had been raised to the use of the term "General Assembly of Judges" (art. 13), on the grounds that it might be mistaken for the General Assembly of the United Nations. He would point out that the term "General Assembly" was in common use and the United Nations did not have a monopoly on it.

6. So far as the investigation procedure (art. 26), was concerned, he did not care for the French system, and proposed instead that the investigation should be carried out by the court itself, at the hearing. That was closer to the British system. If a case was too complex, the court might appoint a special committee from among its members to carry out the investigation. Some members of the Commission had disagreed, arguing that an investigating body must be established. He did not object, but such a body would not make for the small, flexible structure as called for by the Working Group. The system of the examining magistrate was unsatisfactory because he had too much power to make arbitrary decisions about the freedom of an individual; such a magistrate could sometimes even place a person in custody before having heard the case or having questioned him. If the investigation was to respect human rights, the powers of the examining magistrate had to be limited as much as possible, and another arrangement must be found which would prevent the judge from reaching his decision according to his mood, instead of in accordance with the law. Hence, such investigations should be carried out not behind closed doors, but in a public hearing. If the public hearing by the plenary court did not make any headway, the court could appoint an investigative committee from among its members, which could then report to the court on the case.

7. In article 25, he had proposed in alternative A that the complainant State, not a Prosecutor General, should be responsible for conducting the prosecution. Even in courts in which a Prosecutor General was responsible for prosecution, the complainant took part in the proceedings, pleading the case and bringing forward evidence in support of allegations made. Often, the Prosecutor General simply repeated the complainant's arguments. The sole difference was that the Prosecutor General could demand penalties, because he represented the prosecuting authority, whereas the complainant could simply demand compensation. He had therefore proposed alternative A because it was simpler. With reference to article 35 (Remedies), revision had been generally accepted, but no member of the Commission had been categorically opposed to appeal.

8. With regard to penalties, the matter had been appropriately discussed in connection with the draft Code of Crimes against the Peace and Security of Mankind, rather than the draft statute. Several proposals had been made, but none had been adopted yet. If the court were to be created without such a scale being envisaged, it would prove necessary to refer to an internal law. A State might conceivably stipulate application of its own national legislation as a condition for accepting the court's jurisdiction as to the applicable penalty.

9. In closing, he wished to express the hope that he had addressed the essential questions raised in connection with the jurisdiction and organization of an international criminal court.

10. Mr. BENNOUNA thanked the Special Rapporteur for the clarification he had given and said he had been unduly modest about the progress that had been made.

[5] See *Yearbook... 1991*, vol. II (Part One), document A/CN.4/435 and Add.1, chap. II.

[6] See *Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953 (Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645)), annex.

11. One issue not touched on by the Special Rapporteur in his remarks was that of the means whereby the international criminal court would become a judicial organ of the United Nations. The commentary to article 2 referred to Security Council resolution 808 (1993) of 22 February 1993 establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991. However, the Commission had rejected the idea of creating the international criminal court on the basis of a resolution by a United Nations body. Therefore the establishment of the international tribunal could not be cited as a precedent.

12. The Commission had determined that the best way to establish the international criminal court was by international treaty. The commentary was virtually silent on that point, whereas it would have been useful to look into the ways and means of achieving that objective. ICJ, for example, was envisaged in the Charter of the United Nations. It might be argued that if the international criminal court was to be a judicial organ of the United Nations, it, too, should be mentioned in the Charter, but that would require an amendment.

13. An imaginative approach to the problem might be to explore the implications of the international criminal court not being set up as a United Nations body *per se*. The example of the specialized agencies could be used: like them, the court could have parallel yet cooperative relations with the United Nations on the basis of a treaty or agreement. Some such kind of relationship had to be established, if only for financial and administrative purposes—the appointment of judges, for example—for under the draft in its present wording that matter would be the responsibility of the United Nations.

14. Mr. VILLAGRÁN KRAMER said that Mr. Bennouna's remarks had prompted him, too, to put forward a number of considerations that might be useful.

15. He was deeply apprehensive about basing the future court's operations on an ad hoc mechanism like the one set up by the Security Council for the former Yugoslavia. In the absence of any interrelationship between an international criminal court and the United Nations, the Security Council might start to set up ad hoc tribunals whenever it thought such a course was necessary. The guarantees offered by more centralized structures were well established in contemporary concepts of international law. Decentralization ultimately led to oversimplification in international law, while the advantages of centralization were greater flexibility in the drafting and application of legislation at the international level.

16. He could not agree that, if something was not provided for in the Charter it could not be done. On the eve of the twenty-first century, lawmakers should not consider themselves tied by the conceptions of the law that had prevailed 50 years before. They should explore new avenues for determining the specific competence of judicial organs. A restrictive interpretation of such competence should no longer be used: rather, it should be decided whether inherent competence could be usefully applied in a given case. World public opinion seemed to have greater faith in flexible relations within the United Nations and in an associative arrangement between the Organization and national courts.

17. Mr. THIAM (Special Rapporteur) said he endorsed the ideas advanced by Mr. Villagrán Kramer about the relationship between the court and the United Nations. The two should not work independently; rather, they should be associated in a way that would be productive for the international community as a whole. He had not yet arrived at a definitive concept of the form that such cooperation could take: that would be a subject for collective appraisal by members of the Commission.

18. It was clear, however, that if the United Nations truly wanted an international criminal court, it would have to adopt the reforms required to enable the court to function without acting in breach of the Charter. The establishment of ad hoc tribunals by the Security Council was not always advantageous, and members of the Commission had indicated they did not want an international criminal court to be entirely dependent on the Council. The problem was to devise a way of ensuring close cooperation between the court and the United Nations, without establishing a relationship of subservience. Personally, he saw no problem in the international criminal court being an organ of the United Nations. ICJ was the primary judicial organ of the United Nations system, but not the only one.

19. Some members of the Commission wanted the court to be created by a resolution, while others preferred a treaty. He thought both roads could be taken. A General Assembly resolution could be adopted and, on that basis, a statute elaborated and a treaty signed by Member States to give it effect. In any event, priority should be given now to elaborating the statute of the court.

20. Mr. ARANGIO-RUIZ said he welcomed the views expressed by Mr. Bennouna and Mr. Villagrán Kramer about establishing the international criminal court on the basis of a treaty, something which was absolutely essential.

21. The commentary to article 2 referred to the international tribunal, but in his opinion no court of criminal justice could be established as a subsidiary body of the General Assembly or of the Security Council, nor could one be created by a resolution of either of those bodies, for they were not empowered under the Charter of the United Nations to take such steps. They could, as had been the case with the Administrative Tribunal, establish an administrative body—but not an international criminal court. He proposed to address that delicate matter at a later stage of the debate.

22. The CHAIRMAN announced that the meeting would be adjourned to enable the Working Group on a draft statute for an international criminal court[7] to continue with its efforts.

The meeting rose at 11 a.m.

[7] The Commission, at its 2300th meeting on 25 May 1993, decided that the Working Group on the question of an international criminal jurisdiction should, henceforth, be called "Working Group on a draft statute for an international criminal court".