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Summary record of the 2345th 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:-
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35. Following a further exchange of views in which Mr. CALERO RODRIGUES, Mr. GÜNEY, Mr. ROSENSTOCK, Mr. Sreenivasa RAO, Mr. VILLAGRÁN KRAMER and Mr. YANKOV took part, the CHAIRMAN said he would suggest, in the light of comments made, that members should first have the opportunity to make their general statements, after which the draft Code would be considered article by article, having regard to the fact that the subject-matter of some of the articles was under consideration in the Working Group on a draft statute for an international criminal court. He would then convene a meeting of the Bureau to decide how to coordinate further work on the two subjects.

It was so agreed.

The meeting rose at 11.30 a.m.

2345th MEETING

Tuesday, 31 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN said that, as agreed, the consideration of the topic would be broken down into two parts, beginning with a general discussion that would take only one meeting and followed by an examination of the individual articles, certain of which dealt with questions also treated in the Working Group on a draft statute for an international criminal court. In order to avoid excessively fragmenting the second part of the debate, which would last for several meetings, he proposed taking up five clusters of articles successively, namely, articles 1 to 4 first, followed by articles 5 to 7, articles 8 to 10, articles 11 to 13, and, lastly, articles 14 and 15.

2. If he heard no objection, he would take it that the Commission agreed to proceed in that manner.

It was so agreed.

3. Mr. PELLET said that he wanted to make three brief comments in the framework of the general discussion.

4. The first concerned the title itself of the Code of Crimes against the Peace and Security of Mankind, which was entirely deceptive. The title was appropriate for certain crimes, such as aggression, but was much more debatable for others, such as genocide or crimes against humanity, that did not come under the peace and security of mankind unless the concept was given a very broad meaning, which would play into the hands of ideologies with an emphasis on security. A review was therefore necessary because it was the Commission's last chance to remedy that great weakness in the text.

5. His second comment concerned the problem raised by the relationship between the Code and the statute for the international criminal court, which affected less the drafting of the Code, that was perfectly viable with or without the court, than it did the establishment of the statute for the court, for which it was still uncertain whether it would have jurisdiction for applying the Code. He cautioned the members of the Commission against the temptation of rigidly linking the two exercises and even more so against making the adoption of one of the instruments contingent on the adoption of the other. Such an approach might well prove to be totally sterile.

6. Inevitably, however, there were provisions and problems common to the two drafts, as Mr. Bennouna had already pointed out (2344th meeting). In particular, he acknowledged that, apart perhaps from articles 1 and 5, all the articles of part one of the Code were related to the statute of the court. That did not prevent the Commission from considering the draft Code on second reading because nothing justified the Commission's giving priority to the statute of the court over the Code, but such consideration should take place in the light of the draft statute. Above all, it was very important, with regard to each of the articles of the draft Code, for the Chairman or the members of the Working Group on a draft statute for an international criminal court to provide information on the corresponding progress made so that the discussions could be mutually enriching and incompatibility avoided. By the same token, it was essential for the Working Group to take the draft Code fully into account for the drafting of the statute and, assuming that the draft Code was adopted on second reading prior to the completion of the draft statute, the Working Group must use the wording of the Code. It therefore had to demonstrate consistency and intellectual discipline and not go back on its decisions, whether in the framework of the Code or in that of the statute.

7. His third comment related to part two of the draft Code, on crimes, and concerned the intention expressed

[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 . . . 1994*, vol. II (Part One).

[3] Ibid.

by the Special Rapporteur in the introduction to his twelfth report (A/CN.4/460) to limit the list of such crimes to those that could not be challenged. He welcomed that intention because, apart from aggression, genocide, crimes against humanity, serious violations of the humanitarian law of war and, probably, apartheid, the maintaining of colonial domination by force and, indeed, the systematic and massive use of torture, he did not believe that it was necessary to keep the long litany of crimes currently enumerated in the draft. That change, which the Special Rapporteur had promised, would have a direct impact on part one of the draft, inasmuch as the title of certain provisions must necessarily be very different, depending on whether the Code covered virtually all violations of international law or whether it would be limited to acts which the Special Rapporteur had defined earlier as "crimes of crimes", those that constituted either a breach of the peace or a violation of the very notion of humanity.

8. In respect of the non-applicability of statutory limitations, for example, covered in article 7 of the draft, many Governments had expressed reservations and concern. In its observation on behalf of the Nordic countries, the Norwegian Government had correctly noticed that non-applicability of statutory limitations might be acceptable in regard to the most serious crimes, but was considerably more doubtful in those cases where conflicting national penal laws prescribe statutory limitation after a certain period of time.

9. Generally speaking, he had noted that Governments were rather bewildered, as could be seen in some of their observations on the rather numerous provisions of part one, in particular non-retroactivity, responsibility of the superior and the pretext of an order of a superior. In his view, that was due to the fact that the offences which were characterized in part two as crimes against international peace and security had never been considered as such in the past and, if the Commission confined itself to the idea that the Code was really the Code of offences that outraged the conscience of all of mankind, it might quite easily find formulations to win unanimous approval for part one of the draft. It would therefore be necessary to take account, during the discussion, article by article or by cluster of articles, of the intention expressed by the Special Rapporteur in the introduction to the twelfth report.

10. Mr. BENNOUNA said that there were two essential questions, that of the title of the Code of Crimes against the Peace and Security of Mankind and that of the relationship between the draft Code and other drafts.

11. The title did not fit the content of the Code as it stood. The concept of peace and security was too closely linked to the action of the Security Council or to political questions for the Commission to retain it in the title, which would therefore have to be recast, perhaps by drawing on part two and simply using the existing headings.

12. Concerning the relationship between the draft Code and other drafts, he said that there was perhaps a link between the draft Code, which dealt with crimes committed by individuals, and the draft articles on State responsibility, in particular, article 19 on crimes committed by States.[4] At the beginning of the discussion on the draft Code, the Commission had planned to cover the whole of those two categories of crimes; subsequently, it had rather wisely decided to focus solely on crimes committed by individuals, leaving aside, but not completely excluding, the question of crimes committed by States. But the facts of life being what they were, the problem of the relationship between the two categories of crimes was bound to arise again. If, on the basis of Mr. Pellet's suggestion, the Commission reduced the list of crimes to "crimes of crimes", it would see that many of those crimes could not be committed without State complicity or involvement. That was especially clear for certain crimes, such as aggression or genocide, which could not be committed by an individual without the State apparatus and were often the work of high-level officials in that apparatus.

13. The State was none the less bound to be implicated even in the context of a criminal trial, if only by the agent being tried, who would attempt to exonerate himself by hiding behind the State he had represented. The Commission would therefore have to consider that link at some point.

14. Secondly, there was a link between the Code of Crimes and the statute for an international criminal court. Unlike Mr. Pellet, he did not think the two were separable. Practically all articles in the Code were involved and, if the Commission ignored that fact, it would discover that it could not take a decision on certain articles on second reading without having completed its consideration of the draft statute. The most obvious example was that of the article relating to the *non bis in idem* principle, but many others could also be cited.

15. Moreover, if the Commission persisted in analysing the draft Code while allowing the work on the draft statute to proceed separately, it would find that the articles of part two of the draft Code were also involved. Different approaches to the question of crime had been adopted in connection with the Code and the court. In delimiting the jurisdiction of the court, the draft statute referred to certain clearly designated international conventions, whereas, in the context of the Code, crimes were defined without any reference to the relevant conventions. Those two very different approaches would have to be coordinated at some point.

16. Putting off the problem would merely make it more complicated. The only way to tackle it would have been to prepare a report incorporating both approaches in a single consistent whole. Any hesitations there might have been on that score at one time were no longer justified, as the Commission was now engaged in drafting a statute for an international criminal court and it was thus no longer a mere hypothesis. The basic premise on which the Commission had built the Code, namely, the concept of universal jurisdiction, had evolved and the time had perhaps come to base the Code on the existence of an international criminal court and to reshape the entire edifice. What was involved was not simply a question of legal technique, it was a whole philosophy. Depending on whether the Commission established an

[4] *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

international criminal court having exclusive or concurrent jurisdiction, the approach would be entirely different and would entail very different consequences at the technical level.

17. He therefore formally submitted a specific proposal that the entire set of articles of the draft Code of Crimes against the Peace and Security of Mankind should be referred to the Working Group on a draft statute for an international criminal court and that the Working Group should be instructed to consider the articles of the draft Code on second reading together with the draft statute and to submit an integrated draft for consideration in plenary.

18. Such a method would offer the advantage of consistency and was the only one likely to yield concrete results.

19. Mr. HE said that the ultimate object of drafting a code of crimes against the peace and security of mankind was that it should be brought into effect through an appropriate mechanism. The Code had to be a workable and effective legal instrument to combat attacks on international peace and security. A number of important issues would have to be resolved for that purpose.

20. Thus, the interrelationship between the draft Code, the proposed international criminal court and national courts should be clarified from the outset, since it would have important repercussions on the content and application of the draft Code. If the Code was to be implemented by the proposed international criminal court, it would have to stipulate specific penalties for each crime according to the principle *nulla poena sine lege*. On the other hand, if the Code was to be implemented by national courts or by both national courts and the international criminal court, the provisions on penalties could be left to be decided by national law in the former case or to be dealt with by reference to national law in the latter.

21. Given the seriousness of the crimes included in the draft Code and the basic objective of establishing an international criminal court to deal with serious international criminal acts, it was essential that the crimes listed in the Code should be placed under the jurisdiction *ratione materiae* of the future international criminal court. At the same time, the Code should have effect *erga omnes*, as it would certainly also be implemented by the national courts. Failing that, what would be the point of elaborating such a Code? The Code would thus provide positive rules of law both to the international criminal court and to national courts. As to the relationship between the international criminal court and national courts, it should be borne in mind that the establishment of the international criminal court would probably be based on free acceptance by States and that the statute and function of the court would be in parallel to those of national courts under the existing system of universal jurisdiction. In the circumstances, the provisions of the Code in that regard should retain a certain flexibility so that the Code could be implemented both by the international criminal court and by national courts.

22. As to the scope of the draft Code, it should, in accordance with its title, encompass the most serious crimes against the peace and security of mankind. States were generally reluctant to waive or surrender their criminal jurisdiction and it was only in connection with the most serious international crimes in respect of which the criminal jurisdiction of a single State was practically of no avail that States might be willing to accept the establishment of an international criminal court. For that reason, the draft Code should be closely linked to the proposed international criminal court. Such close linkage required that the elaboration of the two drafts should move forward at more or less the same pace. However, the emphasis thus placed upon the role and function of the international criminal court should not prejudice the jurisdiction of national courts, since both were on an equal footing and their functions were complementary.

23. Mr. ARANGIO-RUIZ said that two general problems were not really covered by any of the articles under consideration. The first involved the relationship between international law and internal law. Article 2 affirmed the primacy of the former over the latter, and that was clearly essential if the Code was to be properly implemented, but it was not adequate. It would be preferable if the convention through which the Code eventually came into force imposed on all participating States the obligation to incorporate the Code in their respective legal systems. States would be free to do that by simple *renvoi* to the convention or by enactment of internal legislation; but they all should be unambiguously bound to graft the entire contents of the Code into their respective systems of criminal law and criminal procedure. In particular, it should be made clear in the convention that any participating State whose legal system was not brought into line as soon as the convention came into force would be in breach of the convention *vis-à-vis* all other participating States. In that way, the primacy of the provisions of the Code over internal law would be automatically ensured in respect of all participating States. Article 2 could then perhaps be shortened. The Special Rapporteur and the Drafting Committee would undoubtedly find the necessary drafting solutions, the essential point being that the necessary provisions should be inserted in the draft at the present stage without waiting for an eventual diplomatic conference.

24. His second point related to the settlement of disputes. Since the likelihood of disputes between participating States over the implementation of the convention embodying the Code was considerable, a suitable arbitration clause should be included specifying the settlement procedure or procedures to which States should have recourse in the event of failure to settle by negotiation a dispute over the compliance by any State with its obligations under the convention. The Commission should not pass on the problem to the international criminal court which might be set up for the purpose of implementing the Code. One thing would be the competence of an international criminal court to implement the Code *vis-à-vis* individuals. Another would be the settlement of disputes between States parties over the fulfilment of their obligations relating to the implementation of the Code.

25. Mr. BENNOUNA said that he wondered whether, in addition to the problem of the relationship between the Code and internal law, there was not a problem of

the relationship between the Code, on the one hand, and international conventions, especially the Charter of the United Nations, on the other.

26. Mr. VILLAGRÁN KRAMER congratulated the Special Rapporteur on his report, which explained concepts such as the link between the Code and the international criminal court. It was now clear that the Code was to be an instrument which the court would apply.

27. In his view, the present title of the topic restricted the range of international crimes as they were defined now and might be in future and which were not necessarily crimes against the peace and security of mankind. He therefore proposed a simpler and more general title: "Code of international crimes". That wording would have the advantage of indicating from the start that an international or national court would have to refer to the Code—the product of a regulatory exercise *de lege lata* and *de lege ferenda*—as well as to the international treaties in force in order to be able to characterize a crime as an international crime.

28. He entirely agreed with the choice of jurisdiction *in personam* for the Code. It was to be applicable to individuals only and there was to be no question of the criminal responsibility or "criminalization" of States.

29. With regard to legal guarantees, he suggested that the Special Rapporteur might consider leaving a State the choice between handing the presumed perpetrator of the crime over to the international criminal court or to another State with which it had concluded an extradition treaty. Since the rule exempting international crimes from statutory limitations was too rigid, he also proposed that the question of statutory limitations should, if possible, be governed by the law of the country in which the crime had been committed. With regard to the *non bis in idem* (*res judicata*) rule, he noted that the common law concept of double jeopardy, or protection against being tried twice for the same offence, did not have the same scope as that offered by the concept of *res judicata* in some Latin American legal systems, where *res judicata* was fully applicable when the individual concerned had already been found guilty, but not absolute when he had been acquitted.

30. He thought that, if it had time, the Drafting Committee might begin the consideration of the articles of the draft Code at the current session. In any event, the Commission should first conclude the work on the international criminal court before going on to the draft Code.

31. Mr. CALERO RODRIGUES said he fully agreed with the members of the Commission who thought that the title of the draft under consideration might not be an exact reflection of the content of the future instrument. In the 1950s, under the influence of the Nürnberg Judgment, there had been talk of political crimes or, in other words, crimes connected with the activity of the State. Specifically, the Commission had worked on the basis of a very useful three-way split: crimes against peace, war crimes and crimes against humanity. The trichotomy could, however, not be reproduced without change in the title of the Code. The best course might perhaps be to wait and see what crimes would be included in the Code before deciding whether or not the title should be retained.

32. When adopting the draft Code on first reading, the Commission had been aware of its preliminary nature, a fact which the Special Rapporteur seemed not to have taken into account. His report took a somewhat "bureaucratic" approach, leaving aside general problems which were precisely those the Commission was in process of discussing. It would have been far more useful to focus not on part one of the draft, but on part two relating to the definition of crimes, thus contributing to the work of the Working Group on a draft statute for an international criminal court. Moreover, the draft had not been really updated, as shown by the case of article 6, concerning which it was stated that it would have to be reviewed if an international criminal court were established, but for which no revised text was suggested, although the court was in the process of being set up.

33. As several members of the Commission had pointed out, the work of the Drafting Committee on the draft Code of Crimes against the Peace and Security of Mankind and the work of the Working Group on a draft statute for an international criminal court must be much more closely coordinated. Many articles in the statute could be incorporated in the Code in full and vice versa. As it was not known whether the Code would be applied solely by the international criminal court or by national courts as well and since the statute as it stood would not apply only to the Code, some parallel provisions would inevitably be included in both instruments. Such provisions must therefore be absolutely identical in both cases. As to the best way of ensuring such coordination in practice, perhaps all that was needed for the time being was a recommendation to the effect that, when the Working Group on a draft statute for an international criminal court came to examine the provisions which corresponded to those in the draft Code, it should take the latter into consideration without prejudice to any action that might be taken at the Commission's next session.

34. Mr. THIAM (Special Rapporteur) said he would point out that his proposed new wording for article 6 bore no relation to the earlier wording, the difference being, precisely, that the existence of an international criminal court was taken into account. The old wording relied on a system of universal jurisdiction, whereas the new wording restated article 10 of the statute of 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] So far as the relationship between the Code and the statute for the international criminal court was concerned, all the provisions relating to judicial guarantees under the statute were taken from the Code, which had the benefit of antecedence. It was now for the Commission to decide what action should be taken in respect of both texts.

35. Mr. MIKULKA said he wondered whether the comments and observations of Governments on the draft Code as adopted on first reading,[6] given their relatively small number, were really representative of the whole

[5] Document S/25704, annex.

[6] *Yearbook... 1993*, vol. II (Part One), document A/CN.4/448 and Add.1.

range of Government views and, in particular, whether they reflected the prevailing trend of opinion on the problem at issue. At all events, since the adoption on first reading of the draft Code, the Commission had made exceptional progress on the draft statute for an international criminal court, so that fresh light was thrown on many problems concerning the Code. The two issues were autonomous, but they were also, undeniably, interlinked; that meant the Commission must improve the coordination of its action in both cases, but without going so far as to arrange for their joint consideration, since the composition of the Working Group and of the Drafting Committee would perhaps make it possible to dispense with such a rigid structure. The Special Rapporteur's twelfth report dealt with part one of the draft, but the main problems arose with respect to part two. The Special Rapporteur's intention to limit the number of crimes solely to those offences whose character as a crime against the peace and security of mankind was difficult to challenge should therefore be welcomed. There was no procedural obstacle to the examination of part one on second reading, provided that two questions remained open until the Commission considered part two on second reading: the questions of the non-applicability of statutory limitations (art. 7) and of definition (art. 1). The latter was linked to the question of the title, on which subject he endorsed, in particular, the comments made by Mr. Tomuschat (2344th meeting), Mr. Pellet and Mr. Calero Rodrigues.

36. Mr. CRAWFORD said that he agreed with Mr. Pellet's three points, namely, that the title of the draft was rather unfortunate; that the Commission should ensure that the provisions of the Code of Crimes against the Peace and Security of Mankind and of the statute of the international criminal court were consistent; and that the list of crimes should be limited to those of the gravest magnitude. With respect to the first point, in his view, the word "code" was not the one that posed the least problems in the title. In principle, that word should be followed by a generic expression to which, precisely, the Code was supposed to give content. Since there could not be a code of some crimes, the Commission would perhaps have to retain the existing expression, if it could not find something better.

37. As to the relationship between the international criminal court and the Code, it was, of course, essential that the Commission should adopt exactly the same wording in both instruments for the provisions on the indispensable judicial guarantees in order to ensure minimum standards of protection of the individual. The Code enjoyed a certain degree of priority in that connection and the Working Group on a draft statute for an international criminal court had endeavoured to follow the relevant provisions of the Code as closely as possible. The fact that there were articles common to both instruments, however, simply meant that there were minimum standards to be maintained in both cases, but not that there were necessarily other kinds of links. It was, of course, anticipated that the Code would provide one of the bases for the jurisdiction *ratione materiae* of the court, but the Commission had always maintained the principle that the court should not be linked exclusively to the Code. It was States that would ratify and implement both instruments, which meant that the Commission must draft instruments that were acceptable to them and must provide for the case, which, regrettably, was possible, of many States not ratifying the Code.

38. Moreover, there was a large number of crimes of genuine international concern which were contained in treaties that provided for their own apparatus, but which would not have a place in the Code. The purpose of the statute for an international criminal court was to establish a new mechanism that would assist in the implementation of some of those treaties at the international level. In the case of the Code, too, the Commission's endeavour was one of creation, not just of consolidation or codification, in that it was establishing new definitions of crimes where there had been only international customary law, the most important example being crimes against humanity. The two undertakings were distinct in that the statute created a new mechanism to assist in the implementation of existing provisions, whereas the Code created new provisions. Without actually creating any new structure to ensure concordance between the articles common to the Code and the statute, the Commission might wish to call on the Working Group at the current session to ensure that the articles it drafted reflected fully any changes proposed to the draft Code and that any variations from the Code should be fully debated, clearly understood and taken into account by the Drafting Committee when it came to drafting the articles of the Code.

39. Mr. ROSENSTOCK said that he found it somewhat difficult to comment on part one, the general part of the draft, without having a sense of the crimes that would actually be included in the Code of Crimes against the Peace and Security of Mankind. The Special Rapporteur intended to introduce substantive changes in part two, which should, in his own view, contain a narrower, or more contemporary, list than the one suggested by Mr. Pellet. He also found it difficult to comment on the question of the title, since it too depended on the crimes that would be included in the Code. It would therefore be advisable to await the consideration of part two before asking the Drafting Committee to begin work on the articles in part one. As to the relationship between the work on the Code and the work on the statute for an international criminal court, he endorsed Mr. Crawford's position and in particular his rejection of the joint consideration of the two questions by the Working Group.

40. Mr. Sreenivasa RAO expressed his thanks to the Special Rapporteur for leading the Commission to the consideration on second reading of an important, difficult and controversial subject, which had been the subject of many vicissitudes.

41. The elaboration of the draft Code was not the drafting of just any legal instrument: the Code was seen essentially as a symbol—a symbol of the aspirations of a large majority of the international community to prosecute, with a view to deter certain offences which were committed wantonly, wilfully and arbitrarily and which it regarded as crimes.

42. It had to be recognized that the Code could not be as comprehensive as the Commission would have liked; but, at all events, it should be framed around certain

common denominators and should be based on a consensus.

43. With regard to the crimes to be included in the draft Code, he noted that the Commission was not in the process of codifying customary international law and in that case he was willing to accept a limited number of generally and widely recognized crimes. Article 1 of the draft Code should therefore be re-examined from that point of view to emphasize that crimes not included in the Code were not rejected as such under international law. As to motives, the principle was that they would not be taken into account during prosecution. Motives were linked, indirectly or directly, to defences. But what was the position with respect to self-defence in the case of aggression? In his view, the deliberate use of certain weapons regarded as causing widespread and long-term harm should be considered as a crime against humanity which would not benefit from extenuating circumstances.

44. The establishment of an international criminal court and the drafting of the Code of Crimes against the Peace and Security of Mankind were closely linked and, if the work in that connection was to be successful, it should legitimately, logically and morally proceed in step, on a consensual basis. The future international criminal court should not be brought into being at the expense of national courts: the main thing was that justice should be done, that the accused should be tried and that the guilty party should be punished.

45. Mr. KABATSI thanked the Special Rapporteur for his wisely structured report, which would facilitate and ensure progress in the debate in the Commission. The Special Rapporteur's choice to focus at the current session on part one of the draft Code of Crimes against the Peace and Security of Mankind, namely, on the part dealing with definition, characterization and general principles, before discussing the list of crimes, was a useful one. It would not, however, be possible for the Commission to conclude its consideration of certain articles in the draft Code which also had a bearing on jurisdiction before it had taken a decision on the corresponding articles of the draft statute for an international criminal court. Generally speaking, the articles that related both to the draft Code and the draft statute were those dealing with procedural matters, especially those dealing with due process and fair trial. It would be desirable for those articles to be dealt with in such a way that there would be no conflict between the Code and the statute and no serious practical problem would arise. The Working Group on a draft statute for an international criminal court, of which the Special Rapporteur was a member, would no doubt make sure that was so. Many articles in the draft Code were, however, independent of the provisions of the draft statute and could be considered without delay.

46. In general, the Special Rapporteur had dealt carefully with the issue of general acceptance by States of the draft Code and had made useful proposals. It was also very wise, in his view, to limit the list of crimes to those whose characterization as a crime against the peace and security of mankind was hard to challenge.

47. The Code was intended to focus exclusively on crimes committed by individuals and thus did not provide for the direct or implied criminality of States. Vicarious civil liability for criminal acts committed by individuals acting directly or indirectly on behalf of the State could be envisaged, but that was in any case unnecessary because the concept came under a separate legal regime that would be better dealt with separately.

48. He welcomed the emphasis in the draft Code on the role of State agents because they, more than anyone else, were likely to be the perpetrators of crimes against the peace and security of mankind. State officials were not to be allowed to hide behind the façade of an excuse, whether orders from superiors or their official position. The Special Rapporteur's proposals were therefore very useful and should be maintained.

49. Lastly, he endorsed the principles relating to due process and guarantees of a fair trial. A stable world involved not only the punishment and suppression of crimes against the peace and security of mankind, but also the provision of legal guarantees to the accused.

50. Mr. PAMBOU-TCHIVOUNDA said that he was not sure whether the draft Code of Crimes against the Peace and Security of Mankind could actually be adopted on second reading by the end of the current session. He feared that it would, rather, give rise to an endless and wide-ranging debate. He himself had a number of comments to make on the twelfth report of the Special Rapporteur.

51. First, the Special Rapporteur announced that chapter II was intended to give a broad picture of the relevant general principles, but it actually dealt more with general issues, from the definition of a crime, through defences, to extenuating circumstances. It was surprising that no mention was made of penalties, since the crimes did have to be punished. It might therefore be useful to supplement that chapter and complete the picture.

52. Secondly, he was uncomfortable not with the Commission's approach to the topic, but with its working methods. The very title of the report could be misleading, since it referred to a draft Code. However, the word "code" did not cover the whole set of general rules to be taken into consideration. He would have preferred the report to provide information at the outset on the crimes to be covered so that the Commission might have a clear idea of what those crimes were.

53. Thirdly, he stressed that there was what could be called almost an organic link between the draft Code and the draft statute for an international criminal court. He had already drawn the Commission's attention to that point during the consideration of the draft statute in plenary and he even wondered whether the comments on the twelfth report concerning the draft Code were not ultimately intended for the Working Group responsible for drafting the statute. He therefore endorsed the appeals by other speakers that coordination should be ensured between the work on the draft Code and the work on the draft statute in view of the close interrelationship between the two topics.

54. He had some reservations about the cluster of provisions which in his view, lay at the heart of the matter, namely, draft articles 11 to 13. He greatly feared that they showed both how much and how little progress had been achieved. After all, how could one determine the responsibility of a president or of a minister? More attention should be given to that matter.

55. He also noted with concern that the Special Rapporteur had elected to tie himself down by stating in the introduction to his twelfth report that he would limit the list of crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge. There were two obstacles to the achievement of that objective. The first was the draft statute, which might force the Special Rapporteur not to limit, but to lengthen the list, although that would not change the constraints inherent in the definition of crimes. The second obstacle derived from the nature of the victim, namely, mankind as a whole, which might also appeal to the Special Rapporteur to lengthen the list. Mankind was referred to in nearly all legal texts nowadays. Perhaps some consideration should be given to the impact on any list of crimes of the inclusion of mankind in the law; in other words, it might be asked whether a list of crimes, even a limited one, should be closed off to any change.

56. Mr. YANKOV thanked the Special Rapporteur for his succinct report, which had nevertheless led to a somewhat unusual debate in the Commission. The Special Rapporteur had tried to find a common denominator for a great many questions in order to facilitate consensus and rightly so, for an instrument of such great importance as the draft Code of Crimes against the Peace and Security of Mankind could attain its objective only if it was accepted by the majority of States. The draft articles themselves should, in his view, be considered in the light of the results achieved in the Working Group on a draft statute for an international criminal court.

57. He did not believe that the Commission could change the title of the draft. It was, after all, used in General Assembly resolution 177 (II) of 21 November 1947, in which the Assembly had given the Commission its mandate and had asked it to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal.[7] He was proposing that argument not because he was old-fashioned, but simply to warn the Commission against any attempt to change a title which had been established many years previously and gave a number of indications about the type of crimes to be covered. The word "code" was used in many areas, including technical fields, because a code was more specific than a convention. He did not see how the use of that term could impair the Commission's work and, consequently, he was in favour of retaining it for the time being for reasons of both form and substance.

58. However, he agreed that some concepts should be reviewed and he therefore endorsed the Special Rapporteur's idea of limiting the list of crimes to be included in the draft Code to the most serious ones—the "crimes of crimes", as Mr. Pellet had called them.

59. There was no question that the coordination of the work of the bodies responsible for the draft Code and for the draft statute was indispensable and that was not a novel idea, since such coordination had already been established at the forty-fifth session. On matters relating both to the draft Code and to the draft statute, the Working Group on a draft statute for an international criminal court had requested the views of both the Special Rapporteurs concerned. The question now was how to strengthen that coordination. Like other members of the Commission, he believed that the Code should form part of international criminal law so that all States parties could incorporate it in one way or another into their internal law. It might be worthwhile to look into that matter.

60. As far as the settlement of disputes was concerned, he shared the view of Mr. Arangio-Ruiz that a substantive provision should be included in the draft to provide expressly for dispute settlement machinery. He suggested that the Special Rapporteur should submit proposals on that subject in his next report.

61. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on the concision and clarity of his twelfth report. The Commission would have been able to complete its work on the draft if it had not been obliged, after the adoption of the draft on first reading and at the request of the General Assembly, to give priority to the draft statute for an international criminal court, for much of international public opinion seemed to be in favour of the establishment of such a court and the rapid adoption of such a statute.

62. The general debate on the twelfth report clearly showed that the draft Code continued to give rise to significant problems, particularly part two concerning the crimes themselves. One of the problems related to the title of the draft. He would have no objection if it was changed, as long as that was done at the end of the current exercise, after the Commission had completed its consideration of the crimes to be covered by the Code. In any event, the draft Code should not be given an extremely general title, such as "draft code of international crimes", because that might create confusion with article 19 of part one of the draft articles on State responsibility.[8] There was no doubt that there was a link between the draft Code and the statute for an international criminal court. In fact, the draft statute should contain the definitions included in the draft Code, which predated it, but, in view of the mandate entrusted to it by the General Assembly and the status of its work, the Commission would not be well advised to consider the draft Code and the draft statute together. However, if the draft statute was adopted on first reading and approved by the General Assembly, the Commission should take it into account during its consideration of the draft Code on second reading and, where appropriate, include the terminology used in the draft statute in the draft Code.

[7] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127). Text reproduced in *Yearbook... 1985*, vol. II (Part Two), para. 45.

[8] See footnote 4 above.

63. He endorsed the idea of limiting the list of crimes covered in the draft Code to particularly serious crimes, including aggression, genocide and crimes against humanity, and he looked forward with interest to the proposals that the Special Rapporteur might make on that subject in his next report.

The meeting rose at 1 p.m

2346th MEETING

Wednesday, 1 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited members of the Commission to consider the articles of the draft Code of Crimes against the Peace and Security of Mankind.

ARTICLES 1 TO 4

2. Mr. FOMBA said that article 1 involved a choice between an enumerative approach and a general approach to the definition. As noted in paragraph 11 of the Special Rapporteur's twelfth report (A/CN.4/460), the solution adopted in many criminal codes was to have no general definition of the concept of crime; that, however, would not be justified in the case of the draft Code of Crimes against the Peace and Security of Mankind. He therefore supported the compromise proposal put forward by Bulgaria, subject to improvements in the wording. So far as deletion of the expression "under international law" was concerned, the question was whether the expression "crime under international law" and the expression "crime under national law" reflected two different legal realities. If so, retention of the expression "under international law" would be justified. A distinction should, however, be made between the various cases, depending on whether the same facts were treated as crimes under international law and under national law. In that connection, he would refer members to principle II of the Principles of International Law recognized in the Charter of the Tribunal and in the Judgment of the Tribunal,[4] as well as to article I (*b*) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which stipulated that crimes against humanity, eviction by armed attack or occupation, inhuman acts resulting from the policy of apartheid and the crime of genocide were not subject to any statutory limitation even if such acts did not constitute a violation of the domestic law of the country in which they were committed. The new French Penal Code, which also dealt with crimes against humanity, laid down a definition that covered not only genocide but a series of other crimes, thus providing an example of a case in which a national criminal code treated as criminal the same category of acts as did international law.

3. The discussion on the relationship between international law and national law could be implicitly perceived from the standpoint of the classical debate on monism and dualism. "Crimes under international law" was a hallowed term. It appeared in principle VI of the Nürnberg Principles. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity stated in the fourth preambular paragraph that war crimes and crimes against humanity were "among the gravest crimes in international law". The Convention on the Prevention and Punishment of the Crime of Genocide spoke of "a crime under international law" and the International Convention on the Suppression and Punishment of the Crime of Apartheid spoke, in the preamble and in article 1 (1), of a "crime under international law" and of "crimes violating the principles of international law". Again, Security Council resolution 918 (1994) of 17 May 1994, concerning Rwanda, referred in the preamble to a "crime punishable under international law".

4. He agreed with the Special Rapporteur—who stated in his report that he had no objection to deletion of the words "under international law"—that the debate was purely theoretical and that once the code becomes an international instrument, the crimes defined therein would automatically come under international criminal law derived from treaties. On the whole, however, and having regard to the fact that the Special Rapporteur intended to cover only the most serious crimes—the "crimes of crimes"—and that the title of the draft should be amplified by including the humanitarian dimension, the two approaches—the general and the enumerative—were both conceivable, in his view.

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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... 1994*, vol. II (Part One).

[3] Ibid.

[4] Hereinafter referred to as the "Nürnberg Principles". *Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook... 1985*, vol. II (Part Two), para. 45.