Document:-

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Summary record of the 2254th meeting

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

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2254th MEETING

Tuesday, 5 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

1. The CHAIRMAN recalled that, at the forty-third session, the Commission had concluded its consideration of the draft Code on first reading and had requested Governments to submit their comments and observations on it by 1 January 1993. It would therefore be unable to begin the second reading until the 1993 session. The inclusion of the item on the agenda of the present session responded, however, to the request contained in paragraph 3 of General Assembly resolution 46/54 of 9 December 1991. The report (A/CN.4/442) which was before the Commission dealt with the issue referred to in the resolution, namely, the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court.

2. Mr. THIAM (Special Rapporteur) said that he had intended to submit a draft statute for an international criminal court to the Commission, but had been dissuaded from doing so by General Assembly resolution 46/54. He had, therefore, endeavoured to consider further the idea of an international criminal court by referring in his tenth report to certain issues already discussed at preceding sessions and by tackling some new ones. Part one of the report was devoted to the consideration of certain objections to the possible establishment of an international criminal court. In that connection, he referred to an article by Mr. Bennouna which had appeared in the *Annuaire français de droit international*[3] in which the latter had mentioned some of the problems that might give rise to doubts about the advisability of establishing such a court: the Commission was not, however, called upon to judge the validity of any decision to be taken in that respect, since that was not the mandate it had received from the General Assembly. The champions and opponents of the establishment of an international criminal court continued to cross swords without convincing one another; the arguments on both sides were known and therefore he had summarized them only briefly in the report. Part two dealt with six more specific issues, which were presented in the form of possible draft provisions, but not draft articles which the Commission would have to refer to the Drafting Committee; that explained the rather unusual style in which the provisions were drafted. Furthermore, he had decided not to draw up an inventory of all the problems arising in connection with the issue, but had simply drawn attention to the most important ones, on whose solution the establishment of the court would depend.

3. Two alternative possible draft provisions were proposed in connection with the first issue, that of the law to be applied, which read:

ALTERNATIVE A

The Court shall apply international criminal law and, where appropriate, national law.

ALTERNATIVE B

The Court shall apply:

(*a*) International conventions, whether general or particular, relating to the prosecution and prevention of crimes under international law;

(*b*) International custom, as evidence of a practice accepted as law;

(*c*) The general principles of criminal law recognized by the United Nations;

(*d*) Judicial decisions and teachings of highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;

(*e*) Internal law, where appropriate.

Alternative A was generic, while alternative B was analytical. Alternative B was to be found in all earlier drafts on the question, except for the draft which had been prepared by the 1953 United Nations Committee on International Criminal Jurisdiction,[4] on which alternative A was based.

4. The second issue was that of the jurisdiction of the court *ratione materiae*, which had already been discussed at length at the preceding session by those in favour of exclusive jurisdiction and those in favour of concurrent jurisdiction with national courts.[5] The possible draft provision read:

1. All States Parties to this Statute shall recognize the exclusive and compulsory jurisdiction of the Court in respect of the following crimes:

Genocide;

Systematic or mass violations of human rights;

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

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

[3] "La création d'une juridiction pénale internationale et la souveraineté des Etats", *Annuaire français de droit international* (Paris), vol. XXXVI, 1990, pp. 3 *et seq.*

[4] 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.

[5] For summary of discussion, see *Yearbook... 1991*, vol. II (Part Two), paras. 106 *et seq.*

Apartheid;

Illicit international trafficking in drugs;

Seizure of aircraft and kidnapping of diplomats or internationally protected persons.

2. The Court may take cognizance of crimes other than those listed above only if jurisdiction has been conferred on it by the State(s) in whose territory the crime is alleged to have been committed and by the State which has been the victim or whose nationals have been the victims.

3. The Court shall not be competent to hear appeals against decisions rendered by national jurisdictions.

On that problem, to which he did not dare hope to have found a fully satisfactory solution, the idea underlying the draft provision was one expressed at the last session, namely, that certain crimes, such as genocide, were of such a nature that they could not but come within the exclusive jurisdiction of the court. Paragraph 1 thus listed a number of such crimes and it would be for the Commission to decide whether to add to or delete from the list. In respect of other crimes, the court would have jurisdiction only by conferment. As to the question of which States would be empowered to confer jurisdiction on the court, it would be as difficult to expand their number indefinitely as to dispense with the conferment-of-jurisdiction rule. The explanation for paragraph 3 was that the question of the competence of the court to hear appeals had been discussed at length at the Commission's preceding session[6] and then in the Sixth Committee of the General Assembly. The text, which was drafted in negative terms, was probably unsatisfactory, but it would provide an opportunity for the members of the Commission to make their views known on that aspect of the question.

5. He had not perhaps addressed the third issue, that of complaints before the court, as clearly as he should have done at the preceding session when he had referred to the public right of action[7] and several members of the Commission had rightly made the point that States could not exercise an international public right of action. Only the Security Council or a prosecutor's office could do so.

6. The possible draft provision he was proposing on complaints before the court read:

1. Only States and international organizations shall have the right to bring complaints before the Court.

2. It shall be immaterial whether the person against whom a complaint is directed acted as a private individual or in an official capacity.

The real question was who could bring a complaint before the court. The answer was naturally that cases would be brought before the court by States and, in addition, by international organizations. It mattered little whether the complaint related to an individual having acted in a personal capacity or one vested with some official power. He would nevertheless like the members of the Commission to tell him whether they thought that certain juridical persons under municipal law, such as anti-racist or human rights associations, whose goals were universal, might not also bring complaints before the court. In that connection, he explained that he had deliberately avoided using the word *saisine* (referral), which was a civil law term, in the draft provision.

7. As to the fourth issue, on proceedings relating to compensation, he was proposing a possible draft provision which read:

1. Any State or international organization may bring proceedings to obtain compensation for injury sustained as a consequence of a crime referred to the Court.

2. A State may also bring such proceedings on behalf of its nationals.

It might be asked whether, in addition to States and international organizations, associations of the type to which he had just referred might not also institute proceedings before the court to obtain compensation for moral injury, and what the relationship between the court and ICJ would be in such a case. A State victim of a crime might bring a complaint before the court and, when the case was considered, institute a civil action before the same body. But it might also institute proceedings to obtain reparation before ICJ under Article 36, paragraph 2, of the Court's Statute. In that case, would ICJ have to wait until the international criminal court had ruled on the criminal nature of the act or could it ignore its existence?

8. As to the fifth issue, on handing over the subject of criminal proceedings, he was proposing two alternative possible draft provisions which read:

ALTERNATIVE A

The handing over of an alleged perpetrator of a crime to the prosecuting authority of the Court is not an extradition. The International Criminal Court is deemed for the purpose of this Statute a Court common to all the States Parties to the Statute, and justice administered by this Court shall not be considered as justice emanating from a foreign court.

ALTERNATIVE B

Every State Party to this Statute shall be required to hand over to the prosecuting authority of the Court, at the request of the Court, any alleged perpetrator of a crime coming within its jurisdiction.

The words "handing over the subject" in the title had been used advisedly because it did not seem possible to speak of extradition in such cases. If States agreed to establish an international criminal court, it would be inconceivable that the court could obtain the handing over of an accused person only through extradition.

9. Concerning the sixth and last issue, on the double-hearing principle, he recalled that some members of the Commission, but not many, had been in favour of giving the court appeal jurisdiction, an approach vigorously opposed by others, who had taken the view that allowing the court to review rulings of national courts would undermine the sovereignty of States.[8] After due consideration, he had tried to propose an intermediate solution, which read:

1. The Court shall be both a court of first instance and a court of final appeal in respect of criminal cases within its jurisdiction.

[6] Ibid., paras. 116 *et seq.*

[7] See *Yearbook... 1991*, vol. II (Part One), document A/CN.4/435/Add.1 and vol. II (Part Two), paras. 146 *et seq.*

[8] See footnote 6 above.

2. Nevertheless, in order to guarantee the double-hearing principle, a special chamber of judges, excluding those who were involved in making a ruling, may consider an appeal against that ruling.

For some members of the Commission, the right of appeal of the person found guilty was a basic human right. Perhaps those who supported that line of reasoning could agree to paragraph 2 of his text.

10. He hoped that his work, however imperfect, would serve as a basis for discussion. He had not wanted to revert to the problem of the method of establishing the court, for that was a matter for political rather than judicial bodies. He personally did not think that it was enough for the General Assembly to adopt a resolution establishing such a court: a convention to which States would accede was also necessary.

11. The CHAIRMAN thanked the Special Rapporteur for the introduction to his report.

12. Mr. CALERO RODRIGUES, on a procedural point, noted that the report of the Special Rapporteur consisted of two parts, the first dealing with objections to the possible establishment of the court and the second with more specific problems, such as the jurisdiction of the court or the organization of its proceedings. If each speaker intended to discuss all those questions in the same statement, a protracted discussion might well ensue at a very general level, whereas it was probably time to be more specific. He therefore proposed starting with a general discussion on part one, followed by a discussion on part two, during which members could state their views on each of the problems raised by the Special Rapporteur. The Commission would not be short of time at the current session and it would be easier for each of the members, in particular the new ones, to speak briefly on each question and then receive replies. Used flexibly, that method would be conducive to fruitful discussions.

13. The CHAIRMAN said that he would like to know what the members of the Commission thought of that proposal.

14. Mr. ROSENSTOCK said that he supported the proposal, but was in favour of going into some of the problems discussed in the Commission's report on the work of its forty-second session[9] in greater depth once the specific questions had been considered.

15. Mr. YANKOV said that he also supported the proposal by Mr. Calero Rodrigues, but wondered when and how the Special Rapporteur would reply to the speakers: after the consideration of each question or at the end of the discussion? As Chairman of the Drafting Committee, he stressed that the method chosen might also have an impact on the work of that body.

16. Mr. ARANGIO-RUIZ said that the Commission should either decide to adopt simultaneously and in a single instrument a draft Code of Crimes against the Peace and Security of Mankind and the statute of an international criminal court or abandon the idea of a draft Code because such a Code would then be largely inoperative.

17. An international criminal court would not undermine the sovereignty of States any more than the system of universal jurisdiction, which, in practice, subjected the nationals of a State to the jurisdiction of another State without an acceptable guarantee of a fair trial. The Commission and its parent body, the General Assembly, had been playing hide-and-seek for several years. The General Assembly had never given the Commission any clear answers when the latter had asked whether it should deal with the specific problem of the establishment of an international criminal court and had, instead, always invited the Commission to consider the issue further. As a result, the Commission had never regarded it as part of its mandate to consider the problem as thoroughly as it might have done and the Special Rapporteur had, for fear of displeasing the Sixth Committee or the General Assembly, restricted himself to making a few comments on the subject rather than undertaking a real study. Yet it was for the Commission, composed as it was of legal experts, to decide whether the Code was feasible without an international criminal court. If it took the view that the Code was feasible only in conjunction with an international criminal court, it should say so to the General Assembly and work on the statute of that court. If it did not regard the establishment of an international criminal court as feasible, it should acknowledge that the Code was utopian. If the Commission did not take that decision, which was incumbent upon it, the same problem would arise year after year and the same question would be put to the General Assembly.

18. Mr. RAZAFINDRALAMBO said that he supported Mr. Calero Rodrigues' proposal, which was in keeping with the practice regularly followed in the Commission and the Sixth Committee and which would allow the new members of the Commission to take the floor as they saw fit on either part of the report. However, that should not prevent members who so wished from speaking on both parts of the report at the same time, perhaps at the end of the discussion.

19. Mr. PELLET said that he also supported Mr. Calero Rodrigues' proposal, but was concerned that too much flexibility might make it a dead letter.

20. With regard to the comments by Mr. Arangio-Ruiz, the issue raised in part one of the report was of fundamental importance and he did not share Mr. Thiam's point of view that the Commission was not mandated to discuss the question of the desirability of establishing a court. General Assembly resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991 had requested the Commission to study proposals for the establishment of a court and it was for the Commission to say whether such a court was feasible or not, from the legal point of view at any rate.

21. Mr. GÜNEY said that he also supported Mr. Calero Rodrigues' proposal.

22. Mr. ARANGIO-RUIZ said that the first part of Mr. Thiam's report dealt with proposals for the establishment of an international criminal court, but, in his view, the question of the link between the court and the Code must be considered before any other questions to which the establishment of an international criminal court might give rise. The Commission had produced ex-

[9] *Yearbook... 1990*, vol. II (Part Two), paras. 116 *et seq.*

cellent work at its preceding session, but it had chosen to request guidance from the General Assembly again on the question of establishing a court. In his view, that was inappropriate: the Commission must provide the General Assembly with the Code it had requested, along with a statute of the court, because the two matters were inseparable.

23. The CHAIRMAN recalled that, for the moment, only questions of method, and not of substance, were under discussion.

24. Mr. VERESHCHETIN said that he supported Mr. Calero Rodrigues' proposal. He asked whether the jurisdiction of the international criminal court would be based on the Code or whether it would have a broader foundation; the report was unclear on that point. The answer to that question of principle would be vital on several accounts and would have a bearing on the very establishment of the court.

25. Mr. THIAM (Special Rapporteur) said that he had raised that question several times, particularly in his first report,[10] but the Commission had never given him a truly satisfactory reply. If he had been asked to present the statute of a court with jurisdiction for all international crimes, he would have done so. Clearly, if the court was to hear only crimes provided for in the Code, its jurisdiction would be much more limited; but the question had not been settled.

26. The CHAIRMAN said that that would be one of the main problems to be dealt with in the general debate and that the question was also related to the interpretation of the relevant General Assembly resolutions.

27. Mr. MIKULKA said that he welcomed the proposal by Mr. Calero Rodrigues, which would give the new members of the Commission the opportunity to express their general views on the topic and help ensure the smoother organization of the discussion of the questions covered in part two of the report. As Mr. Rosenstock had said, however, the Commission should also be in a position to examine those issues enumerated in the Commission's 1990 report which had been left unresolved and of which the Special Rapporteur could usefully draw up a list, indicating the order in which they could be taken up.

28. Mr. IDRIS said that he found Mr. Calero Rodrigues' proposal interesting, but hoped that the way in which the discussion was to be divided up would also enable the Commission to review the topic comprehensively, without, however, engaging in a lengthy Sixth Committee-style political debate. He also hoped that the general debate and the subsequent point-by-point consideration of the issues dealt with in part two of the report would not prejudice the prospects of the possible draft provisions being prepared by the Special Rapporteur.

29. Mr. KABATSI said that the Commission's duty was not to put questions to the General Assembly, but to make specific proposals which the General Assembly could accept, reject or amend. He wondered whether it was really necessary to consider the possibility of establishing an international criminal court. Could the jurisdiction of ICJ not be expanded in such a way as to entrust it with the implementation of the Code?

30. Mr. PELLET said he feared that, if the Commission accepted Mr. Rosenstock's proposal, as amended by Mr. Mikulka, it would be setting out on an interminable marathon. The fact was that the Commission could not definitively settle the problem of the statute of the possible international criminal court at the current session. However, the general debate and the discussion on the various issues set out in the report should make it possible to clarify ideas and, on that basis, to make some headway.

31. Mr. THIAM (Special Rapporteur) said that he agreed with the proposal by Mr. Calero Rodrigues.

32. With regard to substance, he recalled that, as early as 1950, the Commission had indicated that it considered the establishment of an international criminal court possible and desirable[11] and it had not changed its mind since then. As Special Rapporteur, he felt bound by that view, unless the Commission decided to call it into question.

33. Replying to the comment by Mr. Rosenstock, he said that, of the large number of issues raised in the Commission's 1990 report, he had focused on those ideas which seemed crucial for the establishment of an international criminal court, with perhaps one exception, namely, the expansion of the jurisdiction of ICJ. In that connection, he recalled that the Commission had not recommended the establishment of a criminal chamber, since it would require the amendment of the Statute of ICJ and hence of the Charter of the United Nations.[12]

34. As Special Rapporteur, he was entirely in the hands of the Commission and he expected it to provide specific guidelines, without which the discussions would make no progress. He dared hope, though he in no way overlooked the problems, that a consensus of ideas and a will would emerge. In due course, at the conclusion of the discussion at the current session, he would propose that the Commission should set up a working group on the topic under consideration, even though there was a danger that a working group would merely reflect the Commission's divergent views.

35. In the meantime, he proposed that the Commission should consider his tenth report according to the method suggested by Mr. Calero Rodrigues.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to split the consideration of the report into two parts, as suggested by Mr. Calero Rodrigues, with a general debate on part one and then a specific discussion on each of the questions covered in part two, on the understanding that that approach would be applied with the necessary flexibility.

It was so agreed.

[10] *Yearbook... 1983*, vol. II (Part One), p. 137, document A/CN.4/364.

[11] *Yearbook... 1950*, vol. II, p. 379, para. 140.

[12] Ibid., para. 145.

37. Mr. BENNOUNA, taking note with interest of the report submitted by the Special Rapporteur, said that he wished to raise a number of preliminary questions in connection with the establishment of an international criminal court to which answers would be required.

38. The first concerned the relationship between the draft Code and the possibility of establishing such a court. The question was fundamental, and must be answered without delay, to avoid making the same mistake as in the 1950s, when the two topics had been regarded as separate and the Commission had come to grief on both of them. In fact, the court was ultimately only the embodiment of the Code and had no existence in its own right. That was why he regretted that the question of the Code and that of the court had been considered separately—albeit no doubt for practical reasons—when they were actually closely related. The Commission, which was now called upon to consider the question of the establishment of an international criminal court, still had to bear in mind the spirit of the Code and its shortcomings, as well as the problems of methodology that had arisen during the drafting. Two of those problems remained and were the key to any progress.

39. The first methodological problem was to determine whether the Code should apply to both individuals and States or to individuals alone. The Commission had decided early on that it would only apply to individuals, leaving the question of its application to States in abeyance. The question was coming up again, however, since the State could always be discerned behind certain of the crimes listed in the draft Code, such as State terrorism, aggression, genocide and colonialism. A court whose jurisdiction would extend to States could not be viewed in the same light as a court whose function was to try individuals only. A judgement against a State was not based on the same logic or technique as a judgement against a person. The Commission had to solve that problem, for, otherwise, it would keep cropping up or ambiguities would remain.

40. The second methodological problem had to do with universal jurisdiction and its relationship to the establishment of an international criminal court. The question had already been raised and the draft Code had been prepared on the basis of the principle of universal jurisdiction, without, however, prejudicing the establishment of a universal criminal court, so that some provisions of the draft Code which were valid within the context of universal jurisdiction would have to be amended if an international criminal court were established. It might be asked whether the two types of jurisdiction—universal jurisdiction and the jurisdiction of an international criminal court—were mutually exclusive or whether they could exist concurrently. In other words, did the establishment of an international criminal court imply the abandonment of the principle of universal jurisdiction? Did it mean that all States would definitively waive their jurisdiction or could the two systems coexist? Would it be possible to have recourse to the international court only in certain cases, when the exercise of universal jurisdiction gave rise to serious problems? Would it not be possible for the court of a third country to have trial jurisdiction, possibly with international participation?

41. In the case of certain crimes, such as aggression or mercenarism, moreover, it would be inconceivable to separate charges against an individual from charges against the State. While it was not difficult to determine the responsibility of a head of State or a minister, what would happen if it was the parliament which decided, by a majority vote, by consensus, or anonymously, by secret ballot, to attack another country or to finance terrorism? Could it be charged? That was one of the many questions that had been asked, but not answered.

42. Crimes against the peace and security of mankind were the corollary of peace-keeping activities, which were the responsibility of the United Nations Security Council. However, the question of the relationship between the Security Council and any future international criminal court had also not been answered and neither had that of the relationship between the powers of the Security Council and those which would be conferred on a judge called upon to determine the existence of an act of aggression, for example. Under Article 39 of the Charter of the United Nations, it was the Security Council that determined the existence of an act of aggression. Who then was the judge? The question had been raised in the Commission, but had been left in abeyance because it was so difficult. Accordingly, the Security Council would not be bound by the Code any more than it was bound by General Assembly resolution 3314 (XXIX) of 14 December 1974, on the definition of aggression. If the Council took action, it did so by virtue of Article 103 of the Charter. The question was thus what the relationship would be between the Charter of the United Nations and the Code. Would the Charter take precedence over the Code? The issue had to be considered from the legal point of view.

43. There was another preliminary question, namely, whether the Code would be binding on all States or only on those that had subscribed to it and, consequently, whether the jurisdiction of the international criminal court would be general or confined to States parties. The answer to that question was vital and the case of ICJ and the European Court of Human Rights provided no guidance, as they involved two entirely different systems with different objectives.

44. The question of penalties had also not received adequate attention. Was it possible to conceive of a code that would not provide for penalties and of a criminal court that would devise the applicable penalties ad hoc? What then would become of the *nulla poena sine lege* principle? It would, moreover, be difficult for an international court to apply internal law in that area, because it varied considerably from one State to another, witness the penalty of capital punishment, which had been abolished in some countries, but retained in others for various reasons.

45. Another question was who would have the right to bring a case before the international court? All possibilities had been considered and the Special Rapporteur had even spoken of a prosecutor's office attached to the international court. In his own view, it would be better not to transpose certain notions of internal law into international law. In States, the prosecuting authority was the representative of the executive; that would mean that the

prosecutor's office of the international criminal court would represent a world executive, which seemed far-fetched. Moreover, would the prosecutor's office act on its own initiative or solely upon request and, if so, at whose request? The question remained. The best thing would perhaps be to envisage a kind of popular right of action whereby any State could bring a case before the court and, if the possibility of bringing proceedings was extended to individuals, to provide for screening to prevent frivolous claims, as was done for the European Court of Human Rights, for instance.

46. Yet another question concerned the power of the international court to carry out investigations or inquiries, which would allow the examining magistrate attached to the international court to go to any given country to hold an inquiry or take evidence. That would probably be extremely difficult.

47. If an international court was actually created, it would, of course, have to be established in a particular country and the question of the seat of the court and of the immunities linked to the sovereignty of the State where the court had its seat, along with the question of the place where sentences would be carried out, would probably have to be examined.

48. Turning to the general considerations which formed the subject of part one of the Special Rapporteur's report, he noted that the establishment of an international criminal court was far from being decided. In resolution 46/54 of 9 December 1991 the General Assembly merely invited the Commission to study the possibility of establishing such a court. It was for the Commission to answer the crucial question whether or not such a court was necessary and whether or not the Code could be applied without it. It should also not be forgotten that there already existed an international order: the prospective court must not transform it, but rather blend in with it.

49. The problem was not one of efficiency, as the Special Rapporteur seemed to suggest in his report, but one of the relationship between international law and internal law, between sovereignty and the international order. The principle "try or extradite" had been distilled by the existing international order and any modification of it would be tantamount to modifying the international order. As for the lack of objectivity of national courts, there was a real risk of that not only for weak States, which were not always capable of countering the moves of certain criminal organizations, as the Special Rapporteur stated in the report, but also for strong States like France, a permanent member of the Security Council —the kind of stir the Touvier case was currently creating there among public opinion was well-known. In that connection, he again stressed the need to avoid any comparison with ICJ and the European Court of Human Rights, which were cited by way of example in the report, for ICJ, the main judicial organ of the United Nations, had been set up in the aftermath of the Second World War and the European Court formed part of a highly integrated political system, that did not yet extend to the world order. It should also not be forgotten that, as already pointed out at the preceding session, the establishment of an international criminal court would inevitably have repercussions on the constitutional order of some States. Those were the issues on which the Commission should reflect during its debate and to which there was no ready answer. He reserved the right to revert to certain points raised in the report of the Special Rapporteur, whom he congratulated on his contribution to the work of the Commission.

50. Mr. FOMBA said that all documents relating to the item under consideration should be circulated to the members of the Commission, and particularly to the new members, at the proper time. It would have been helpful, for example, if the new members could have acquainted themselves with the 1990 report so as to have an initial insight into the problems involved in the establishment of an international criminal court. He wished, however, to congratulate the Special Rapporteur on the competence with which he had outlined those problems and proposed solutions to them. In particular, he had placed the question in its proper philosophical and political perspective and he (Mr. Fomba) endorsed his conclusions in their entirety.

51. As to the choice between universal jurisdiction and special institutional jurisdiction, his own inclination was to opt for the latter solution, given the current stage of legal knowledge and the advantages and disadvantages of the two systems. The rule of universal jurisdiction was not always satisfactory, as was apparent from the current disputes between the Libyan Arab Jamahiriya, and the United States of America, the United Kingdom of Great Britain and Northern Ireland, and France, respectively. Special institutional jurisdiction was the more logical solution, first of all, from the legal standpoint, since the principle *nullum crimen sine lege, nulla poena sine lege* meant that there could be no international crimes without penalties laid down by international law and without international institutional machinery to impose them and, secondly, from the political standpoint, inasmuch as States which recognized the logic of an international code should take that logic to its conclusion. The prerequisite, of course, was to gain the widest possible political acceptance. At all events, States could not turn a deaf ear to the appeals of the universal conscience.

52. He would confine himself to those few remarks, given the little time he had had to consider the question, but reserved the right to speak again.

Drafting Committee

53. The CHAIRMAN announced that the Drafting Committee would be chaired by Mr. Yankov and would be composed of Mr. Al-Baharna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Koroma, Mr. Mahiou, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Vereshchetin and Mr. Villagran Kramer. Mr. Razafindralambo would participate *ex officio* in his capacity as Rapporteur of the Commission.

54. Mr. YANKOV (Chairman of the Drafting Committee) said that the composition of the Drafting Committee had been determined in keeping with the requirements of geographical distribution and of the

representation of the various legal systems throughout the world. As a general rule, the Drafting Committee would meet twice a week, on Monday and Wednesday afternoons. It could also meet in the mornings if there were no speakers for the plenary meetings.

Planning Group

55. The CHAIRMAN announced that the Planning Group would be chaired by Mr. Calero Rodrigues and the other members would be Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Thiam, Mr. Vargas Carreño and Mr. Yamada.

The meeting rose at 1 p.m.

2255th MEETING

Wednesday, 6 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. The CHAIRMAN said that, as decided at the previous meeting, the Commission would concentrate on aspects related to part one of the Special Rapporteur's report (A/CN.4/442), deferring detailed consideration of part two until later in the week.

2. Mr. VERESHCHETIN said that the question of an international criminal jurisdiction could be regarded either as directly linked to that of the draft Code of Crimes against the Peace and Security of Mankind or as having a broader dimension that would include jurisdiction over crimes which in legal doctrine were often termed crimes of an international character. Such crimes normally fell within national jurisdiction. Unfortunately, in the draft Code itself that issue was not fully clarified. The question also had specific practical aspects in that States might be reluctant to surrender part of their sovereign rights in a prosecution involving their own citizens. Recourse to international criminal jurisdiction should be seen as the exception rather than the rule; moreover, it should concern in the main the crimes covered by the draft Code, in view of the risks they entailed for the international legal order as a whole.

3. The international criminal responsibility of individuals in accordance with the norms of international law was one of the forms of responsibility of States for the commission of an international crime, a topic which would have to be addressed in due course in the context of State responsibility. When it referred to the responsibility of individuals, the draft Code was understood to cover crimes in the commission of which the State generally played some role. Individuals committing such crimes must be amenable under the norms of international law, even if they were not liable under those of internal law. However, crimes of an international character, as distinct from international crimes, were basically punishable in accordance with the norms of national law.

4. If a direct link was established between the Code and an international criminal jurisdiction, there would be fewer problems to be solved, but if the Code was not to be backed up by such a court, it would lose most of its significance. Admittedly, it was difficult to imagine that a State which pursued policies of apartheid or genocide or was engaged in mass violations of human rights would be prepared to punish those responsible in its domestic courts. That did not mean the Commission should wait until work on the draft Code was completed before studying the problems raised by the institution of an international criminal court, and in particular those of the applicable law, the penalties to be imposed and the question whether the court's jurisdiction would be exclusive or optional.

5. Crimes of an international character in which responsibility lay with individuals were of great concern to the international community, but suppressing and punishing them would require, first of all, considerable cooperation between States in concluding special conventions and international instruments. As a rule, the competence of the court with respect to such crimes should be optional.

6. Mr. VILLAGRAN KRAMER said that he saw an international criminal court as a means of controlling unilateral actions by countries which had the economic power and the necessary means to impose their will on small countries. His object, therefore, was to avoid the

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

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