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Summary record of the 2261st meeting

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

Extract from the Yearbook of the International Law Commission:-
1992, vol. I

but also because the Code might conflict in that respect with the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

63. He was not satisfied with the draft provision on jurisdiction and wondered what kind of justice would confer jurisdiction on the court for genocide, but not for war crimes, for the kidnapping of diplomats, but not for terrorism against innocent victims, and for international drug trafficking, but not for aggression in the form of colonialism and intervention. The result would be to demolish international criminal justice.

64. He was in favour of a court which had jurisdiction for all crimes under international law. That should be the purport of any recommendation submitted to the General Assembly.

65. Mr. KABATSI said that, if the intention was to prevent crimes against the peace and security of mankind, an international criminal trial mechanism must be established to apply known international criminal law, which was basically the draft Code of Crimes against the Peace and Security of Mankind. However, to stipulate that such a court should apply internal law would be unrealistic, except where internal law was only a transposition of international law. An international criminal court could not in fact know every country's internal law and its task would therefore be difficult, both in determining the relevant internal law and in applying it. Alternative A of the draft provision on the law to be applied was too imprecise and he preferred alternative B, but hoped that both subparagraphs (*b*) and (*e*) could be deleted, since they were not in keeping with the requirements of stringency in criminal law.

66. The question of the compulsory or optional jurisdiction of the court would depend on what kind of court the international community wanted. A cumbersome and rigid mechanism was unlikely to survive, whereas an unduly lightweight mechanism would be difficult to set up and would not have the necessary authority. He therefore considered that the international criminal court should have compulsory, but not necessarily exclusive, jurisdiction and that it might be wise to wait a little in order to be in a position to establish a robust mechanism rather than one which would be anaemic and unable to solve existing problems. A court with optional jurisdiction would not have been able to find a way out of the deadlock in the Lockerbie case between the United States of America and Libya. The international community should be able to rely on an international criminal court in order to eliminate crimes against the peace and security of mankind.

The meeting rose at 1.10 p.m.

2261st MEETING

Friday, 15 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Arangio-Ruiz, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, 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. Mr. KUSUMA-ATMADJA, referring to the misgivings expressed by Mr. Crawford at the preceding meeting, said that reluctance to institutionalize the use of force—a sentiment with which he was entirely in sympathy—should not rule out readiness to define the conditions under which the use of force might be resorted to if necessary.

2. With reference to the possible draft provision on the law to be applied,[3] he recalled his earlier suggestion (2256th meeting) that a distinction should be drawn between criminal acts committed by individuals on behalf of the State and those committed by individuals in their personal capacity. In the case of crimes in the first of those categories, the issue of sovereignty was a real impediment; he could not agree with arguments to the effect that invoking national sovereignty in connection with such cases merely revealed a lack of political will. However, sovereignty was not relevant to acts committed in a personal capacity. He had no difficulty with subparagraphs (*a*) and (*b*) of alternative B, but the reference to the general principles of criminal law in subparagraph (*c*) was unnecessarily restrictive; in certain borderline cases, such as those of culpable negligence, it might not be clear whether civil or criminal law was involved. The subparagraph should read: "The general principles of law recognized by the community of nations", "nations" being preferable to "States" in that context. Subparagraphs (*d*) and (*e*) were acceptable in view of the qualifying reference to "subsidiary means" in (*d*) and the use of the clause "where appropriate" in (*e*); in that connection, he would point out that internal law could in some respects be more advanced than international law. Indeed, in some instances, international law might be unclear or even non-existent.

3. As to the court's jurisdiction *ratione materiae*,[4] the court should have exclusive and compulsory jurisdiction

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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] For text, see 2254th meeting, para. 3.

[4] Ibid., para. 4.

in respect of the first category of crimes and concurrent jurisdiction in respect of the second category. Where matters were dealt with by a special convention, whether global or regional in character, the court's jurisdiction should be optional. The point was an important one in view of the present-day level of integration within the international community.

4. Referring to points raised at earlier meetings by Mr. Villagran Kramer (2255th meeting), Mr. Robinson (2260th meeting) and Mr. de Saram (2257th meeting), he expressed the opinion that the international trial mechanism established to deal with crimes in the first category should not be a permanent court or a criminal chamber of ICJ—even if the Statute of ICJ could be amended to allow the establishment of such a chamber—but, rather, an ad hoc tribunal established by a treaty and linked with the system relating to action with respect to threats to the peace, breaches of the peace and acts of aggression provided for in Chapter VII of the Charter of the United Nations, under which authority with regard to such action was vested in the Security Council. The question of the precise stage in the proceedings under Chapter VII at which the international court should be activated would require careful consideration at a later stage.

5. Mr. KOROMA said that, had he been present when the Commission had embarked on the discussion, he would have suggested that the question of the desirability of establishing an international criminal court should be considered only after conclusions had been reached on technical aspects of the problem, such as the applicable law and the jurisdiction of the court. Such an approach would seem more logical and he suggested that it should be adopted in the Commission's report on the consideration of the item at the present session.

6. He stressed the need for a high standard of precision in defining the applicable law, not only from the point of view of safeguarding the rights of the accused, but also making sure that serious offences did not go unpunished. With regard to alternative B of the possible draft provision on the law to be applied, the fact that international conventions, including the draft Code itself, would certainly constitute the main applicable law did not preclude reliance on customary law, especially in the case of new crimes not yet defined by any convention. On no account should perpetrators of such crimes be allowed to find refuge in a claim of *non liquet* simply because there was as yet no international convention to cover them. Cases in which international custom was applied should, of course, be very limited, but it should not be forgotten that the Nürnberg and Tokyo Tribunals had had to rely on customary law. In some situations it might be necessary to view General Assembly resolutions, particularly those adopted unanimously or by an overwhelming majority of the international community representing all geographical regions, as part of customary law. A unanimously adopted resolution would meet the test of "international custom, as evidence of a general practice accepted as law" referred to in Article 38, paragraph 1 (*b*), of the Statute of ICJ, as well as that of article 53 of the Vienna Convention on the Law of Treaties which defined a peremptory norm of general international law (*jus cogens*) as a norm accepted and recognized by the international community of States as a whole.

7. Among the general principles of criminal law referred to in subparagraph (*c*) of the draft provision, one could cite such principles as *nullum crimen sine lege*, *nulla poena sine lege* and the double jeopardy rule, all of which were fundamental principles which the court must apply. The judicial decisions referred to in subparagraph (*d*) also had a role to play and should undoubtedly serve as a subsidiary means for the determination of rules of law. The inclusion of internal law, where appropriate, among the sources of law was, in his view, correct. In that connection, he endorsed the views expressed in the Special Rapporteur's commentary. The provision concerning the applicable law should ensure maximum flexibility of the system while at the same time fully safeguarding the rights of the accused. In conclusion, he drew attention to article 15, paragraph 2, of the International Covenant on Civil and Political Rights, which provided for the trial and punishment of any person for

> ... any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

8. The court's jurisdiction should be determined by the Code. As the draft Code attempted to confine itself to the most serious crimes, such as aggression, genocide and mass violations of human rights, including apartheid, States should initially have the option to bring any of those crimes before the court. That would provide States with a tribunal for trying very serious offences and, if the tribunal gained in reputation because it was impartial and objective, more and more cases would be brought before it. Jurisdiction should be optional because, if it was made compulsory, the court would not be attractive to States.

9. A determination by the Security Council did not relieve an individual of personal responsibility. The court must have the possibility to find that the Geneva Conventions had been violated and to try individuals for their personal responsibility, even if the Security Council had held that an act did not constitute aggression. Thus, decisions of the Security Council should not always be binding on the court, whose impartiality and objectivity were at stake. If the Security Council concluded that an act did not constitute aggression, it did not follow that the act itself did not qualify as a crime under the Geneva Conventions.

10. Mr. ROBINSON, speaking on a point of clarification, said that when he had proposed (2260th meeting) the deletion of the reference to judicial decisions from subparagraph (*d*) and to internal law from subparagraph (*e*) of alternative B, he had not been suggesting that their deletion prevented the court from availing itself of judicial decisions and of internal law. He had merely meant that they should not be specified as applicable law. The court could refer to them in carrying out its work and, indeed, it would be necessary for it to do so.

11. The CHAIRMAN said that that point certainly had to be looked into by the working group and the plenary.

12. Mr. ROSENSTOCK said that, as he had understood it, Mr. Koroma had stated that the court's action

on aggression required a finding by the Security Council that such an act had been committed, but that, if the Security Council had not concluded that aggression had been committed, that did not prevent the court from trying individuals for other crimes, either those set forth in the draft Code or in other conventions. If that was Mr. Koroma's point, he agreed with it entirely.

13. Mr. PELLET said that he was against linking the court and the Code and was surprised that none of the members of the Commission in favour of such linkage had proposed the obvious: that the court should apply the Code.

14. He disagreed with the members of the Commission who had spoken out against international custom and cited the example of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Although the modalities of that instrument were unacceptable to many States, there was general agreement that apartheid was a crime against the peace and security of mankind. South Africa was not a party to that Convention and, if it one day decided to bring those responsible for apartheid to trial, he wondered what court would have jurisdiction. If the Commission eliminated custom from the law to be applied by the court, it would deprive the court of the possibility of taking any decision on such a question.

15. In subparagraph (*d*) of alternative B of the possible draft provision on jurisdiction, he did not think that the words "judicial decisions and teachings of highly qualified publicists of the various nations" should be deleted because they had been taken from Article 38 of the Statute of ICJ and it was therefore legitimate to include them in the provision. The point was not to apply judicial decisions and teachings of highly qualified publicists as such, but merely to use them "as subsidiary means for the determination of rules of law", as stated in the last part of subparagraph (*d*).

16. With regard to internal law (subpara. (*e*)), the court would have to refer to provisions of internal law, but it would never have to apply internal law. The Commission should not state that an international court could apply internal law. Instead, it must specify that it was the cases that had been brought before the court that were at issue. The court might be asked to apply internal law as a material source, but not as a formal one. However, the report had listed only formal sources.

17. Concerning the relationship between the Security Council and the court, a number of members had pointed out that the Security Council ruled on acts by States, whereas the court would judge acts by individuals. That did not, however, answer the question whether the court was bound by a finding of the Security Council. For example, was the court bound by a decision of the Security Council concerning a person accused of having ordered or participated in an act of aggression? It was not so easy to separate acts of States and acts of individuals. The court therefore had to ensure that the Security Council had acted in conformity with the Charter of the United Nations and international law. Thus, even if the Security Council did not conclude that aggression had taken place, the court was not bound by that decision. That view might not please the permanent members of the Security Council, including France, but he stood by it.

18. Lastly, he said that, in French, it would be more accurate to use the term *cour criminelle internationale* in place of *cour pénale internationale* in order to underline the seriousness of the crimes in question.

19. Mr. VILLAGRAN KRAMER said he thought that it might be necessary to make a distinction in the Code between crimes and offences and he asked Mr. Arangio-Ruiz for his view.

20. He endorsed the comment Mr. Robinson had made the previous day (2260th meeting) to the effect that it would be useful for the court to apply internal law and he suggested that the Commission should postpone its discussion of the relationship between the Security Council and the court with regard to the question of aggression and that it should bear in mind the decisions of ICJ in the *United States Diplomatic and Consular Staff in Tehran* case,[5] the *Military and Paramilitary Activities in and against Nicaragua* case[6] and the two cases recently brought by Libya in connection with the Lockerbie bombing.[7]

21. The CHAIRMAN pointed out that the draft Code of Crimes against the Peace and Security of Mankind had originally been called the draft Code of Offences against the Peace and Security of Mankind, but had been renamed to underline the particularly odious character of the acts with which it dealt.

22. Mr. ARANGIO-RUIZ said that he favoured neither of the two proposed alternatives for the provision on the law to be applied. He found particularly objectionable the use, in both cases, of the expression "where appropriate", which was typical of international commercial arbitration proceedings when tribunals were vested by the parties with the power to do virtually whatever they pleased so far as their sources of law were concerned. In addition, alternative B was couched in terms that were very similar to those used in the Statute of ICJ, which were inappropriate for an international criminal court. The main thing was that the Code should stipulate clearly which rules should be applied by the court. It was also essential for the convention that embodied the Code to include a provision whereby every State party to the convention would be required to incorporate the terms of the Code into its own legal system. Any State not complying with that obligation would be in breach of the convention.

23. As to the relationship between the Security Council and the international criminal court, the court should not have to bow before any decision of the Security Council. That was, however, a complex and wide-ranging issue which might call for an ad hoc report by the Special Rapporteur.

24. He was not certain why Mr. Villagran Kramer had asked him about the words "crimes" and "offences",

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[5] *I.C.J. Reports 1980*, p. 3.

[6] *I.C.J. Reports 1986*, p. 14.

[7] See 2255th meeting, footnote 8.

since he was not an expert in that particular aspect of the matter. In so far as the question related to the topic of State responsibility, however, he had decided that it would be better, in the context of draft article 19 (International crimes and international delicts) of that topic[8] to leave crimes aside for the time being. In any event, he increasingly felt that crimes were in fact only a more serious form of delicts. Any distinction between crimes and delicts in the context of that draft article was made solely with regard to the consequences, although he was unable at the present stage to recommend precisely what form that distinction should take. The draft Code, however, was a code of crimes and, as such, delicts had no place in it.

25. Mr. CALERO RODRIGUES said that he would like Mr. Koroma to confirm that he really was proposing that the international criminal court could rely on resolutions of the General Assembly where conduct was deemed by those resolutions to be a crime, but was not recognized as such in any international instrument. Was he also proposing that, if the court could find no law to qualify an act as a crime and if it was itself convinced that the act in question was a crime, it could go ahead and punish the individual concerned? If that were so, it would seem to be vesting the international criminal court with quite extraordinary powers.

26. Mr. KOROMA said it was his view that, where repeated resolutions of the General Assembly reflected the *opinio juris* of the international community, the court could use those resolutions as a subsidiary means of applying the law. In other words, he had been referring to resolutions not on their own, but in the general context of customary international law.

27. Secondly, he considered that, if a grave offence not covered by any specific law was committed, the court should not, having regard to what he would term international common law, allow that offence to go unpunished.

28. Mr. CRAWFORD said that he could not agree with the proposition that criminals could be charged under the Code for offences against an as yet to be conceived common law of mankind. What was required in the case of the criminal court was definition and precision. The *nullum crimen sine lege* principle was not to be answered by a proposition that there was no lacuna in international law inasmuch as the two operated at different levels.

29. Mr. YAMADA said that he had no difficulty with the possible draft provision on complaints before the court.[9] As the Special Rapporteur pointed out, however, the Commission should discuss the question of which international organizations should be made eligible to bring proceedings before the court. In that connection, he noted that, under the terms of Article 96 of the Charter of the United Nations and Article 65 of the Statute of ICJ, the organizations eligible to seek an advisory opinion of the Court were the organs of the United Nations and the specialized agencies. In the specific case of the international criminal court, however, he would suggest that that list should be expanded to include certain other international and regional intergovernmental organizations such as OAS, OAU and possibly also ICRC, whose function it was to administer humanitarian law as reflected in the 1949 Geneva Conventions. He did not, however, favour the inclusion of non-governmental organizations, as it would be difficult to draw a line between those that could and those that could not be accepted. The working group might wish to consider the matter in more detail and draft an appropriately worded proposal to define which organizations were eligible to bring proceedings before the court.

30. Mr. CALERO RODRIGUES said that it had emerged from the discussion on the institution of criminal proceedings at the Commission's forty-third session[10] that there was a difference between the formal institution of such proceedings and the submission of a case for consideration by the court. The general feeling had been that the formal institution of criminal proceedings should be the prerogative of a special public organ—a kind of prosecutor's office—which would be attached to the court and would probably operate under its supervision. The submission of cases for possible prosecution, on the other hand, would be a right of States and possibly of some organizations as well.

31. He noted that, in his tenth report, the Special Rapporteur had adopted the word "complaints", which appeared in human rights and other documents. While he was not altogether happy with that word, he considered that, as no better one had been found, it should be used for the time being pending the adoption of some more suitable word at a later date.

32. That States could refer cases to the international criminal court or to a prosecutor's office was so self-evident that it would not be a very controversial issue. The main question was whether other entities such as non-governmental organizations should be recognized as having that right. His own view was that they should and that the draft provision on complaints should so stipulate. After all, if a State or organization suggested that proceedings should be instituted, that did not mean that the court would necessarily take up the case; only the prosecutor's office would decide whether or not the case would be formally brought before the court.

33. Although the draft provision referred to international organizations, he saw no reason why FAO or UNESCO, for instance, should have the right to bring a case before the court—a right that was in fact already vested in each and every member State of those organizations.

34. It had been suggested that certain national organizations of a humanitarian character should also be able to refer a case to the court. He was not sure that that would be a good idea, given the problems that would almost inevitably arise. He was also not sure that ICRC, which had been mentioned in the same connection, would like to have such a power. For the time being, it would be best, in his view, if the right to bring a case be-

[8] For text, see *Yearbook... 1980*, vol. II (Part Two), p. 32.

[9] For text, see 2254th meeting, para. 6.

[10] For summary of discussions, see *Yearbook... 1991*, vol. II (Part Two), chap. IV.

fore the international criminal court was confined to States and non-governmental organizations.

35. Mr. YANKOV, noting that under the second paragraph of article 24 of chapter III of the draft Statute adopted by the International Association for Penal Law in 1927[11] international criminal proceedings could be instituted by any State, said that he wondered what precisely that meant. The Special Rapporteur, in his report, had identified at least four groups of States, but it should perhaps be made clear in the commentary whether the right to institute proceedings before the court would apply to all four groups. If so, that could create considerable difficulty in the case of a multilateral treaty which might include a requirement concerning consent to jurisdiction by all parties to the treaty.

36. The reference to international organizations in paragraph 1 of the possible draft provision might be interpreted as covering both intergovernmental organizations, whether regional or global, and non-governmental organizations and also, possibly, such entities as the European Community. There was, of course, the possibility that, where not only the intergovernmental organization, but also its member States, had the right to bring proceedings before the court, there would be duplication. He had no ready answer to that problem, which called for special consideration.

37. Reference had been made to ICRC, but, as he understood the position, it had always been the practice of ICRC not to become involved in disputes and he therefore doubted whether it would be interested in instituting proceedings before the court.

38. The question of the institution of proceedings also arose in connection with the separation of powers as between the Security Council and the international criminal court, particularly in the case of aggression—a question that would arise time and again. He would merely point out that, even in the case of the imposition of sanctions under Articles 41 and 42 of the Charter of the United Nations, the object of such sanctions was to secure the maintenance of international peace and security; such sanctions did not provide for any measures that would lead to the punishment of those who actually perpetrated or were involved in an act of aggression.

39. He agreed in substance with paragraph 2 of the draft provision, but would suggest that it should be couched in more positive terms, so as to provide that proceedings should be instituted against natural persons, regardless of their rank and position.

40. Mr. IDRIS said that the requirement that only States and international organizations should be entitled to bring complaints before the court and that the submission of a complaint by the injured State would be necessary to institute proceedings implied that the court could not institute proceedings in its own right, a situation which was markedly different from that of some national courts, where an action could be brought by the prosecutor's office.

41. He wondered what justification there was for limiting the right of action to States and international organizations and what would happen if neither, for political reasons, wished to lodge a complaint, even if an international offence had been committed and the injury had been duly established. It might also be asked why certain legal persons in internal law or having an international or universal character were denied the right to bring complaints before the court.

42. Paragraph 2 of the possible draft provision stated that it was immaterial whether the person against whom a complaint was directed had acted as a private individual or in an official capacity. In view of the seriousness of the crimes in question, persons vested with the power of command must not be able to claim that they had acted in an official capacity in order to be relieved of their personal responsibility, a principle clearly established by the Nürnberg Tribunal.

43. He also wondered what would happen in the event of *dommages collatéraux*, such as human rights violations, caused by actions carried out by a State or a group of States against another State in the name of international legality.

44. Mr. CRAWFORD said that the formal right to institute proceedings before the court was normally vested in a public official—in the case of his own country, the Attorney-General. That official was empowered to decide, on the basis of the evidence produced, whether or not proceedings should be instituted. However, he agreed with the view that the prosecutor's office should not, at least while the court was still at an early stage of its existence, be authorized to take that decision unilaterally. In his opinion, the right to bring complaints before the court should be restricted to States parties to the statute of the court, particularly in the light of the high cost of such proceedings, as could be seen from the prosecutions which had been brought in connection with domestic war crimes legislation in Australia and which had cost millions of dollars.

45. At the same time, he could see no reason why evidence could not be brought to the attention of the prosecutor's office by a non-governmental or other relevant organization in support of a possible complaint. There was no justification for limiting that function to the authorities of States parties. As it stood, the draft provision on complaints before the court did not distinguish between the different aspects of the complaints procedure.

46. Mr. ROBINSON said that he was unsure whether the possible draft provision was intended to be wholly substantive, or whether, as would be appropriate, it should also deal with some of the procedural rules relating to complaints. In particular, the role of the prosecutor's office should be clarified.

47. Paragraph 1 of the draft provision raised the question of the conditions under which States and international organizations were vested with the right to bring complaints before the court. In his view, Mr. Crawford

[11] For text as revised in 1946, see United Nations, *Historical Survey of the Question of International Criminal Jurisdiction* (United Nations publication, Sales No. 1949.V.8), p. 61, appendix 4.

was correct in regarding that right as belonging solely to States parties to the statute of the court and he could not see what role international organizations could play if they were not to be parties in their own right.

48. He queried the relevance of paragraph 2 to the context in which it was placed, since it seemed to be more substantive than procedural, although he had no difficulty with the proposition it affirmed.

49. The CHAIRMAN said that a fairly complex structure might be required for the complaints procedure, particularly as far as appeals were concerned, and, in that connection, he noted that there was a United Nations body to review decisions of the United Nations Administrative Tribunal[12] that might serve as a model for appeals procedures in the court.

50. Mr. MIKULKA said that the draft provision on complaints had two aspects, the first being "active" in that it concerned the entitlement to bring complaints before the court, while the second was "passive" and related to the question of who might be the subject of such complaints. It might be better if the two aspects were covered in separate provisions.

51. He agreed with Mr. Yankov that the statute of the court should contain a provision on jurisdiction *ratione personae* which would unequivocally state that the court had jurisdiction to try cases involving crimes against the peace and security of mankind committed by individuals, whether or not they were acting in an official capacity. Such a provision might be based on paragraph 2 of the possible draft provision on complaints.

52. Paragraph 1 of that draft provision was crucial and he agreed with those who were in favour of the court's exclusive and compulsory jurisdiction in respect of crimes such as aggression, threat of aggression, intervention and colonialism. In such cases, it was impossible to agree with the view that an unlimited number of States should have the right to bring complaints before the court and that international organizations should also enjoy that right, since the latter had no role to play in connection with universal jurisdiction. If such a role were to be assigned to them, it would be very difficult to reconcile the international criminal trial mechanism with universal jurisdiction as already provided for by many international conventions. In his view, States would not be keen to accept the jurisdiction of the court if international organizations were also entitled to intervene in a procedure which was not open to them in internal law. In particular, it was unclear how an international organization could comply with some of the obligations that would be established, such as that of handing over suspects.

53. An exception would be the Security Council, the only international organ that was competent to determine the existence of an act of aggression or other use of force in contravention of the Charter of the United Nations and to take any necessary measures to restore international peace and security. It should therefore be entitled to bring complaints before the court.

54. It would be difficult to agree that every State should enjoy such an entitlement unless there was a specific link between the State concerned and the suspected criminal. In order to establish such a link, it would not be satisfactory to use the criterion of nationality or that of the injured State, namely, the State whose nationals had been the victims of the crime in question. In his opinion, the right to bring complaints before the court should be restricted to the State in whose territory the presumed offender was found. That should apply in the case of crimes within both the exclusive and the optional jurisdiction of the court.

55. Mr. RAZAFINDRALAMBO said that he would like to know whether Mr. Crawford believed that the right to bring complaints before the court should be restricted to States parties to its statute solely because of the costs involved in the proceedings.

56. Mr. Robinson seemed to be concerned about the lack of a link between the two paragraphs of the draft provision on complaints. The second paragraph of the commentary nevertheless appeared to have a direct bearing on the issue. Under the regime envisaged by the Special Rapporteur, a two-tiered procedure would be followed, consisting, first, of bringing the complaint before the court and, secondly, of setting in motion a public action at the international level. There was thus an organic link between the two paragraphs of the draft provision.

57. Mr. CRAWFORD said that the only person who could refer a case to the court was, to use the French term, the *procureur général* or another comparable public official of the State concerned. However, it was not the responsibility of that official to search out criminals, at least in the early stages of the court's existence. The right to bring a complaint, on which the *procureur général* would be entitled, after investigation, to act, should be vested only in States parties to the statute of the court, but there need be no restriction on the right of other States or of an international organization to bring evidence of a crime under the Code to his attention in order to assist him in carrying out his functions.

58. He had some misgivings about Mr. Mikulka's suggestion that the Security Council should have the right to institute proceedings, since the Council's decision might be seen as having determined the issue which was the subject of those proceedings. The suggestion should, however, be given further consideration.

59. Mr. VERESHCHETIN said that he saw the Special Rapporteur's possible draft provision as setting out certain basic principles rather than as establishing specific procedures, an exercise which would require more detailed consideration at a later stage.

60. The title, "Complaints before the court", did perhaps give rise to some problems, at least in the English version, and it might be better to change it to read: "Submission of cases to the court".

[12] Committee on Applications for Review of Administrative Tribunal Judgements.

61. In paragraph 1 of the draft provision, reference should also be made to intergovernmental organizations and he tended to agree with the view that there should be some limitation on the categories of organizations entitled to apply to the court. Perhaps, as Mr. Mikulka had suggested, the right should be confined to the Security Council.

62. He supported the view that the two paragraphs of the draft provision should be separated and that paragraph 2 should be placed elsewhere in the draft, since it dealt with jurisdiction *ratione personae*.

63. Mr. ROBINSON said that procedural aspects needed to be discussed before the Commission could arrive at a definitive formulation of the two paragraphs of the draft provision on complaints. He noted that there seemed to be a divergence of opinion on the procedural steps to be followed, for example, in connection with the arrangements for bringing complaints before the court. The possible draft provision as it stood tended to occlude the role of the prosecutor's office in that process and the second paragraph of the commentary did not give any reason for not including a paragraph specifically dealing with that role.

64. In identifying the circumstances in which States had the right to bring complaints before the court, the underlying consideration was to establish the conditions under which they had *locus standi*. He took the view that the right to institute proceedings should be confined to States which had recognized the statute of the court and he believed that there was a necessary relationship between paragraph 1 and alternative B of the draft provision on handing over the subject of criminal proceedings to the court.[13] As a minimum, one of the categories of States entitled to bring complaints before the court should be the State which was identified in alternative B of that draft provision as the State in which the alleged perpetrator was found.

The meeting rose at 1.05 p.m.

[13] For text, see 2254th meeting, para. 8.

2262nd MEETING

Tuesday, 19 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, 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. Mr. VILLAGRAN KRAMER said that General Assembly resolution 46/54, paragraph 3, offered the Commission a much wider range of possibilities than the establishment of a court *stricto sensu*, as the use of the term "mechanism" showed. An intellectual effort was therefore required to go beyond the usual concepts of criminal law under the Roman or common law systems. Conceived as a dialectic between the prosecution acting on behalf of the State and the collective interest, on the one hand, and the defence of an accused person, on the other, a trial or *procès pénal* was not the only possible option. In other parts of the world, there was another system, under which any person could institute proceedings before the public prosecutor, known as a *denuncia*, which, unlike a complaint, did not necessarily involve an indictment.

2. To be sure, at the international level, in moving towards a centralization of international law—which would not necessarily yield the best results—it was not possible to deprive States, the principal subjects of international law, of their right of accusation, which was a feature of a criminal trial. For that reason, he welcomed the wording of paragraph 1 of the possible draft provision on complaints before the court[3] and the flexibility with which the text provided for a concurrent system that allowed States and international organizations to bring complaints before the court. The United Nations, the most active of international organizations, should be allowed to bring a complaint before the court, although it should not have any exclusive right in that regard. He ruled out the idea of a United Nations prosecutor, but the United Nations Office of Legal Affairs might set up, under the Legal Counsel, a body of legal experts of different nationalities to assist in the prosecution, for several years at least.

3. If States retained the right to prosecute the perpetrator of a crime as part of a trial in the traditional sense of the term, perhaps it should also be possible for an accused national of a country that had not accepted the jurisdiction of the international court to be judged by it if he so wished. A person accused of an odious crime might fear that the fundamental rights of the defence would be violated in the event of a trial in his own country and an international criminal trial mechanism would then be of considerable interest. He thus believed that the thrust of the draft provision, namely, the possibility

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

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

[3] For text, see 2254th meeting, para. 6.