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Summary record of the 2326th meeting

Topic:
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ported Mr. Vereshchetin's proposal to delete the footnote.

97. Mr. MAHIOU said that, so far as the question of a list of special questions was concerned, there was no need to add to the three clear indications already given in the Working Group's report: first of all, certain points on which the comments of the General Assembly were sought had been placed between square brackets in the report; secondly, in certain instances, as in the case of article 23, various options were given and it would be for the General Assembly to determine which was the preferred option; and, thirdly, the Working Group had itself requested the General Assembly's opinion on certain matters, such as article 11, concerning disqualification of judges.

98. There were, however, two very important questions on which the Commission might wish to indicate that it would like to have the reaction of the Sixth Committee: the list of crimes, dealt with in article 22, and the question of jurisdiction, dealt with in articles 23 to 26.

99. Mr. KUSUMA-ATMADJA, supported by Mr. KOROMA, said that the words "and proceed to their adoption", in the first paragraph of Mr. Yankov's proposal, were not really necessary. He therefore proposed that they should be deleted.

100. The CHAIRMAN suggested that the Commission should take note of the report of the Working Group on a draft statute for an international criminal court, and should agree that the report should be annexed in its entirety to the report of the Commission to the General Assembly on the work of its forty-fifth session. He further suggested that the text proposed by Mr. Yankov, as amended by Mr. Crawford, Mr. Koroma, Mr. Kusuma-Atmadja and Mr. Vereshchetin should be included in the report of the Commission to the General Assembly.

It was so agreed.

The meeting rose at 6.10 p.m.

2326th MEETING

Thursday, 22 July 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

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

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

[Agenda item 3]

REVISED REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT *(concluded)*

1. Mr. FOMBA said that the Working Group's report revealed a proper concern to strike an overall balance between the rigour of criminal law and the necessity for flexibility in the light of political imperatives. The report was, in the main, satisfactory and he held no appreciably different views from the Working Group's consensus positions on basic questions. Nevertheless, he did sometimes have a differing or more qualified view of certain issues, such as the question of trial *in absentia*, a solution he favoured because of its deterrent effect, or again, the choice between "selective participation" by States in the court and "automatic participation", which was better because it gave the Court more legal consistency and rigour. He was none the less fully alive to the fact that the Working Group had chosen the possible, rather than the desirable, by adopting an approach which better reflected the requisite consensus basis for the Court's jurisdiction and which was marked by flexibility.

2. He reserved the right to comment on other points at the next session, bearing in mind, however, the reservations expressed more particularly by Mr. Bennouna and Mr. Vereshchetin about the usefulness of a further general discussion.

3. Mr. VERESHCHETIN said he wished to clarify a point which was by no means the most important but had been mentioned more especially by Mr. Pellet, namely, the reasons why the Working Group had decided to describe the proposed jurisdiction as a "Tribunal" and not a "Court".

4. The Working Group had been faced with a dilemma. They had to decide how to call, on the one hand, the entity consisting both of the procuracy, the judges and the registry, and on the other, the trial body itself.

5. The problem lay in the fact that, in the various languages, different terms were used for a court of first instance. The Special Rapporteur, had explained that, for example, in the French system the word *tribunal* was used for a court of first instance. In Russia and in other countries, the word "tribunal" was used exclusively for a military court. Hence there had been no unanimity about which term to use, more particularly because of the differences in the legal systems, and it had proved necessary to take a number of other factors into account in making the choice. The first factor, not by far the most important, had been the need to distinguish the future court from ICJ at The Hague. To use the same term

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

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

[3] Ibid.

[4] Ibid.

for both jurisdictions might well have opened the way to lasting confusion in the minds not only of students but also of all those who, subsequently, would seek to distinguish between the proceedings of the two bodies. The second factor was the tradition that had been established since the time of the Nürnberg Tribunal and had been continued with the body set up by the Security Council in connection with the situation in the former Yugoslavia, a body which had also been called a tribunal. The term "tribunal" therefore carried on a certain tradition in which the word meant a body that tried persons and not States.

6. The third factor had been the lack of consistency in the use of particular terms in the various legal systems. For that reason, the Working Group had arrived at what was not perhaps the best solution but one which seemed to be the best in view of the circumstances: calling the entity the "Tribunal" and using the term "Court" for the part of that entity that would hand down judgement.

7. It was useful to recall those arguments, for it was a point that could give rise to misunderstanding. The Chairman or the person who would be presenting the results of the Working Group's work to the Sixth Committee should mention them.

8. Mr. RAZAFINDRALAMBO said that, as a member of the Working Group, he agreed with the draft statute as a whole. However, he had been unable to attend the Group's early meetings at which Part 1 of the draft statute had been adopted, and he therefore wished to enter certain reservations, more particularly with regard to the provisions on the status of the Tribunal (art. 4) and the independence of judges (art. 9). In those two matters, the draft statute proposed by the Working Group did not, in his opinion, meet the basic criteria for a permanent and stable court or those to ensure that the judges were equal, independent and impartial.

9. To begin with, no organ of the proposed court operated on a permanent basis. The Court's seat and premises alone were permanent. It was a kind of permanent court of arbitration with criminal jurisdiction, the only difference being that its members were elected. It did not, therefore, have any genuine stability, for it depended on the availability of judges, who would work for the court only intermittently. The judges must in fact continue to perform other paid duties in order to earn a living. If, for example, they still had national judicial duties generally regarded as enough to ensure that they were independent, they would not, for all that, be free of interference in their international mandate. Actually, if they were elected, they would be dependent on their electors, and if they were appointed by the Executive, they would still have a subordinate place in a hierarchy. Accordingly, their impartiality could not be properly guaranteed.

10. Consequently, the judges would not enjoy equality in terms of remuneration, for judges from third-world countries would be in a worse position than their colleagues from wealthy countries, something that was inconsistent with a democratic judicial organization. Lastly, the fact that the judges would continue to engage in their normal activities might well expose them to serious security problems, since the statute provided for the protection of witnesses and victims, but afforded no guarantee of safety of the judges. The risks were particularly great if, for example, drug trafficking was added to the list of crimes falling within the court's jurisdiction *ratione materiae*. Indeed, when they travelled on behalf of the Court the judges would not even be protected by belonging to their national administration.

11. In the circumstances, he thought that Governments or public or private organizations would not be inclined to allow their nationals to forsake their duties for periods that might prove to be very long if one bore in mind the trials for crimes against peace and crimes against humanity such as the Barbie or Noriega cases.

12. Mr. MIKULKA said that he fully endorsed the overall course taken in the proposed draft. Nevertheless, even though it was warranted to some extent by the fact that the subject was topical, unfortunately the Commission was, at the end of the present session as at the previous session, sending to the General Assembly a text that had not been sufficiently discussed in the Commission itself. Furthermore, some remarks were called for on issues relating to the Court's jurisdiction *ratione materiae*, which were dealt with in article 22 and article 26, paragraphs 2 (*a*) and 2 (*b*).

13. First, he was not convinced that article 26, paragraph 2 (*b*), which related to "crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty", had a place in the draft. The Commission had decided that only crimes under international law should fall within the jurisdiction of the Court, something that was not reflected in the introductory phrase in paragraph 2. However, some international treaties regulated inter-State cooperation in the prosecution of individuals for criminal acts that did not necessarily fall into the category of international crimes. In other words, despite the existence of a treaty, some criminal acts covered by the provisions of article 26, paragraph 2 (*b*), were still crimes under internal law. The question should be re-examined very closely.

14. The other provisions relating to jurisdiction *ratione materiae* were spread quite artificially between article 22, which listed crimes defined by treaties, and article 26, paragraph 2 (*a*), which was concerned with crimes that were prohibited exclusively under customary international law. There was nothing to warrant favouring one form of jurisdiction over another, and therefore the provision should form the subject of two separate paragraphs in one single article; in other words, the content of article 26, paragraph 2 (*a*), could form paragraph 2 of article 22. The result would be logical from the standpoint of acceptance of jurisdiction, for the difference at the present time between the provisions of article 23 and those of article 26, paragraph 1, was not very clear.

15. Such a rearrangement of the provisions concerning the Court's jurisdiction *ratione materiae* would also have positive effects for the interpretation of article 25. While it was obviously not the Working Group's intention, a reading of article 25, concerning cases referred to the Court by the Security Council in the context of the two provisions on jurisdiction *ratione materiae*, could give the impression that, so far as jurisdiction under article 26 was concerned, acceptance of jurisdiction was a *sine qua non* for the Security Council to be able to sub-

mit a case to the Court. It was a defect in drafting that would have to be discussed, but could easily be corrected.

16. Mr. PELLET said there were two problems of immediate importance that were of concern to him and on which no real decision had been taken.

17. The first was the name of the jurisdiction, something that was not fundamental but was important enough to be examined. The arguments, recalled by Mr. Vereshchetin, that were supposed to explain the Working Group's choice seemed indeed to plead in favour of the opposite, since the Working Group had ultimately decided to use the word *Cour* (Court) to describe something which, in French, and apparently in English as well, ought reasonably and logically to be called a "Tribunal". Again, *Tribunal* was used for what should logically be called a *Cour* (Court).

18. As to the risk of confusion with ICJ, the fact that a "Court" had been established as the principal judicial organ of the United Nations showed that the term designated something that was most "dignifying" in the international system. To choose the word *Tribunal* meant, quite illogically, reversing the order of things, all the more so since it had none the less been decided to establish a Court (*Cour*) and the risk of confusion had not therefore been removed.

19. The second argument, based on tradition, was no more convincing. In the case of the two bodies that had been mentioned, the word "tribunal" had been used precisely because they had been or were temporary jurisdictions, whereas the Working Group's draft was concerned with the establishment of a permanent body, and it was the "court" concept that highlighted the idea of permanence. When the idea had arisen of an international tribunal in CSCE and the question had been raised at the initiative of a number of countries, the term "tribunal" had been used precisely to confer on another future permanent jurisdiction the dignity of the word "Court".

20. Nevertheless, it was not too late to reverse the terms if the Commission agreed to do so. Conversely, if the proposed terminology was used, there was a possibility of unending confusion.

21. As to the list of subjects, no decision had really been taken and, in his view, the variants and the passages appearing in square brackets in the report itself related not to the major points but in fact to relatively secondary issues. Actually, the important thing for the Commission was to have the General Assembly's view not so much on formulations as on basic options. He continued to think that the fundamental problem was that of jurisdiction and that trial *in absentia* was something important on which it would be better to obtain the views of politicians. He therefore hoped that those two subjects would appear on the list, on the understanding of course that if some members considered other subjects to be important they could be added. Failing such a list, representatives on the Sixth Committee might speak only of matters that were of interest to them, and perhaps of little interest to the Commission. Furthermore, an indication of the points on which the Commission considered that there was a problem which needed consultation would make for a structured debate.

22. Lastly, he cordially yet completely disagreed with Mr. Razafindralambo, whose reservations about some aspects of the draft applied, with the exception perhaps of those relating to safety, to all judges, particularly to a number of present international tribunals whose status was halfway between that of a permanent court and the list of the Permanent Court of Arbitration. That was true, in particular, of international administrative tribunals.

23. Mr. CRAWFORD said that the choice of the word "tribunal" also posed problems in English, for it brought to mind a non-permanent and semi-judicial, even administrative, body, whereas the "courts" were genuine judicial organs. In matters pertaining to the criminal law, he would have preferred the term "court".

24. The CHAIRMAN said that the problem of terminology also existed in Spanish.

25. Mr. MAHIOU said that it was perhaps a problem of translation, one that each language group could settle by adopting the usual word in the language in question. He continued to think that it would be useful to advise the General Assembly of the important issues on which its views were sought. As to the report itself, the Working Group had produced remarkable results, even though some articles did pose problems of substance and principle, matters to which he would revert at the next session.

26. The CHAIRMAN pointed out that the Commission had decided at the previous meeting to take note of the Working Group's report and to submit it to the General Assembly in the form of an annex to its own report, adding the paragraph proposed by Mr. Yankov and deleting the second footnote, which in fact contained the questions to the Assembly. The Commission could not alter the Working Group's report, but terminology or other problems could be indicated in the Commission's report itself, or in the statement he would be making in the Sixth Committee.

27. Mr. ROSENSTOCK said that it would be a serious mistake to let the Sixth Committee embark on a "tribunal/court" terminological discussion. If the matter was to be raised, the Commission should state very clearly that the problem was strictly one of terminology.

28. Mr. de SARAM said that, like Mr. Pellet and Mr. Crawford, he thought the word "court" would be better for the proposed body. He too was of the opinion that the Commission should categorize the problems and indicate to the Sixth Committee which were the most important.

29. Mr. KOROMA urged the Chairman not to bring up the question of terminology in the Sixth Committee, so that the Committee could give its views on more important issues. The Commission could take note of the points raised by Mr. Pellet and consider them at the next session.

30. Mr. TOMUSCHAT proposed that the Commission, if it decided to raise the question, should incorporate the following text in its report:

> "At its next session, in 1994, the Commission will revert to the question of whether to preserve the term provisionally used for the jurisdictional mechanism for which the Working Group elaborated a statute. In the Working Group's report, the institution as a whole was called the Tribunal and the trial organ, which is one of its constituent elements, is called the Court. It

would perhaps be desirable, in accordance with the terminological usage in some of the official languages of the United Nations, to change these two terms and use the name International Criminal Court for all of the system covering the Chambers, the Registry and the Procuracy. The Commission emphasizes that this terminological problem is of no substantive importance."

31. Mr. VERESHCHETIN said that the third sentence of the proposed text prejudged the Commission's decision and should be deleted.

32. Mr. CALERO RODRIGUES said that, in its report, the Commission included only a few sentences on the submission of the report by the Working Group, and the text proposed by Mr. Tomuschat could well place too much emphasis on the matter. The best course would be to include the text in the commentary and, since all members of the Working Group were present, they might agree to making that change in their report. If that approach was adopted, the proposal to delete the third sentence should also be adopted, so as to avoid inconsistency in the commentary.

33. The CHAIRMAN suggested that the Commission should adopt the solution proposed by Mr. Calero Rodrigues, namely to add to the commentary in the Working Group's report the text proposed by Mr. Tomuschat, without the sentence which Mr. Vereshchetin had suggested should be deleted.

It was so agreed.

34. Mr. BOWETT said that the Commission should perhaps ask Member States for their written comments on the proposed draft statute.

35. Mr. YANKOV proposed that the second paragraph of the text the Commission had adopted the previous day should include an additional sentence reading: "The written comments of Member States would also be welcome".

36. Mr. BENNOUNA said that it was premature to ask Governments to take a formal position on a text which, after all, was only the report of a working group, not a document formally approved by the Commission.

37. Mr. ROSENSTOCK said Mr. Bowett's proposal, in the form suggested by Mr. Yankov, was perfectly justified in view of the urgent need to respond to the expectations of the international community.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt Mr. Yankov's proposal.

It was so agreed.

Draft report of the Commission on the work of its forty-fifth session (*continued*)

CHAPTER V. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.485)

39. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, chapter V of the draft report, on the topic of the law of the non-navigational uses of international watercourses (A/CN.4/L.485).

Paragraphs 1 to 17

Paragraphs 1 to 17 were adopted.

Paragraph 18

40. Mr. BENNOUNA said that paragraph 18 did not take full account of the discussion in plenary and the phrase "in view of the flexibility of the legal instrument under preparation" should be inserted after the words "The comment was made that", at the beginning of the third sentence. Again, a sentence should be inserted at the end of the paragraph, reading: "Moreover, it was argued that the draft already provided in Part III for a set of consultation procedures intended precisely to avoid disputes between parties".

Paragraph 18, as amended, was adopted.

Paragraphs 19 to 21

Paragraphs 19 to 21 were adopted.

Paragraphs 22 and 23

41. Mr. AL-KHASAWNEH proposed that paragraph 22 should be recast to read:

"22. According to another view, the elasticity of the substantive rules made it indispensable to provide for compulsory fact-finding and conciliation and binding arbitration and judicial settlement".

Paragraph 23 would be deleted.

It was so agreed.

Paragraph 22, as amended, was adopted, and paragraph 23 was deleted.

Paragraphs 24 to 50

Paragraphs 24 to 50 were adopted.

Paragraph 51

42. Mr. GÜNEY said he had consulted members whose working language was French and it seemed to them, as it did to him, that the translation of the English word "significant" by the French word *sensible* was not satisfactory.

43. The CHAIRMAN, speaking as a member of the Commission, said that the adverse effect alluded to in article 3, paragraph 2, was not "insignificant", but it was not "substantial" either.

44. Mr. ARANGIO-RUIZ, supported by MR. BENNOUNA, MR. PAMBOU-TCHIVOUNDA and MR. MAHIOU, said that "significant" could perhaps be translated by *significatif.*

45. Mr. GÜNEY said that, in the course of the consultations, Mr. Pellet had expressed reservations about using the word *significatif* in a legal text. For his own part, however, he was willing to accept the term.

46. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed that, in the draft articles and the commentaries, the English word "significant" should be translated in the French version not by *sensible* but by *significatif.*

Paragraph 51, as amended in the French version, was adopted.

Paragraphs 52 to 76

Paragraphs 52 to 76 were adopted.

Paragraph 77

47. Mr. THIAM said that the formula *il a été noté* (it was noted) in the second line of the paragraph was not particularly felicitous, for it failed to indicate whether it was the opinion of the Commission or of only some members.

48. Mr. ROSENSTOCK (Special Rapporteur) said the question appeared to be one of translation, for the English expression was well established in the terminology of reports and also appeared in countless paragraphs in the document under consideration.

49. The CHAIRMAN, speaking as a member of the Commission, proposed that the words *il a été noté* should be replaced by *la remarque a été faite.*

It was so agreed.

50. Mr. BENNOUNA, said that the use of the expression *diligence voulue* meant virtually nothing in French and it was preferable to keep the English expression, namely "due diligence".

It was so agreed.

Paragraph 77, as amended in the French version, was adopted.

Paragraphs 78 to 82

Paragraphs 78 to 82 were adopted.

Chapter V, as a whole, as amended, was adopted.

The meeting rose at 1 p.m.

2327th MEETING

Friday, 23 July 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

Present: 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. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft report of the Commission on the work of its forty-fifth session (*concluded*)

CHAPTER I. ***Organization of the session*** **(A/CN.4/L.481 and Corr.1)**

A. Membership

B. Officers)

C. Drafting Committee

D. Working Group on a draft statute for an international criminal court

E. Secretariat

F. Agenda *and*

G. General description of the work of the Commission at its forty-fifth session

Paragraphs 1 to 20

Paragraphs 1 to 20 were adopted.

Sections A to G were adopted.

Chapter I, as a whole, was adopted.

CHAPTER II. ***Draft Code of Crimes against the Peace and Security of Mankind*** **(concluded)* (A/CN.4/L.482 and Corr.1 and A/CN.4/L.482/Add.1/Rev.1)**

1. The CHAIRMAN said that the text of chapter II of the draft report was contained in documents A/CN.4/L.482 and Corr.1 and A/CN.4/L.482/Add.1/Rev.1. The latter document, whose paragraphs are numbered 1 to 49, was a revised version of documents A/CN.4/L.482/Add.1 and Corr. 1 which contained paragraphs 32 to 109 of chapter II. He suggested that the meeting should be suspended to give the members of the Commission time to read the documents.

It was so agreed.

The meeting was suspended at 10.15 a.m. and resumed at 10.45 a.m.

A. Introduction (A/CN.4/L.482 and Corr. 1)

Paragraphs 1 to 12

Paragraphs 1 to 12 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.482 and Corr.1)

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

1. ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (A/CN.4/L.482 and Corr. 1)

Paragraphs 15 to 31

Paragraphs 15 to 31 were adopted.

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* Resumed from the 2324th meeting.